GPSSBC
GENERAL PUBLIC SERVICE SECTOR BARGAINING COUNCIL

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

**Postal Address:**
PO Box 16663,
Lyttelton, 1040

**Tel:** 012 644 8132
**Web:** http://www.gpssbc.org.za

# ARBITRATION AWARD

Panellist/s: P M NGAKO
Case No.: GPBC1347/2019
Date of Award: 19 NOVEMBER 2020

**In the ARBITRATION between:**

PSA OBO G PHOKOJOE
(Union / Applicant)

and

DEPARTMENT OF HIGHER EDUCATION AND TRAINING
(Respondent)

**Union/Applicant's representative**: ARCHIE SIGUDLA
Union/Applicant's address:

Telephone:
Telefax:

**Respondent's representative**: SIBUSISO MASHININI
Respondent's address:

Telephone:
Telefax:

## ARBITRATION AWARD

**DETAILS OF HEARING AND REPRESENTATION:**

1.1 This matter was set down before me by Council on the 29th and 30th of October 2020. Appearing before me was the applicant who was represented by Archie Sigudla an official from the trade union PSA. The respondent was represented by Sibusiso Mashinini an employee in the employment of the respondent. On the 29th of October 2020 during visual proceeding in the morning we had connectivity problems at the respondent premises where the respondent's witnesses were based, we then decided to relocate to the respondent's premises for the afternoon session, and the representative of the respondent continued to conduct the case from home virtually. Then on the 30th of October 2020, we had contact session at the respondent premises at Tshwane North College Pretorius Street, Pretoria. After oral evidence was concluded parties submitted written heads of arguments on the agreed date. The employer submitted a bundle marked bundle "R", while the applicant submitted a bundle marked bundle "A"

**ISSUE TO BE DECIDED:**

2.1 I am required to determine whether dismissal of the applicant was procedurally and substantively fair

**BACKGROUND TO THE MATTER:**

3.1 Applicant was employed by the respondent at Tshwane South Campus on January 2000

3.2 Applicant was employed by the respondent as Chief Admin Clerk

3.3 Applicant at time of his dismissal was earning a monthly gross salary of R26 240.22

3.4 Applicant attended a disciplinary hearing on the 30th and 31st of August 2018

3.5 Consequent to the disciplinary hearing, applicant was dismissed.

3.6 Applicant noted an appeal and his appeal was dismissed

3.7 Applicant was found guilty on allegation 2, 3 and 4 and the respondent made a concession that in relation to allegation 4 applicant had prior approval for the 13th of June 2018

**SURVEY OF EVIDENCE AND ARGUMENT:**

**RESPONDENT'S CASE**

4.1 The first witness called by the respondent was **REGINAH MOGAMI-HADEBE** who after being duly sworn in testified as follows: she is employed by the respondent as Labour Relations Officer TVET Colleges. It was here evidence that on the 23rd of May 2018 she and Mr Ngwenya went to Soshanguve South College to serve the applicant with a precautionary letter, they went to Mr Nkabinde's office who requested the applicant to come to his office, upon arrival, the Campus Manager gave the letter to the applicant, then the applicant gleaned at the letter, got angry then tore the letter and threw it in the bin; and stormed out of the office of the Campus Manager and said that people are trying to have him dismissed.

4.2 Under cross examination she conceded that the applicant complied with the contents of the letter and went to report at Central after his sick leave. She insisted that she can differentiate between insubordination and insolence and insisted that the behaviour of the applicant amounted to insubordination not insolence. She insisted that the applicant did tear the letter it was not crumpled.

4.3 Under re-examination it was her evidence that the body language of the applicant was disrespectful.

**SIPHIWE NKABINDE**

5.1 The second witness called by the respondent was **SIPHIWE NKABINDE** who after being duly sworn in testified as follows: he is employed by the respondent as the Campus Manager, at time of this incident involving the applicant, he had two days as the Campus Manager.it was his evidence that he arranged for the applicant to be called to his office and he arrived, he gave the letter of suspension in the presence of the officers from the Central

Office, the applicant browsed the letter cramped it and threw it near the bin and left the office. He later called him back to his office as he had a copy applicant apologised for his conduct he told him he has heart condition, he signed the letter and advised him to take leave and at the end of the leave, report to Central office as the later stated. He testified on the 21st of June, he was informed that the applicant was on campus went to him at his office and explained the terms of his transfer and after explaining what he was looking for he told him that must look for what he is looking for and leave them

5.2 Under cross examination it was the evidence of the witness that the behaviour of the applicant was corrected and complied with the instruction he signed the letter of transfer, took leave and after his leave went to report where he was required to report in terms of his precautionary transfer letter. It was his evidence that when the applicant came to correct his PMDS there was no written communication; and can't dispute that the applicant on the 21st when he found him in his office had prior approval from Ms Matloba.

