



PHSDSBC

Public Health and Social Development  
Sectoral Bargaining Council

# ARBITRATION AWARD

Commissioner: **James Ngoako Matshekga**

Case No: **PSHS147-21/22**

Date of award: **3 May 2022**

In the matter between:

**PSA OBO MATSHIDISO CYNTHIA PHEEHA**

Applicant

and

**DEPARTMENT OF HEALTH- NORTH WEST**

Respondent

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## Details of hearing and representation

1. The arbitration of this dispute was set down before me by the Public Health and Social Development Sectoral Bargaining Council (PHSDSBC) ("the Council") on 19 and 20 April 2022 but was finalized on 19 April 2022.
2. The arbitration took place at Witrand Psychiatric Hospital ("the Hospital"), an institution of Department of Health- North West ("the respondent") situated in Potchefstroom.
3. The applicant in this matter is Ms. Matshidiso Cynthia Pheeha.
4. The applicant appeared in person and represented by Mr. Kabelo Moalosi from the registered trade union Public Servants Association of South Africa (PSA).
5. The respondent was represented by its employee Mr. Joseph Dlamini.
6. The proceedings were digitally recorded.

## **Issue(s) to be decided**

7. I have to decide whether or not the applicant's dismissal by the respondent for alleged misconduct was for a fair reason (i.e. substantively fair).
8. I also have to determine the appropriate relief if I find that the applicant's dismissal was substantively unfair.
9. The relief sought by the applicant is retrospective reinstatement in terms of section 193 of the Labour Relations Act 66 of 1995 ("the LRA"). The respondent wants the applicant's dismissal to be upheld and claim of unfair dismissal to be dismissed.

## **Background to the dispute**

10. The matter is fairly simple and straightforward.
11. The applicant is an adult female who was, until her dismissal by the respondent on 3 May 2021 on allegations of misconduct, appointed as a Senior Food Service Manager.
12. The applicant's annual salary notch at the time of her dismissal was R290 079.00.
13. The allegations of misconduct for which the applicant was dismissed for emanate from an incident that allegedly occurred on 2 May 2019. Following the alleged incident, the applicant was charged with misconduct in the following terms:

### ***MAIN CHARGE: THEFT***

*3.1. Our evidence is that on or around 2 May 2019 you- together with others. unlawfully (wrongfully) appropriated food items belonging to Witrand Hospital or Medi-Ware (Pty) Ltd with the intention of permanently depriving the owner thereof its benefit and without the latter's permission.*

### ***ALTERNATIVE CHARGE: UNAUTHORIZED REMOVAL OF PROPERTY***

*3.2. Our evidence is that on or about the 2<sup>nd</sup> may 2019 you together with others removed property in the form of food items belonging to the hospital or Medi-Ware (Pty) Ltd without having obtained either the hospital's or the company's permission to do so.*

## **SECOND ALTERNATIVE CHARGE: DISHONEST CONCEALMENT OF A MISCONDUCT**

3.3 *Our evidence is that you on or around the 10<sup>th</sup> May 2019 and knowingly to be wrong to do so failed to disclose in your report dated the 10<sup>th</sup> May 2019 the circumstances of theft of food items belonging to the hospital or Medi-Ware (Pty) Ltd or the removal of food items belonging to the hospital or Medi-Ware (Pty) Ltd.*

14. The applicant was found not guilty of the main charge and the alternative charge but was found guilty of the second alternative charge and dismissed as a result.

15. Dissatisfied with her dismissal, the applicant referred an alleged unfair dismissal dispute to the Council on 10 May 2021. The dispute remained unresolved at a conciliation that took place on 4 June 2021 whereafter it was referred for arbitration.

16. The parties held a pre-arbitration conference and provided me with a signed copy of the minutes thereof. The applicant challenges only the substantive fairness of her dismissal. Procedural fairness is not in dispute in this matter.

17. As far as substantive fairness is concerned, the only issue that I am called upon to decide is whether or not the applicant contravened a rule or standard regulating conduct in, or of relevance to, the workplace. There are no other substantive issues in dispute.

### **Survey of evidence and argument**

#### **The respondent's case**

##### **Documentary evidence**

18. The respondent submitted a bundle of documents that was marked bundle R and paginated from pages 1- 45. The documents in the bundle were agreed as being what they purported to be and their contents were also not in dispute (unless specified otherwise). The individual documents not listed in this award for the sake of brevity and due to the number of items involved. I will however refer to relevant documents were necessary.

