



# ARBITRATION AWARD

Case No: **PSHS1039-18/19**

Commissioner: **Mr. Anand Dorasamy**

Date of award: **25 February 2020**

In the matter between:

**PSA OBO MOLEFE AUTILIA THANDI**

(Union/ Applicant)

and

**DEPARTMENT OF HEALTH-KWAZULU NATAL**

(Respondent)

## **DETAILS OF HEARING AND REPRESENTATION**

1. The arbitration proceedings commenced at 10H00 on the 8 July 2019 at the Uthukela Health District Boardroom in Ladysmith. After the evidence was completed the parties were to submit written closing arguments on the 18 February 2020. The respondent was initially represented by Mr. SME Mavundla who has since been appointed as a commissioner with the CCMA and Mr. Nkosiyapha Qwabe completed the matter. The applicant lodged a dispute in terms of section 186(2) (b) of the Labour Relations Act (LRA) challenging the finding and sanction arising from the disciplinary action taken against her.

## **ISSUE TO BE DECIDED**

2. I am required to determine whether the Respondent (employer) had perpetrated an act of unfair labour practice against the applicant in respect of her disciplinary finding

and sanction. Should I find in favour of the applicant, I am to determine what relief should be granted to her.

### **BACKGROUND TO THE DISPUTE**

3. The applicant was disciplined for misconduct and the disciplinary hearing chairperson found her guilty and recommended a sanction of dismissal and on appeal her sanction was changed to three- month's suspension without pay and a final written warning.
4. The applicant seeks the reversal of the guilty finding as well as the sanction. The respondent prays that the application be dismissed.

### **SUMMARY OF EVIDENCE**

#### **APPLICANT'S CASE**

##### **AUTILIA RITAH MOLEFE**

5. The salient aspects of the witness' testimony are recorded below
6. She was on duty on the 17 May 2017 and was working night shift at Estcourt Forensic Department. On the day she had to relieve Mr. Ngubo and Mr. Dladla. She did not find them and thought that they left early and was not surprised that they left early.
7. She did not see any record on the Occurrence Book (OB Book) that the policemen would collect specimens. She was not phoned or messaged. The procedure to release specimens to SAPS is that normally when an employee receives a phone call from SAPS that they would come to collect specimens it is written in the OB book or notice board.
8. The register used to release the specimen is the SAP 434 and the policeman must sign for the specimen. Sometimes there is no specimen register. The policeman came at 04H15 on the 18 May 2017 and she was not expecting them. They told her what specimens they wanted and she went to the freezer room and found it packed. She did not record in the specimen register because she looked for it but could not find it. Normally the register is locked in the safe. This was not the first time the policeman came to collect specimens and did not sign the register.
9. The policeman came and the register was not there and the specimen was released. The policemen would come back and sign for it because they know the policemen. In this case they came back on the 19 May 2017 and signed for it. The keys to the safe

- are kept by Mr. Dumakude and Mr. L S Ntuli who do not work night shift but are on stand-by duties.
10. Her colleagues who released specimens without signing for it were not charged and she was shocked to be charged and believed that they had a grudge against her. When an employee is charged the employer will have lost something or suffered prejudice. Her employer did not suffer any prejudice because the specimen went to Pretoria. The service delivery was not compromised because when she did it she was working alone on the day.
  11. She was dismissed and on appeal the sanction was reduced to three months suspension without pay and a final written warning. The sanction was too harsh and her children were not able to go to school and her policies had lapsed and she could not help when a family member passed away.
  12. When she returned to work it was hurtful. She returned to work on the 1 April 2019. Mr. Dumakude and Ms. Mbili and her colleagues were on duty. When she signed on there was a call and Ms. Mbili went out to another office and returned and then left the facility with the keys to the mortuary.
  13. Thereafter members from the District office came and told her not to go back to Estcourt but to work at the District. The Appeal's committee asked her to return to her former place of employment. Mr. Qwabe threatened her that he would call the police to remove her.
  14. Thereafter she was told that a Protection Order was made for her not to enter the place where she worked as her colleagues were not happy to work with her.
  15. She got a letter to go to the District office and she would go there and sit and do nothing until present. She was paid from the date of her dismissal to the finalization of her appeal.
  16. Under cross examination she stated as follows:
  17. Mr. Ngubo and Dladla had left. Since she did not find the register, she did not phone anybody because she was alone and did not want to delay the policemen. The policeman came and signed on the 19 May 2017
  18. The specimens are from a deceased person about the cause of death as it may be related to poisoning.
  19. Her sanction should be reduced and she will not do it again.

