



GENERAL PUBLIC SERVICE
CTOR BARGAINING COUNCIL



Physical Address:
260 Basden Avenue,
Lyttelton, Centurion,
Pretoria

Postal Address:
PO Box 16663,
Lyttelton, 1040

Tel: 012 664 8132

Web: <http://www.gpsbc.org.za>

**IN THE GENERAL PUBLIC SERVICE SECTORAL BARGAINING COUNCIL
HELD AT BAVIAANSPOORT PRISON, PRETORIA**

Commissioner : Adv. Itumeleng Kgatla

Case No : GPBC1145/2022

Date of Award : 19 July 2023

In the dispute between:

PSA obo M BEZUIDENHOUT

(Union/Applicant)

And

DEPARTMENT OF CORRECTIONAL SERVICES

(Respondent)

Applicant's representative : Mr Andre Eager (PSA)

Respondent's representative : Mr Lawrence Moela (Labour Relations)

ARBITRATION AWARD

PARTICULARS OF THE PROCEEDINGS AND REPRESENTATION:

- [1] The above-mentioned matter was referred to **GPSSBC** for arbitration in terms of section 186(2) (b) of the Labour Relations Act 66 of 1995 (LRA), as amended. The arbitration was set down before me on several days at the Baviaanspoort Prison, Pretoria.
- [2] The Applicant appeared and was represented by **Mr Andre Eager**, a union official from the **PSA**. The Respondent was represented by **Mr Lawrence Moela**, an employee of the Respondent attached to the Labour Relations Directorate.
- [3] The proceedings into the arbitration were concluded on the 08th of June 2023. The Respondent's closing arguments were received by the Commissioner on the 22nd of June 2023. The Applicant's closing arguments were received by the Commissioner on the 21st of June 2023.
- [4] The proceedings were conducted in English without the need of a language interpreter. Digital and manual recordings were made during the process. Both parties were afforded the opportunity to present *viva voce* evidence under oath, in chief and in re-examination and to cross examine opposing testimonies. Written closing arguments were presented and considered.
- [5] In terms of Section 138(7) of the LRA, the Commissioner is required to issue a signed arbitration award with brief reasons. It is for this reason that only salient points will be referred to in this award even though all evidence and submissions were considered.

POINT IN LIMINE

- [6] The *points in limine* raised by the Respondent were dispensed with in an arbitration ruling dated the 05th of December 2022, and under the above stated case number.

ISSUES TO BE DECIDED:

- [7] I am required to make a determination on whether or not the conduct of the Respondent in issuing a written warning against the Applicant for leaving the workplace earlier than stipulated in her contract of employment, while she had valid medical reasons to do so, and without following the *audi alterum partem*, amounts to an act of unfair labour practice in relation to disciplinary action short of dismissal as envisaged in terms of Section 186(2) (b) of the LRA.
- [8] Should I find that an act of unfair labour practice was committed by the Respondent against the Applicant, I must determine an appropriate remedy in terms of Section 193(4) of the LRA.

COMMON CAUSE ISSUES

- [9] The Applicant is an employee of the Respondent to the position of Chief Psychologist with effect from the 1st of February 2008, stationed at the Baviaanspoort Management Area, Gauteng Region, and is currently on a monthly gross salary **R67940-08**.

- [10] The Applicant sustained an injury on duty on or about the 25th of October 2021 at Baviaanspoort and she consulted the Medical Practitioner on the 29th of October 2021 following a delay in obtaining documents (**G111**) from the Respondent.
- [11] The Medical Practitioner diagnosed her and confirmed that she sustained multiple injuries and she was referred to the two (2) Orthopaedic surgeons and a physiotherapist.
- [12] The Medical Practitioner(s) recommended that the Applicant should be allocated light duties and work for a maximum of Four (4) hours per day and that same were brought to the attention of the Respondent on the 18th of January 2022 and the 4th of March 2022 respectively.
- [13] The Applicant attended a psychologist consultative session at Kgoshi Mampuru on 7th and the 11th of February 2022. She also attended another workshop at Royal Elephant Hotel and Conference centre from the 8th to the 10th of February 2022.
- [14] The Applicant was issued with a written warning on the 24th of March 2022 which was not preceded by a formal disciplinary hearing.
- [15] The Applicant was issued with a written warning after having been notified that her request to work for a maximum of four (4) hours a day is not approved and that she should refrain from knocking off early.