## Oral evidence

19. The respondent called and relied on the testimony of two (2) witnesses, namely, Ms. Batholede Macheqane Yanta ("Yanta") and Mamekete Lydia Nhlabathe ("Nhlabathe"). The testimony led by all the witness is fully captured on the record of proceedings. What appears in this award is a very concise summary of the evidence relevant and material to the issues in dispute and for determination.
20. The essence of Yanta's testimony was that on 2 May 2019 she was working as normal in the kitchen when a gentleman unknown to her asked to see Amanda (her superior at (Medi-Ware (Pty) Ltd). Amanda gave her a piece of paper on which a list of food items was written and asked her to assist the gentleman to load the food items into the gentleman's vehicle. The pictures of the food items appear on pages 17-22 of bundle R. She loaded the food items into the gentleman's vehicle as instructed and the gentleman subsequently left. The applicant was at work on that day but did not witness the incident. She also did not mention or discuss the incident with the applicant.
21. The essence of Nhlabathe's testimony was that on 2 May 2019 at about 06:00am, she saw a gentleman named Oupa carrying a box of meat. The applicant was not on duty at that time.

## Closing arguments

22. Mr. Dlamini stated the respondent's written closing arguments appear on pages 28-31 of bundle R. I must record that I attached no value to those arguments for two reasons: (a) the arguments were made by Mr Mzamo Shadrack Adoons (the respondent's representative during the disciplinary hearing who was not a representative before me) and (b) the arguments were made to motivate for the dismissal of the applicant and are not based on the evidence before me or aimed at persuading me why I should find that the applicant's dismissal was fair.

## **The applicant's case**

### **Documentary evidence**

17. The applicant submitted a bundle of documents that was marked bundle A and paginated from pages 1-45. The documents in the bundle were agreed as being what they purported to be and their contents were also not in dispute (unless specified otherwise). The individual documents are not listed in this award for the sake of brevity and due to the number of items involved. I will however refer to relevant documents where necessary.

### **Oral evidence**

18. The applicant relied on her testimony and did not call any other witnesses. The testimony led by the applicant is also fully captured on the record of proceedings and therefore it is unnecessary for me to repeat it in this award.

19. The essence of the applicant's testimony was that on 2 May 2019 she reported for duty at 07:30am, carried out her normal duties (reconciliation of accounts) and knocked off at 15:00pm. On 9 May 2019, Ms. Tlou called her into an office and showed her an email from the registered trade union National Education, Health and Allied Workers' Union (NEHAWU) in which NEHAWU alleged that there was an incident of theft on 2 May 2019. Ms. Tlou tasked her to investigate the matter. She investigated the matter and on 10 May 2019 gave a written report to Ms. Tlou in which she stated she could not find evidence to substantiate the allegation. On 17 May 2019, the respondent suspended her on allegations of theft and subsequently dismissed her. The dismissal had a negative effect on her health.

### **Applicant's closing argument**

20. Mr. Moalosi requested an indulgence to submit written closing arguments on behalf of the applicant by no later than 22 April 2022; which he did. The applicant's written closing arguments are also a matter of record and therefore I will not repeat them in this award.

21. In essence, Mr. Moalosi argued that the respondent failed to prove that the applicant's dismissal was substantively fair and therefore the applicant should be retrospectively reinstated.

### **Analysis of evidence and arguments**

22. I am required to decide whether or not the dismissal of the applicant by the respondent was substantively fair. I am also required to determine the appropriate relief if I find that the applicant's dismissal was either substantively or procedurally unfair or both.

23. Section 138(7)(a) of the LRA enjoins me to provide brief reasons for my findings.

24. Section 192 of the LRA provides that in any proceedings concerning any dismissal, the applicant must establish the existence of the dismissal. If the existence of the dismissal is established, the respondent must prove that the dismissal is fair.

25. The dismissal of the applicant is not in dispute in this matter. Therefore, the respondent bears the onus of proving on a balance of probabilities that the dismissal was fair.

26. According to Section 188(1) of the LRA, the dismissal of the applicant by the respondent will be unfair if the respondent fails to prove that the applicant's dismissal was for a fair reason related to the applicant's conduct or capacity or based on the respondent's operational requirements and that the dismissal was effected in accordance with a fair procedure.

27. In determining whether the respondent has complied with the requirements for substantive fairness, I must take into account the provisions of schedule 8 of the LRA (See section 188(2) of the LRA). I am also duty bound to take into account the CCMA guidelines on misconduct arbitration (see section 138(6) of the LRA).

28. The determination of whether or not the dismissal of the applicant by the respondent was fair requires me to make "a moral or value judgment as to what is fair in all the circumstances" (See *Metro Cash & Carry Ltd v Tshehla* [1997] 1 BLLR 35 (LAC); and *Numsa v Vetsak Co-Operative Ltd and Others* (1996) 3 All SA 311 (A)).

