



# ARBITRATION AWARD

Case No: **PSHS684-22/23**

Commissioner: **Jules McGillavray-Teale**

Date of award: **29 May 2023**

In the matter between:

**PSA obo Selina Mnisi**

Applicant

and

**Department of Health- Gauteng**

Respondent

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## **Details of hearing and representation**

1. Ms. Selina Mnisi (the applicant) referred an unfair labour practice dispute under section 186 (2)(b) of the Labour Relations Act, 66 of 1995 regarding unfair disciplinary action taken against her by the Department of Health- Gauteng (the respondent) to the Public Health and Social Development Sectoral Bargaining Council (the Council).
2. The matter was set down for arbitration on 10 February 2023, 3 and 4 April 2023 which was postponed by the parties, and finally on 8 and 9 May 2023, at Westkoppies Hospital in Pretoria. The applicant appeared in person, represented by Martin Mashaba of the Public Servants Association of South Africa (PSA) and the respondent was represented by its employee Sebako Serepo.

**Issue to be decided**

3. I must decide if the conduct of the respondent constituted an unfair labour practice and if so determine the appropriate remedy.

**Background to the dispute**

4. It was common cause that the applicant has been employed by the Department of Health since 1986. She currently holds the position of Operations Manager and has 20 subordinates. It was further common cause that she was issued with a written warning by Matron Mogale. Which was appealed and upheld by the CEO of the hospital.
5. The applicant submitted a bundle of 70 pages and the respondent submitted a bundle of 40 pages.
6. Only the pertinent information will be mentioned in this award. This should not be misconstrued to suggest that I have not considered all the evidence. The proceedings were recorded both manually and electronically and the copy thereof is filed with the Council.

**Survey of the evidence and argument****The applicant's case****Selina Mnisi**

7. The applicant testified under oath that she had received a written warning from Matron Mogale for "failure to ensure safekeeping of medication administration charts records of August 2022." The warning was issued on 10 October 2022.
8. She appealed the disciplinary action on 12 October 2022 on the basis that filing and safekeeping were never her accountability, were not contained in her job description and most importantly, that she was not even present at the time the documents were filed. She also stated that she was the only person who was not there during the month end period, but the only person who got a warning.
9. She received the outcome of her appeal on 26 October 2022 which upheld her warning. She then referred an Unfair Labour Practice dispute under Section 186 (2)(b) of the Labour Relations Act, 66 of 1995 to the council for conciliation. The matter was conciliated on 13 December 2022 and remained unresolved. She then requested that the matter be arbitrated on 11 January 2023.

10. Matron Mogale, wanting to do an audit for August 2022, had gone to ward 21 on 7 September 2022 and requested the records which could not be found. The process that the ward follows is that all nurses use the medication charts during the month and they are placed in a tray on the desk of the ward clerk who would file them at month end. The applicant had been booked off ill from 30 August 2022 until 5 September 2022 and was not present in the ward. This meant that another Operations manager would take over from her while she was away. The ward clerk, Wendy Kubayi who was on duty during the period in question and is responsible for filing and safekeeping of records. Ms Kubayi also does not report to the applicant but to a Case Manager, Ms Ledwaba. She went on to state that the ward was under video camera but no one had watched the footage which might have assisted to establish what had happened to the missing documents.
11. The applicant felt that the warning was extremely unfair. She was unaware of which provision of the protocols she had contravened. There also was no requirement of her to have developed a system for safekeeping of records. She did not implement the system; it was already there when she started.
12. With regard to the appeal process, Matron Mogale reports to Chief Matron Schoonwinkel, who reports to the CEO, Mr Motaung. She confirmed that there is no one above the CEO. Also, Resolution 1 of 2003 of the Public Service Disciplinary Code, Section 8 states the following:
- “8.3 The appeal authority, who shall consider the appeal, shall be:*
- a. the executing authority of the employee, or*
  - b. an employee appointed by the executing authority, who was not involved in the decision to institute the disciplinary proceeding, and*
    - i. who was not involved in the decision to institute the disciplinary proceeding,”*
13. It was the applicant's assertion that the CEO of the hospital should not have dealt with her appeal since he would have been part of the decision to discipline her along with all the other senior role players who were all part of the institution and that the appeal should have been heard by the MEC.
14. The recourse she sought was that the warning be set aside.