ISSUES IN DISPUTE

- [16] The Applicant contends that the recommendations of the Medical Practitioners were not accepted and or implemented by the Respondent. The Respondent contends that they tried to assist the Applicant by attempting to implement some of the Medical Practitioners recommendations.
- [17] The Applicant contends that she lodged an internal appeal against the written warning within five (5) working days, and that, there was no reaction from the Respondent. The Respondent contends that the appeal was lodged in a manner not provided for in the policies in that it was sent to the wrong authority hence it was not entertained.
- [18] In terms of the relief sought, the Applicant is praying for an order that the written warning be reviewed and set aside, consequently, that the Applicant be awarded compensation equivalent to her three (3) months remuneration. The Respondent has recorded its prayer that the application should be dismissed.

SUMMARY OF EVIDENCE

APPLICANT'S EVIDENCE

- [19] The Applicant was sworn in and testified as the only witness in support of her own case and her evidence is summarised as follows:
- [20] She is employed by the Respondent to the position of Chief Psychologist at the Emthontjeni Correctional Centre Since the 1st of February 2008. She testified further that she is responsible for the provision of psychologists' services to the inmates.
- [21] She testified that she sustained an injury at the Emthontjeni Correctional Centre while exiting the gate, and that the three (3) colleagues who were in front, ran her over while they were running away from what to them looked like a snake.

- [22] She testified that Page 1 of the bundle (A) contains an internal document (G111), which is completed whenever there is an injury on duty as an undertaking by the employer to carry the medical costs. She testified further that the document on page 2 of the bundle (A) is the first medical report, which is compulsory for the Department of Labour processes as it contains the diagnosis of the patient, in this case herself.
- [23] She testified that the document on page 3 of the bundle (A) is the medical certificate booking her off sick from duty, and issued by the same Medical Practitioner who had initially diagnosed her following the injury on duty.
- [24] She testified that she went to Med Forum and consulted with Dr Pitso (Head of Casualty), who then referred her to two Orthopaedic Surgeon(s), (Prof Gulele) and (Dr Makhubela). She testified further that she was also referred to the Physiotherapist at Verbeek. She testified furthermore that the injuries sustained are neck, shoulder, back hip and bruises as per page 5 of the bundle (A).
- [25] She testified that she was not able to report for duty on the 26th of October 2021 due to pains associated with the injury sustained on duty and was on injury on duty (IOD) leave, and that the leave was on the following intermittent dates:
- 26 October 2021-31st of December 2021
 - 1st January-18 January 2022
 - 20 January-28 January 2022
 - 31 January-4th of February 2022
- [26] She testified that she was on IOD related leave and sick leave at the same time as she could not be treated by the medical practitioners through IOD leave as certain information was omitted on the G111 form.
- [27] She testified that she attended the Continuous Professional Development (CPD) workshop for psychologists from the 8th-10th of February 2022 while on IOD leave. She testified further that she also signed the special leave form to attend the same workshop.
- [28] She testified that she has also attended the National Consultative Sessions of the Department of Correctional Services on the 7th and the 11th of February 2022 respectively, and further that the trip sheet(s) was approved by the Head of the Correctional Centre (Emthonjeni), **Mr Collen Rambau**.
- [29] She testified that the Verbeek Physiotherapists recommended specifically that she be allocated work related light duties as per the first light duty report on page 9(a) of the bundle (A). She testified further the second light duty report dated the 24th of March 2022, and as per page 6 (f) of the bundle (A), emphasized that she is not fit for normal but for light duties, which included the following:
- Working reduced hours of 4 hours per day,
 - Working in a sit/stand routine allowing her to break her sitting every 45 minutes
 - Must have an appropriate desk and office chair
 - Reduced walking due to angle pathology