29. In considering issues of fairness, I am obliged to have regard to fairness to both parties. There is no room for any suggestion that fairness is confined to its effect on the applicant only (See in this regard *FAWU and Others v SAB Limited* [2004] ZALC 65 (LC) at para 40.)

30. In *National Education Health & Allied Workers Union (NEHAWU) v University of Cape Town and Others* 2003 (2) BCLR 154 (at para 38) the Constitutional Court held that what is fair depends upon the circumstances of a particular case and essentially involves a value judgment and consequently it is neither necessary nor desirable to define the concept of fairness. The court further held that fairness is not confined to workers only but comprehends that regard must be had not only to the position and interests of the workers, but also those of the employer, in order to make a balanced and equitable assessment.

### **Substantive fairness**

31. It is common cause that the reason for the applicant's dismissal is rooted in alleged misconduct.

32. Item 7 of Schedule 8 of the LRA provides that:

*Any person who is determining whether a dismissal for misconduct is unfair should consider-*

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

*(b) if the 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; and*

*(iv) dismissal was an appropriate sanction for the contravention of the rule or standard.*

33. As already stated, the applicant disputes breach of the rule.

**Did the applicant contravene a rule or standard regulating conduct in, or of relevance to, the workplace?**

34. It is true that an arbitration constitutes a hearing *de novo*, but not in a literal sense. In other words, I don't start from a scratch. I must determine whether or not the dismissal of the applicant by the respondent for the reasons given and relied on by the respondent at the time of the dismissal was fair.

35. In *Palluci Home Depot (Pty) Ltd v Herskowitz and Others* [2015] 5 BLLR 484 (LAC) (at para 46) the Labour Appeal Court held that "...Accordingly, the commissioner undertook the enquiry in a misconceived manner by determining the fairness of the first respondent's dismissal on the basis of reasons for the dismissal, which the appellant did not rely on at the time of dismissing the first respondent."

36. As already stated, the chairperson of the applicant's disciplinary hearing acquitted her of the theft and unauthorized removal of property allegations (see pg 39 of bundle R). It was also Yanta and Nhlabathe's testimony that the applicant was neither involved nor witnessed the incident of 2 May 2019. Accordingly, there is no evidence of theft or unauthorized removal of property against the applicant before me.

37. Yanta and Nhlabathe did not lead any evidence on the allegation for which the applicant was dismissed, namely, the allegation that the applicant dishonestly concealed the circumstances of theft of food items belonging to the Hospital or Medi-Ware (Pty) Ltd or the removal of food items belonging to the Hospital or Medi-Ware (Pty) Ltd. A record of the evidence of the respondent's other witness that testified during the disciplinary hearing (i.e. Mr. Alfred Kgositsile Mokanyane) also do not contain any such evidence against the applicant. If anything, Mr Mokanyane was declared a hostile witness (see pages 33-34 of bundle R).

38. I am a slave of facts and evidence. In this case, the respondent led no evidence against the applicant to support the allegation for which the applicant was dismissed. Therefore, I find that the respondent failed to prove that the applicant contravened a rule or standard regulating conduct in, or of relevance to, the workplace. Because of my finding that the applicant did not contravene a rule or standard regulating conduct in, or of relevance to,



the workplace, it logically follows that the applicant's dismissal by the respondent was substantively unfair.

#### DECISION

39. I have found that the dismissal of the applicant was substantively unfair.

40. In *Sidumo and Another v Rustenburg Platinum Mines and Others (Sidumo)* [2007] 12 BLLR 1097 the Constitutional Court held that I have to consider the full extent of the relevant personal and surrounding circumstances which includes the nature, the importance and purpose of the rule breached, the nature and extent of the breach, the reasons for the imposition of the sanction of dismissal, the basis of the challenge thereto, the harm or potential harm caused or likely to be caused by the breach of the rule, further conduct, including disingenuousness surrounding the commission of the breach and the disciplinary and arbitration processes, a complete lack of remorse and re-commitment to the values of the respondent, the effect of the breach on the trust relationship and the capacity for the resuscitation of a workable employment relationship, the effect of the dismissal on the applicant and her service and disciplinary record.

41. The Applicant has requested relief of retrospective reinstatement. Section 193(2) of the LRA directs that if a dismissal is unfair, I must require the respondent to reinstate or re-employ the applicant unless (a) the applicant 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 unfair only because the respondent did not follow a fair procedure.