**SINABO QINISO BUTHELEZI**

20. He testified as follows:

21. He worked at the Estcourt Forensic Mortuary as a security guard in 2017. On the 17 May 2017 he was on night shift. He came in at 16H00 and the applicant came at 16H15. Mr. Dladla and Mr. Ngubo left the facility at 16H14. Previously they left things and messages because they waited to get a lift home.

22. On the 18 May 2017 the policemen came and he took them to the applicant. She was not expecting them. Mr. Dladla and Mr. Ngubo left early all the time.

23. Under cross examination he stated as follows:

24. There is a register to sign and an OB book. The employee signs when they leave the institution. He is now working for another company. He opened the gate for Mr. Ngubo and Mr. Dladla.

**NKOSINATHI INNOCENT MPILA**

25. He testified as follows:

26. He is a policeman at SAPS in Estcourt and collects specimens from the Estcourt Forensic Mortuary and signs the register on the day if it is present and if it is not present, they sign when they come back. In respect of all employees he takes the sample and signs the next day if the register is not present.

27. They need to take the specimen to Pretoria.

**XOLANI TERRENCE SIKHAKHANE**

28. He testified as follows:

29. He works at the Estcourt Forensic Mortuary for 13 years. The policemen must sign the register if it is present and if not present, they do not sign. When they return they sign the register. It happened many times and the other employees who did the same thing were not charged and the applicant was the first employee to be charged. Since the applicant was charged, he has not handed over specimens to policemen. Now the keys are given to Mr. Dumakude.

30. The specimens are kept in the safe and the keys are kept by Mr. Dumakude who does not work night shift. The policemen come early in the morning for the specimens and they would be told that the policemen would be coming to collect certain specimen.

31. The day shift workers leave before he comes to work and no proper hand over is done. He knows Mr. Ngubo and Mr. Dladla and did not see them.
32. Under cross examination he stated as follows:
33. It is normal practice to give the specimens and come back and sign.

#### **RESPONDENT'S CASE**

##### **LETHUKUTHULA ENOCK DUMAKUDE**

34. The salient aspects of his testimony are recorded below.
35. At the time he worked from 07H30 to 16H00. On the day of the incident he received a phone call from Detective Constable Phewa after 16H00 and he was in town. She said on the following day she wanted to take specimens to Pretoria. He went back to the mortuary and took the specimen register out from the safe. Only he and Mr. Ntuli had the keys to the safe. He took the specimen register and handed it to Mr. Ngubo and Mr. Dladla and told Mr. Ngubo that the policeman will come and collect it the following day and he then left.
36. The specimen register is used in court. The SAPS personnel know when coming to collect specimens they must sign the specimen register.
37. Under cross examination he stated as follows:
38. On the day he did not know who were working night-shift. He does not know if Mr. Ngubo passed on the message to the employee on duty. The SAPS would arrive early in the morning.
39. The Occurrence Book is used to inform the employees about happenings in the shift. The applicant was a senior person in the facility. She had to make a note in the OB but did not do so. He did not record in the OB for the benefit of the night shift about the specimens.

##### **MTHOKOZISI ELIJAH NGUBO**

40. He testified as follows:
41. He works at the institution as a Forensic Pathologist Officer. On the 17 May 2017 he was on duty. Mr Dumakude returned and informed him that there was a specimen book and a note to hand over to the applicant at 19H00. When the applicant came he gave it to her.
42. The applicant trained them on procedures. He stays in Pietermaritzburg and was using Mr Dladla's transport and his wife would pick him up on the way.

43. Under cross examination he stated as follows:
44. He left the facility at 19H00 and the applicant was at the facility. He worked at the mortuary for 5 years and they did not record in the OB on receiving the note and register. He did not record that the applicant received it.