- [30] She testified that **Mr Collen Rambau** sent her an email as per page 7 of the bundle (A) indicating that she must work for a full 8 hours following his consultation with her physiotherapist who indicated that she is fit for normal duty. She testified further that the physiotherapist was contacted and or consulted without her knowledge or consent, and further that there was no written report submitted or produced by **Mr Collen Rambau** to the effect that she is fit to work normal schedule.
- [31] She testified that she received a written warning from **Mr Collen Rambau** as per page 8 of the bundle (A), dated and received on the 24th of March 2022, and to the effect that she has absented herself from work without permission from the 16th to the 23rd of March 2022. She testified that the warning was not fair, and her plea to negotiate with **Mr Collen Rambau** was not taken serious, and further that she was threatened with dismissal in the process.
- [32] She testified that she noted and lodged an appeal against the written warning on the 31st of March 2022, and further that the same was sent to various officials within the employ of the Respondent, including the Human Resource Manager's Office, as per the email on page 9 of the bundle (A). She testified further that, to date, there has not been any response to her appeal.
- [33] She testified that the physiotherapist report from pages 10-16 of the bundle (JB), and dated the 10th of May 2022, concluded that her pain resulting from her IOD has progressed to a point of chronicity and that her road to recovery will take atleast three months of an intensive graded program under careful monitoring and self-discipline.
- [34] She testified that the medical report are not countered by any further expert evidence and **Mr Collen Rambau** acted contrary to the recommendation(s) of the medical professionals.
- [35] She testified that signed the G111 form as per page 17 of the bundle (JB), and dated the 26th of April 2022 further authorising for her treatment at the expense of the Respondent. She testified further that she was booked off from the 14th to the 15th of April 2022 as per the medical certificate on page 18 of the bundle (JB), and further from the 16th of May 2022 to the 31st of May 2022, as per page 19 of the bundle (JB).
- [36] She testified that she was discharged from physiotherapy on the 29th of September 2022 as per the physiotherapist report on page 20 of the bundle (JB), she however testified further that she is of the view that such a report should not be interpreted to mean that she is fit to resume duties on full blown scale. She testified further that she had already resumed her full time duties with effect from the 5th August 2022 even though her work reporting routine was on an intermittent basis since January 2022.
- [37] She testified that she has been previously dismissed by the Respondent and later reinstated as per the arbitration award on page 43 of the bundle (JB). She submitted further that she is of the view that the Respondent is treating her unfairly and is deliberately disregarding the rule of law.
- [38] She testified that she was on IOD leave at the time that she attended the (CPD) training and she attended in those circumstances on the basis that the training was very important given the shortage of psychologists in South Africa. She testified further that the organisers of the training were accommodative, and that the event was not attended for a full day as there were two tea breaks and lunch, and further that the arrangement was flexible as it her allowed her walk around from time to time.

- [39] She testified that she is not aware of the application for leave of absence form on page 82 of the bundle (JB), and that the form does not contain her signature. Page 95
- [40] She testified that she sent an email dated the 7th of February 2022, and as per page 95 of the bundle (JB) to **Mr Collen Rambau** indicating to him her intention to attend the (CPD) training which she had missed for the past three years owing to her dismissal but no response forth came.
- [41] She testified that she could not report for duty after the training due to Covid-19 related conditions given the fact that there was information that certain attendees of the training had tested positive for Covid-19, and to that effect, she sent an email to **Mr Collen Rambau** as per page 94 of the bundle (JB).
- [42] She testified under cross-examination she does interviews and therapy sessions with inmates including juvenile offenders as part of her job description but cannot give account of the daily or monthly statics as the targets change from time to time.
- [43] She testified that the medical certificate on bundle (A) indicates that she should resume duty on the 08th of November 2021 but she did not report for duty on the same date as the medical leave was extended.
- [44] She testified that she was placed at the Emthonjeni Correctional Centre with effect from the 6th of October 2021 and without a job description, further that the same was only received on the 19th of January 2022.
- [45] She testified that her duties involve carrying a Department of Correctional Services bag and files to the mass total of 20 Kilo grams (Kg). It was put to the witness during cross-examination that the 20 Kg in mass bags do not belong to the Respondent but to the witness personally and the version was not objected.
- [45] She testified that the work-station that she is now confined to does not allow her the opportunity to alternate between walking and sitting due to limited office space. She testified further that she has been moved to the nurses' office which is closer to the prison grounds but the office is not conducive due to lack of privacy, and that same was brought to the attention of the Respondent.
- [47] She testified that the first light duty certificate dated the 18th of January 2022 did not specify the number of hours that she should work, and that the recommendation for reduced working hours to a Maximum of Four (4) was only put in writing on the 4th of March 2022, even though same was verbally relayed to **Mr Collen Rambau** on numerous occasions by the treating physiotherapist.
- [48] She testified that she is required to work for Eight (8) hours per day in terms of her contract of employment and that the email on page 7 of the bundle (JB) is indicative of the employer's decision to not approve the Four (4) hours light duty against the recommendation of the physiotherapist.
- [49] She testified that the trip sheet to attend the workshop(s)/training(s) was signed by **Mr Collen Rambau** but it is not included in the bundle of documents.
- [50] The Respondent has put a version to the Applicant that she attended the workshop without the permission or approval of the employer or the Line Manager, and she testified that to the best of her knowledge, she does not have a supervisor currently as she is performing duties of the position to which she was not appointed.