15. Under cross examination she was asked which ward she works in and she replied ward 21. She manages Professional Nurses, general and speciality as well as staff nurses and assistant nurses.
16. She was asked if she managed the ward clerk, Ms Kubayi to which responded in the negative. She was asked whose accountability safekeeping of records was and she replied that she did not know. She was asked why she did not give Ms Kubayi a warning to which she responded that she did not manage the ward clerk and felt it would be unfair if a warning did not come from her manager.
17. She was referred to her performance agreement in the bundle where it noted that she was responsible for the accurate handling of records. She responded that handling of records did not translate to filing. She was responsible for ensuring that medication was recorded by the nurses but not for the filing of the charts at the end of each month.
18. She was asked where she submitted her appeal and she responded that it was submitted to the CEO. She was asked when the records were lost; to which she responded that she was not sure since she was not there. She was then asked if they were there before she took ill; to which she responded that they would still have been with the nurses since filing is only done on the 1<sup>st</sup> of the month. She was asked if she had implemented the system for filing and the reporting structure to which she replied that they were in place when she started in Ward 21.

**Ofentse Dibetso**

19. Ms Dibetso testified under oath that she was employed in May 2022 as a Professional nurse and her functions consisted of providing nursing care to patients, monitoring patients, medication and hygiene.
20. She testified that she did not know the process for filing of medical records. She knew that there was a Ward Clerk but was unaware of any formal protocol other than putting documents for filing in the box on the Ward Clerk's desk. She confirmed that the Ward Clerk, Ms Kubayi was at work during the period that The applicant was ill and was responsible for the filing of documents.
21. She described the handover process to a Senior Professional Nurse if the applicant were absent.

22. Under cross examination she was asked if she knew what the applicant's role was; to which she replied that she did not.

23. Under re-examination the witness was asked who she currently reported to; to which she responded Ms Moila.

**Wendy Kubayi**

24. Ms Kubayi testified under oath that she is the Ward Clerk/Administrator and is responsible for admissions, transfers, attending to messengers, errands for the matron and filing. She confirmed she reported to Ms Ledwaba and was responsible for all filing.

25. She was referred to her statement in the bundle and she testified that she was instructed to write a statement by the Matron when she came to audit the September files. She was asked to verify her statement which noted that the audit was for August 2022. She confirmed that her statement was incorrect and should have stated August 2022. She was asked if she knew what happened to the filing to which she responded that she did the filing but was aware that Ms Maluleka had taken information out of the files; but she only filed the cardex. She was asked who was on duty at that stage and she responded that Ms Maluleka was because the applicant was on sick leave.

26. Under cross examination the witness was asked who she reported to; to which she responded Ms Ledwaba. She was asked who was responsible for filing and she confirmed that she was. She confirmed that she had put the system in place that required all documents for filing to be put into the box on her desk and that they were kept under lock and key in the file room.

27. She was asked how she felt about the warning given to The applicant to which she stated that she found it unfair.

28. It was put to her that she had not mentioned Ms Maluleka and the removal of documents in her statement; she offered no response.

29. Under re-examination it was put to her that she had not mentioned the last person to take documents; again, she could offer no insight.

**Binny Maluleka**

30. Ms Maluleka testified under oath that she was a Professional Nurse in Ward 21, had been employed in December 2003 and knew The applicant, who was her supervisor. She confirmed that she had removed patient charts from the files in early September 2022, that Wendy Kubayi had been on duty at the time and that she had been responsible for filing. She further verified that if the applicant were not present, she was accountable for the ward and all the employees while the applicant was away. She was asked if it was fair that the applicant had received a warning when she was not there, she responded that it was not.
31. She was asked to describe the filing system in Ward 21 and she responded that it was always the practice to put documents for filing into the box on Ms Kubayi's desk because she was accountable for filing.
32. Under cross examination the witness was asked if she was in charge while the applicant was away ill. She confirmed that she was. She further confirmed that there had been no handover because the applicant had gone off ill.
33. She was asked if she had removed charts from the files, she confirmed she had but had put them in the box for Ms Kubayi to file when she was finished with them.
34. She was asked who had investigated the matter but she could offer no answer. She was questioned about the statement she wrote to which she responded that she was instructed to do so by Matron Mogale. She was asked who should have been disciplined to which she responded no one.
35. Under re-examination she was asked to verify that she was the last person to deal with the missing documents; she did.

**Argument for the respondent****Matron Pandi Mogale**

36. Ms Mogale testified under oath that she was responsible for Ward 21 and that the primary responsibilities of the applicant and other Operations Managers was to ensure the smooth running of the ward. She confirmed that Ms Kubayi also reported to the applicant.
37. It was put to her that Ms Kubayi had testified that she reported to Ms Ledwaba, she then amended her statement to say that all ward staff report to the applicant but Ms Ledwaba supervised Ms Kubayi.