42. In *South African Revenue Service v CCMA and Others* [2017] 1 BLLR 8 (at para 38) the Constitutional Court held that the correct approach to adopt when the dismissal has been found to be unfair, is first to consider the provisions of section 193(1) and then section 193(2) to determine which of the three remedies reinstatement, re-employment or compensation may be granted.

43. In *OCGAWU & another v County Fair Foods (Pty) Ltd* [2001] 12 BLLR 1358 (LC) the Labour Court held that an employer that contends that reinstatement is not reasonably



practicable or that continuation of the employment relationship would be intolerable is obliged to lead evidence to support such a claim.

44. The respondent did not place any evidence before me to prove that continued employment relationship will be intolerable. My finding is also that there are no objective facts that would have justified such an argument. I also have no evidence to prove that it will be reasonably impractical for the respondent to reinstate the applicant.

45. In the absence of the evidence and anything to the contrary, I find that reinstatement of the applicant is the appropriate relief in the circumstances of this matter.

46. In *Equity Aviation Services (Pty) Ltd v CCMA and Others* 2009 (1) SA 390 (CC) (at para 36) the Constitutional Court explained the legal effect of a reinstatement order as follows:

*The ordinary meaning of the word "reinstate" is to put the employee back into the same job or position he or she occupied before the dismissal, on the same terms and conditions. Reinstatement is the primary statutory remedy in unfair dismissal disputes. It is aimed at placing an employee in the position he or she would have been but for the unfair dismissal. It safeguards workers' employment by restoring the employment contract. Differently put, if employees are reinstated they resume employment on the same terms and conditions that prevailed at the time of their dismissal. As the language of section 193(1)(a) indicates, the extent of retrospectivity is dependent upon the exercise of a discretion by the court or arbitrator. The only limitation in this regard is that the reinstatement cannot be fixed at a date earlier than the actual date of the dismissal. The court or arbitrator may thus decide the date from which the reinstatement will run, but may not order reinstatement from a date earlier than the date of dismissal. The ordinary meaning of the word "reinstate" means that the reinstatement will not run a date from after the arbitration award. Ordinarily then, if a Commissioner of the CCMA order the reinstatement of an employee that reinstatement will operate from the date of the award of the CCMA, unless the Commissioner decides to render the reinstatement retrospective. The fact that the dismissed employee has been without income during the period since his or her dismissal must, among other things, be taken into account in the exercise of the discretion, given that the employee's having been without income for that period was a direct result of the employer's conduct in dismissing him or her unfairly.*

47. In *Coca Cola Sabco (Pty) Limited v Van Wyk* [2015] 8 BLLR 774 (LAC) (at para 16) the Labour Appeal Court held that the effect of a reinstatement order is to revive the contract of employment which was terminated by a dismissal. The Court further held that *"the money paid to an unfairly dismissed employee consequent to a retrospective reinstatement order is not compensation. Compensation and back-pay may only be granted in the alternative and are mutually exclusive. The back-pay ordered by the commissioner can therefore only refer to the period between the date of dismissal and the date of the order and does not entitle an employee, without more, to remuneration between the date of the award and the actual date of implementation. The Labour Relations Act does not cater for such relief."*

48. The applicant has been unemployed and without a salary from 3 May 2021. She deserves full backpay from the date of her unemployment to the date of this award.

## AWARD

49. I make the following award:

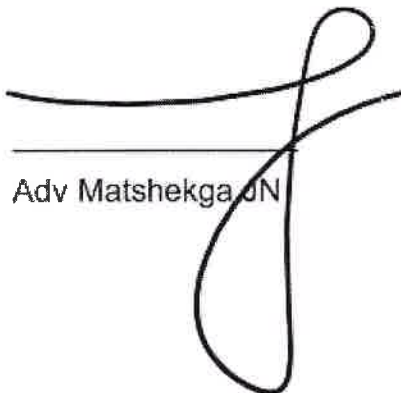
50. The dismissal of the applicant by the respondent on 3 May 2021 was substantively unfair.

51. I order the respondent to reinstate the applicant into the same or similar position and on the same or similar terms and conditions of employment which prevailed immediately prior to the date of the dismissal (i.e. 3 May 2021).

52. The respondent is ordered and expected to pay the applicant back-pay, less applicable statutory deductions, backpay in an amount of two hundred and ninety thousand and seventy-nine rand (R290 079.00), being the equivalent of twelve 12 months' remuneration by no later than 31 May 2022.

53. The respondent must implement this arbitration award on 9 May 2022 and the applicant must report for duty as normal on that date (i.e. 9 May 2022).

54. No order of costs was sought and none is made.



Adv Matshekga JN