- [51] She testified that she is currently performing the duties of an ordinary psychologist. She testified further that the dispute in relation to her role is *sub judice* and the matter is currently at the level of arbitration.
- [52] She testified under re-examination that she was able to attend the workshops on the basis of the flexibility of the program which allowed her more breaks and freedom to move out of the venue as and when the need arose.
- [53] She testified that it would not be possible to move out while consulting with the inmate in the middle of the session as she would at the workshop or training. She testified further that the four (4) hours reduced work was on the basis of the recommendation from the professionals and not something that she decided for herself.
- [54] She testified that she was never verbally warned before receiving the written warning on page 8 of the of the bundle (A),thus refuting the version put to her by the Respondent that she was first verbally warned, prior to the written warning.
- [55] She testified during re-examination that she was not on IOD leave at the time of attending the workshops.

RESPONDENT'S CASE

- [56] **Mr Tebogo Mashia Chidi** was sworn in and testified as the first witness in support of the Respondent's case and his evidence can be summarised as follows:
- [57] He testified that he is employed by the Respondent to the position of Manager: Human Resource Support, and further that he is currently also acting as Manager Human Resource Administration.
- [58] He testified that the **G111** form as per page 1 of the bundle (**JB**) is the document provided to the official and signed by the employee when there has been an injury on duty ,and that the form serves as an undertaking by the employer to cover the medical costs of the employee concerned or injured while on duty.
- [59] He testified that it is not possible for an employee of the Respondent to attend any work related activity while on (IOD) leave unless there is a medical certificate permitting for the same.
- [61] He testified that any employee who is paid while having not rendered any services will be liable for a debt case in that the department can open against that specific in order to recover the monies in line with the no work no pay policy. He however submitted that, as it stands there is no process instituted by the Respondent to recover any monies whatsoever from the Applicant.
- [62] **Mr Collen Rambau** was sworn in and testified as the 2nd witness in support of the Respondent's case and his evidence can be summarised as follows:
- [63] He testified that he is employed by the Respondent to the position of Head of Centre, currently at the Medium Correctional Centre. He stated further that he had previously occupied the same position at Emthonjeni and his duties were and or are as follows:
- Provision of security to the offenders, officials and service providers
 - To ensure the provision of health care to offenders
 - To ensure that the rehabilitation of offenders takes place
 - To ensure the provisions of educational, psychological and spiritual services to the offenders

- He is also responsible for the logistical and human resource availability
- The general Management and overseeing of the Correctional Centre.