38. She recounted the events of the audit in September 2022 for the August 2022 documentation and noted that all documents were missing. She verified the filing process and asked Ms Kubayi where the documents were. Ms Kubayi did not know.
39. She then issued the applicant with a warning since it was her system. She confirmed that applicant was off ill when the medication filing was done on 1 September 2022.
40. She was asked why no one who was present at the time had been disciplined and she responded that the applicant could have disciplined them. She further testified that the applicant had put the system in place and that she had instructed all the staff to use it.
41. She was asked why the applicant had never been provided with the video footage of the ward while she was away in order to establish what had occurred. She responded that the video cameras were not working.
42. Under cross examination the witness was asked to explain the appeal process at the institution. She could not.
43. She was asked to look at the document in the bundle which verified the process and asked if it was complied with. She conceded that the process had not been followed correctly and that there was a procedural defect as the appeal had not gone to the MEC.
44. It was put to her that Ms Maluleka was the last person who dealt with the documents, she conceded this. She went on to say that the applicant was instructed to give warnings to staff but she had not because she had refused. It was then put to her that surely the applicant should have been charged with insubordination then. She did not respond.
45. It was put to her that she had testified that the applicant had implemented the filing system but that Ms Kubayi had testified that she had in fact done so. She had no answer.
46. It was further put to her that the applicant's job description contained no requirement to develop a filing system and that she had been given a warning for something that was never in her control. She maintained that it was the applicant's role.
47. She was asked to point out where in the applicant's role the requirement was to file and safekeep documentation. She could not. She was also asked if the cameras were currently operational and she admitted that they were not.

48. It was put to her that she was holding someone who was not present accountable for something she could not have controlled, then mishandled the appeal and therefore the warning was unfair and should be expunged. She offered no response.
49. Under re-examination the witness was asked what the appeal process is. She did not know but she had written the warning in line with the code.

### **Analysis of the evidence and argument**

50. It was common cause that the applicant was booked off ill from 30 August to 5 September 2022 and that she was not present in Ward 21.
51. It is further common cause that the Matron Mogale issued the warning to the applicant for 'failure to ensure safekeeping of medication administration charts'
52. All the witnesses, Ms Dibetso, Ms Maluleka, Ms Mogale and Ms Kubayi confirmed it herself that she, the Ward Clerk, (Ms Kubayi) was responsible for filing and safekeeping of documents. Ms Kubayi testified that she reported to Ms Ledwaba. Ms Maluleka had testified that the system was standard throughout the hospital.
53. Matron Mogale testified that it was the applicant's accountability to implement a system for the safe keeping of documentation and to ensure adherence to the system. This was in stark contrast to the testimony given by Ms Kubayi who testified that she had put the system in place, she kept documents under lock and key and that the system had already been in place when the applicant had started in the ward.
54. What was in the applicant's role was to ensure adherence to record keeping but given that the applicant was not even present that would have fallen to Ms Maluleka. Matron Mogale could not show any requirement for the applicant to file and safekeep documentation in her job description. There was also no requirement for her produce and monitor a system. Her role merely noted that she accurately handle medical charts which would have been impossible during the period in question since she was ill.
55. There was also no hospital protocol on record keeping. It is also overwhelmingly clear that the last person to deal with the medical charts and take them out of the file was Ms Maluleka and she testified to putting them in the tray for filing.



56. It is further clear that the documents went missing or were not filed somewhere between Ms Maluleke removing the files and them being re-filed by Ms Kubayi. The applicant was not present, so she would have no way of knowing.
57. In terms of the testimony of the witnesses, a proper investigation was not conducted. No one could know what happened, which was aggravated by the cameras in the ward being dysfunctional. As per the applicant's testimony, had they been working, the picture may have become clearer. Even more surprisingly, they remain out of order and the only witness who knew they were not functioning was Matron Mogale. Interestingly enough the cameras remain unrepaired.
58. As for the appeal, Matron Mogale conceded that there had been a procedural defect in the execution since the appeal should have gone to the MEC and not the CEO.
59. Section 186(2)(b) of the LRA defines an unfair labour practice as, *inter alia*, "an unfair act or omission that arises between an employer and an employee involving the unfair suspension of an employee or any other unfair disciplinary action short of dismissal in respect of an employee."
60. Based on the merits of the case, I find that the applicant has indeed discharged the burden of proof and that the conduct of the respondent does constitute an unfair labour practice relating to unfair discipline as defined by Section 186(2)(b) of the LRA.

### **Award**

61. The applicant was subjected to an unfair labour practice.
62. The written warning issued to the applicant by the respondent on 10 October 2022 is hereby set aside.
63. I order the respondent to, with immediate effect, remove the written warning from the applicant's file and destroy it.



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**Jules McGillavray-Teale**