**LESLIE SIFISO NTULI**

45. He testified as follows:
46. He is the facility manager and works from 07H30 to 16H00 and visits the facility as a stand by employee. On the day he was in Durban for a meeting.
47. He became aware of the specimen leaving the facility when he went to the OB register and noticed that there were exhibits that were handed over and he checked the shift. He noticed that the shift on duty was Mr. Diadla and Mr. Ngubo. He phoned Mr. Dumakude and asked him about the chain.
48. He concluded that there needed to be an investigation and the discrepancies needed to be clarified. Then he reported the matter to the District office.
49. On the Monday Mr. Dumakude came to him and said that he left the register and note with Mr. Ngubo. The next day there was a commotion in the mortuary because it is alleged the applicant was not happy with the instructions to her.
50. The exhibits are sealed, forms completed and locked in the freezer room. The stakeholders must observe the chain of custody and it must not be compromised. He could be reached on speed dial and the applicant had phoned him numerous times. If the register is not there they do not give the specimen.
51. After this incident lot of changes were made.
52. Under cross examination he stated as follows.
53. There is no entry in the OB that the specimen register was handed to the applicant. Mr. Ngubo confirmed that Mr. Dumakude handed to him the specimen register, but did not record this in the OB and that he handed it over to the applicant.
54. The specimen related to a suspicious death about poisoning.
55. He is not aware if the employees that did not record the activities on the day were disciplined.
56. He was not called for any hearing except this one.

## **CLOSING ARGUMENTS**

57. The parties submitted written closing arguments and the arguments were considered when I made my determination.

## **ANALYSIS OF EVIDENCE AND ARGUMENT**

58. This matter was cited as an unfair labour practice dispute in terms of Section 186 (2) (b) of the LRA.
59. The issues to be decided was whether the respondent (employer) perpetrated an act of unfair labour practice against the applicant in respect of the finding and sanction meted out to the applicant and if my finding be in the affirmative, what would the appropriate relief be to her.
60. I have taken cognizance of the decision in Sweeney/ Transcash [2000] 6 BALR 712 (CCMA) where the commissioner held that arbitration hearings constitutes a rehearing de novo on the merits. The award must accordingly be based on evidence led at the arbitration.
61. The issues in dispute in this matter are fairly straightforward.
62. The applicant was found guilty at a disciplinary hearing and sanctioned with a dismissal and on appeal her sanction was reduced to three months suspension without pay and a final written warning. She challenges the finding and sanction imposed.
63. In order not to protract my determination I dealt with the matter on the submissions.
64. The chairperson of the disciplinary hearing considered appropriate that the applicant be dismissed but the sanction was changed by the appeal chairperson. The applicant now challenges the findings of both the chairpersons because the appeal chairperson only reviewed the sanction and recommended a sanction of three months suspension without pay and a final written warning.
65. In respect of the finding of guilty I intend only to deal with the salient issues because the applicant knew the rule in respect of handing over specimens to the SAPS. The procedural chain is important as it may be challenged in court resulting in the accused being freed on a technicality.
66. The applicant was a senior employee and ought to have known the importance of preserving the chain.
67. She had breached the chain of events by handing over the specimens without following the procedure. The breach occurred as a result of the actions of the applicant.

I do not believe that the finding was inappropriate. Therefore, the finding of guilty is sustained.

68. I now turn to the applicant's prayer of having the three-month suspension without pay and the warning be set aside.
69. I have taken note that the crucial entries in the OB were not done and if this was done then the issues challenged would have been cleared. Further I have noted that many changes were implemented arising from this incident and this points to the fact that the rule was not properly understood by the employees. I also took into account that other employees at the time who breached the rule were not disciplined.
70. The applicant believed that the sanction was harsh and in this regard commissioner's powers are limited to interfere with a sanction short of dismissal imposed by the employer on the basis of harshness.
71. Discipline is the prerogative of an employer and a commissioner's role in unfair labour practice disputes is to determine if the respondent's conduct is fair. The sanction meted out to the applicant is within the provisions of Resolution 1 of 2003. Therefore the sanction of three-month suspension without pay and a final written warning appears to be fair in the circumstances. Further the applicant was a senior employee and ought to have set a better example to the other employees. I am of the view that the finding and sanction should not be altered because there was a transgression by the applicant and she received a sanction according to the provisions of Resolution 1 of 2003. The final written warning would have been completed by now.
72. As a consequence of the above I find the Respondent (employer) did not perpetrate any act of unfair labour practice against the applicant in respect of her disciplinary finding and sanction.



**AWARD**

73. The respondent did not perpetrate any act of unfair labour practice against the applicant.
74. The finding and sanction are confirmed.
75. The applicant's claim is dismissed.



Anand Dorasamy