- [64] He testified that the written warning on page 8 of the bundle (A) was issued to the Applicant as a corrective measure after the occurrence of a transgression which related to the Applicant having absented herself from work without permission for certain hours on the dates 16th March to 23rd of March 2022.
- [65] He testified that the Applicant's normal working hours as per her contract of employee are from 07:00 AM to 03:00 PM on a daily basis. He testified further that the warning was signed by the him as the Chairperson, and the Applicant as the recipient, with the accompanying comment, "*in agreement*".
- [66] He testified that the Applicant was aware as she was informed that she is supposed to work full hours as stipulated in her contract of employment. He stated further that he has had a telephonic consultation with the Applicant's treating Doctor, and was advised by the same Doctor that the Applicant can work the full hours for as long as she is working next to the gate of the Correctional Centre, so as to avoid her having to walk a long distance.
- [67] He testified that the Applicant has always received her salary in full even in the circumstances where she was working less hours without authorisation.
- [68] He testified that the email on page 6 (C) of the bundle (**JB**) is from the Applicant and addressed to the him, in which email, the Applicant's logistical arrangements to attend the national meetings and CPD Vista training for a five(5) days period are outlined, and that, this happened while the Applicant was on IOD leave.
- [69] He testified that the sessions which the Applicant was attending had a plus minus 8 hours duration per day. He stated further that the IOD is *akin* to sick leave, and that, an employee cannot attend to any work related activity. He stated the Applicant was able to attend the sessions for full hours and for the whole week even though she was not able to work full hours citing IOD leave.
- [70] He testified that the letter from the physiotherapist as per page 6(f) of the bundle (**JB**) speaks to the recommended working hours for the Applicant and further logistical arrangements such as moving her working station closer to the gate and arranging transport for the Applicant.
- [71] He testified that the Applicant was not meeting her daily targets owing to the fact that she knocked off earlier than what is specified by the terms and conditions of her employment contract.
- [72] He testified that the Applicant is in a self-regulating environment where she arranges her own time slots with clients, and can take breaks as and when it is suitable for her. He stated further that the email on page 7 of the bundle (JB), and dated the 15th of March 2022, confirmed to the Applicant that her treating Doctor has recommended that she is in a position to work full hours, and was specifically instructed to work full hours.
- [73] He testified that the monies which have been paid to the Applicant while she did not work full hours have not been recovered, and that the Respondent reserves the right to still recover the same.
- [74] He testified under cross-examination that he was not attending the training but he knows as the standard practice that such meetings last for plus minus 8 hours per day. He stated further that the Applicant's

working environment would not differ with the conditions under which she was to attend the CPD meeting(s) in that her working conditions are very flexible with little to no direct supervision.

- [75] He testified that there is a Human Resource process within the Respondent to deal with leaves relating to quarantine, and that, such a leave was not available merely for the asking, as it was a special leave on its own. He testified that the Applicant was not at work after the CPD meeting, but he is not sure if it was quarantine or any other form of leave
- [76] He testified that the Applicant has always submitted her leaves after the fact and that, there was at some point an investigation in relation to her leave(s), and that the manner in which she takes her leave(s). He stated further that the Applicant would be on IOD leave and later change it to sick leave.
- [77] He testified that the recommendations of the physiotherapist as per page 6 (f) of the bundle **(JB)** could not be implemented by the Respondent he had consulted with the treating Doctor of the Applicant and informed her about the logistical arrangements, and the Doctor agreed that the Applicant can work a full 8 hours.
- [78] He testified that the Applicant was not provided with a State vehicle on the basis that she was parking her own vehicle just next to the gate of the Correctional Centre and that such rendered the provision of State transportation unnecessary.
- [79] He testified that the Applicant's duties are generally light on the basis that it does not involve carrying of heavy things; she is mainly preoccupied with talking to the inmates and writing reports (if any).He stated further that there are no intensive reports necessary for the Applicant produce as she mainly does not deal with long term offenders which would be normally require intensive reports for submission to the Minister of Correctional Services.
- [80] He testified that the Applicant was discharged from her physiotherapy treatment with effect from the 29th of September 2022 as per the report on page 20 of the bundle **(JB)**.He testified further that the Applicant was always granted the opportunity in the form of appropriate leave to attend to her physiotherapy treatment.
- [81] He testified that the Applicant was informed that her appeal should be directed to the Area Commissioner who is also superior to him, but the Applicant addressed her appeal against the written warning to his subordinates.
- [82] The Applicant started working for a full 8 hours after she was furnished with a written warning as per page 8 of the bundle **(JB)** and dated the 24th of March 2022.

EVALUATION OF EVIDENCE, ARGUMENT AND FINDINGS

- [83] The statutory framework for the determination of this dispute is provided in terms of Section 186(2) (b) of the LRA, which defines unfair labour practice as follows:
“any unfair act or omission that arises between an employer and an employee involving unfair conduct of the employer relating to the unfair suspension of an employee or any other unfair disciplinary action short of dismissal..”