**JOSIAH MALEBYE**

6.1 The third witness called by the respondent was **JOSIAH MALEBYE** who after being duly sworn in testified as follows: he is employed by the respondent on the 12th of March 2018 was heading a team that was conducting enrolment monitoring. The respondent was informed with an email from Lien du Preez dated 9 March 2018 at 12:58 and he expected to meet with the applicant at the Campus who was Head of Admin. When they arrived they went to the boardroom as they knew they were coming. Three ladies came with files prepared, and the applicant was not with them. Later the applicant came in and informed them that he was running supplementary exams and took two of the ladies. It was his evidence that they were allowed to sign the attendance register and the applicant also signed

6.2 Under cross examination he conceded that the email was sent on the 12th of February on Friday at 12:58 and the college closes at 13.30 on Friday. In response to the version that

the applicant did not receive the email, only became aware that there was this meeting when he was informed by his staff, it was the contention of the witness that the applicant was under obligation to read his emails. It was his evidence that they signed the attendance register before the applicant came into the meeting, he disputed that the applicant was part of the meeting. It was his evidence the conduct of the applicant is the one that led them to conclude was refusing to participate in the meeting. He conceded that according to the attendance register at page 34 of bundle "A" applicant signed the attendance register at number three and two of his subordinates also signed the register.

**APPLICANT'S CASE**

7.1 Applicant **GODFREY PHOKOJOE** after being duly sworn in testified on his own behalf as follows: before his dismissal, he was employed by the respondent as Chief Admin Clerk and joined the respondent in January 2000. In relation to allegation 2 it was his evidence that on that day being on a Monday he was busy running supplementary examinations, around 11 or 12 was called to the staff room, on arrival found three officers from their Central Office. She requested his administration staff assist with the files as they are they once dealing with the files. He informed Mr Malebye that he is running exams and will join them latter when he has finished setting up the exam. It was his evidence that he filled the attendance register at page 36 of bundle "A". He disputed he refused to participate in the enrolment process, it was his evidence that national department exams was important for TVET colleges

7.2 In relation to allegation 3 it was his evidence that on the 23rd of May 2018 it was during the day he was called to the office of the Campus Manager and was informed that Mr Nkabinde was looking for him and when he arrived was handed a letter from **MOGAMI-HADEBE** after reading the letter was upset he crumbled the letter and threw it in the bin. Later the same day the Campus Manager Called him and he read the letter and signed it and he apologised and informed him that he recently had a heart attack, he advised him to take leave and

must leave the college keys lock the office and go which he did.it was his evidence that he complied with the instruction because after his leave he went to report at Ms Matloba

7.3 In relation to allegation 4 it was his evidence that when he was requested to report at Central Office, he left everything in his office, he had a meeting to attend, she requested permission from Ms Matloba to go and pick documents for the meeting in his office on the 21st of June 2018. When he arrived, Nkabinde the Campus Manager came and told him to take what he came to take and leave and he told him he requested permission from Ms Matloba. On the 13th of June 2018 he went to the college to correct his PMDS at the College his supervisor was aware of this. It was his evidence on both occasions he received verbal permission from Ms Matloba.

7.4 In relation to allegation 2: it was his evidence that he informed Malebye that he was running exams, and explained this to him and disputed that it was a new fabrication. It was his evidence that he was not aware that Malebye was coming. He conceded that the email was sent to him when they were about to knockoff on Friday and did not open his emails, and Monday he concentrated on preparing for exams for the 9:00 paper only became aware that Malebye were coming after was informed by his administrators. He conceded that it was his duty to look at his emails. In relation to allegation 3 it was his evidence under cross examination that he did not tore the letter but crumbled the letter, he conceded he did not sign the letter, he conceded that on the hindsight her conduct was not appropriate. In relation to allegation 4 it was the evidence of the applicant that he made arrangement with administrators being people responsible with the files to assist the team. He disputed that he left the team without any apology

7.5 Under cross examination he denied that he left Malebye without informing him that he was running the exams, and was not aware that Malebye was coming as he did no check his email on Friday and on Monday in the morning concentrated on preparing for exams. It was his evidence that he apologised for his behaviour to the Campus Manager and complied

with the instruction, it was his evidence that on both occasions he came to the campus had verbal permission to do so.

**ANALYSIS OF EVIDENCE AND ARGUMENT:**

8.1 Allegation 2: *You are charged with misconduct in that on or about the 12 March 2018, and or near Soshanguve South Campus, you failed to obey reasonable instruction in that you refused to participate in the enrolment monitoring process and as result, the application forms for students as per attached Annexure A were not found for verification, and thereby committed an act of gross insubordination*

8.1 The applicant on allegation 2 was found guilty on gross insubordination: the applicant has relied In Palluci Home Depot (Pty) Ltd v Herskowitz and others [2015] 5 BLLR 484 (LAC). I am interested in para 20 which provide:

*"[20] The refusal by an employee to carry out an employer"s instruction is, therefore, not always required for a finding of insubordination. However, the failure of the Labour Court to recognise this did not, in my view, influence its characterisation of the conduct of the first respondent, on the evidence led at the arbitration hearing in relation to charge A, as constituting "insolence" as opposed to "insubordination". In characterising the first respondent's conduct as "insolence", the Labour Court relied upon the decision of Wooltru, 10 which emphasises the importance of distinguishing insubordination from insolence simply because they are different offences. Wooltru equates the offence of insolence with conduct which is offensive, disrespectful, impudent, cheeky, rude (disrespectful in speech or behaviour), insulting or contemptuous, and insubordination with "resistance to or defiance of authority; disobedience, and refusal to obey an order of a superior".11 Wooltru makes it clear that although an employee can be both insolent and insubordinate at the same time, he or*

*she can be insolent without necessarily being insubordinate. Notably, the Court in Wooltru held that a mere disrespect for the employer (or insolence, impudence, cheekiness or rudeness) cannot, on its own, constitute insubordination which by its very nature requires disobedience or an outright challenge to authority. Insubordination it observed:*

> *"can manifest itself in the refusal to obey a reasonable and lawful command or in the challenge (or resistance) to or defiance of (see especially The Shorter Oxford Dictionary above) the authority of the employer. It is of course required that insubordination must be deliberate (wilful) and serious (above). This is not to say contemptuousness of authority (insolence, impudence, cheekiness, disrespect or rudeness) cannot constitute a ground of dismissal (provided, of course, that it is wilful and serious). One should, however, always distinguish between insubordination on the one hand and insolence on the other hand because they are definitely not the same kind of offence."*

8.2 Taking into consideration the above judgements was the conduct of the applicant willful and refusal to obey the lawful and reasonable instruction; the instruction to the applicant was in an email that was sent to the applicant on Friday on the 12th of February 2018 at 12:52 while the college on Friday close at 13:30. The respondent does not dispute that the applicant did not see the email on Friday as they knocked of early, and does not dispute that on Monday applicant did not read his emails, as he was busy preparing for national supplementary exams, applicant however conceded that he was under obligation to look into his email, his failure to look into his emails was justifiable; the email was sent at 12:58 on a Friday school closed at 13:30 and on Monday in the morning he was preparing for 9:00 supplementary exam paper. This does not amount to wilful and serious refusal by an employee to obey reasonable instructions, but might be said to be negligent which is mitigated by the reasons that he gave that are not disputed by the respondent.

8.2 Whether the applicant's conduct after the team came refused to participate in the enrolment monitoring process: the respondent witness conceded that applicant did not expressly refuse to participate in the process. The respondent does not dispute that there were national supplementary examination that was taking place, and exams fell under the administration of the applicant as head of Admin and, also did not dispute that applicant was short of one staff member and also that she sent three ladies with the files required by the team. What is in dispute is whether applicant was part of the meeting and whether he joined the meeting and apologised. Taking in to consideration that he signed the register as number 3 while Mr Malebye said they signed while waiting for the applicant, I am satisfied on balance of probabilities that the applicant was part of the meeting and he apologised and delegated her team to assist the team while he was busy supervising the exams. As result the applicant is found to have complied with this instruction as he delegated his team to assist this team while he was busy supervising the exams which were far more important as they could not rescheduled unlike enrolment monitoring process which could be rescheduled. As result applicant on balance of probabilities is found not guilty on this allegation

9.1 Allegation 3: *That you are charged with misconduct in that on or about the 23 May 2018 and at or near Soshanguve South Campus, you displayed unbecoming behaviour/conduct by tearing official letter in the presence of the Campus Manager (Soshanguve-South), and thereby committed an act of gross insubordination*

At para 40 of the above judgement the LAC continued clarifying what would amount to insolence:

*"[40] Also, as alluded to earlier, the Commissioner failed to apply his mind to the fact that the charge of screaming and shouting at Lambrecht could not on the facts (evidence) and the law be interpreted as insubordination in light of established authority, which requires the presence of a wilful and serious challenge to, or defiance of, the authority of the employer to found a charge of insubordination or gross insubordination. The distinct difference between insubordination and insolence is that of disobedience (in intentionally refusing to carry out an instruction or an intentional and serious challenge to, or defiance of the employer"s authority)*

12.1 The dismissal of the applicant is found to be substantively unfair, but procedurally fair;

12.2 The respondent, Department of Higher Education and Training, is ordered to reinstate the applicant Godfrey Phokojoe, into the same or similar position on the same terms and conditions which applied at time of dismissal(subject to any wage review and or change in terms and conditions of a collective agreement negotiated in the interim);

12.3 To pay Godfrey Phokojoe, arrear wages equal to 16 Months as calculated from the date of dismissal, namely 9 July 2019 until date of this award, calculated as follows: R26 240.22 pm x 16 months= R419,843.52 (four hundred and nineteen thousand eight hundred and forty three rand and fifty two cent);

12.4 The order of reinstatement and payment of arrear wages is to be effected within 15 calendar days after receipt of this award;

12.5 There is no order as to costs.

**Name: P M NGAKO**

**(GPSSBC) Arbitrator**