- [84] Briefly, I am required to determine whether or not, the decision of the Respondent to issue a written warning against the Applicant without following the *audi alterum partem* process following the Applicant's decision to work fewer hours than what is stipulated by her employment contract, and refusing to entertain the Applicant's internal appeal was fair, on both substance and procedure.
- [85] Essentially, I must make a determination on whether or not the conduct of the Respondent in the circumstances was justified, and if not, I must determine whether or not such conduct amounts to an act of unfair labour practice against the Applicant as envisaged in Section 186(2)(b) of the LRA.
- [86] It is common cause that the Applicant was issued with a written warning by the Respondent following her decision, and based on the recommendations of her treating physiotherapist to work fewer hours (4) than what is stipulated in her contract of employment.
- [87] It is correct that the recommendations of the Applicant's treating physiotherapist were not countered by any other expert evidence, save for the Respondent's submissions that the same treating physiotherapist of the Applicant had verbally advised the them that the Applicant is in a position to work a full eight (8) hours per day on the condition that her work-station is moved closer to the gate of the Correctional Centre amongst others.
- [88] I find that the Respondent's approach and line of argument to counter written expert evidence with a verbal submission is too simplistic, and seeks to make a mockery of the expert evidence provided by the Applicant's treating physiotherapist in relation to the Applicant's health and or physical condition, and should therefore not be accepted.
- [89] It is correct that the written warning was issued against the Applicant without a disciplinary hearing and/or without affording her an opportunity to make submissions on why such a written warning should not be issued against her as a sanction. I find that the Respondent's conduct in the circumstances bluntly trumped upon the Applicant's right to a hearing, thus undermining the *audi-alterum partem* principle as a well-established rule of natural justice.
- [90] It is correct that the Applicant's internal appeal was not entertained by the Respondent on the basis that the appeal was directed to a wrong authority, the Respondent argued. The Applicant has argued that the appeal was noted and sent to the relevant office, and in this case, the office of the Human Resource Manager and the area coordinator.
- [91] In terms of clause 8.2 of the **GPSSBC** Resolution 1 of 2006 (the resolution):
"the employee must, within five working days of receipt of the final outcome of a hearing or other disciplinary procedure, submit an appeal form to her or his Personnel Office or to her or his manager/supervisor, who must acknowledge receipt thereof and who shall forward it to the appeal authority"
- [92] The fact that the Applicant's appeal was not entertained by the Respondent *albeit* having been sent to the personnel office as partially required by the resolution is fatal to the Respondent's case in as far as it relates to procedure.

- [93] It is common cause that the Applicant has attended to work related activities in the form of trainings and workshops while the light duty recommendation by her treating physiotherapist were still applicable, and while she was not yet discharged from therapy. It is true that the duties of the Applicant mainly relate to talking and drafting light reports, and therefore no different to the conditions of the workshops and trainings she had voluntarily attended.
- [94] I am inclined to believe that, in as much as the Respondent's conduct was wrong in disregarding the written recommendations on the Applicant's treating physiotherapist for light duty or reduced working hours without alternative expert opinion, the Applicant's conduct of implementing the recommendations, and without the approval and/or involvement of the Respondent, was not without malfeasance either, and amounted to an act of self-help which should be sternly discouraged in the South African constitutional democratic system.
- [95] The Respondent's argument which seeks to imply that the Applicant has agreed with the contents of the written warning and the manner in which it was issued merely because she has signed it cannot be accepted. The signature of the Applicant on the written warning was in my considered view, merely for the purpose of acknowledgement of receipt, and that should not be misconstrued to mean that she has waived her rights to challenge the fairness of the same or lack thereof.
- [96] I find that the Respondent's conduct was substantively fair but procedurally unfair. In the circumstances, it is my conclusion that an act of unfair labour practice was still committed by the Respondent against the Applicant. I however find that the second part of the Applicant's prayer cannot be granted in the circumstances, and I therefore come to the following conclusion:

AWARD

- [97] The written warning issued by the Respondent against the Applicant, and dated the 24th of March 2022 is reviewed and set aside
- [98] I make no order as to costs.

Signature:

A handwritten signature in black ink, consisting of a large, stylized 'S' followed by a series of loops and a final horizontal stroke.