



ARBITRATION AWARD

Case No: **PSHS844-22/23**

Commissioner: **Teresa Erasmus**

Date of award: **19 July 2023**

In the matter between:

REBECCA MOHAMED

Applicant

and

DEPARTMENT OF HEALTH- WESTERN CAPE

Respondent

DETAILS OF HEARING AND REPRESENTATION

1. This matter was set down at Room 2 Metro-East Nursing College, Stikland Hospital premises for Arbitration at the Public Health and Social Development Sectoral Bargaining Council for Arbitration in terms of section 191(1)(5)(a) of the Labour Relations Act 66 of 1995 ("the LRA") on 27 June 2023. The Applicant was represented by Ms N Adams from PSA and the Respondent was represented by an attorney Mr M Dyalwane from the State Attorney.

ISSUE TO BE DECIDED

2. I must decide whether the Applicant's dismissal was procedurally and substantively fair.

BACKGROUND TO THE DISPUTE

3. The Applicant was charged with 5 charges of misconduct and found guilty on four of the charges, she was dismissed on the 23rd of January 2023. The Applicant avers that there was splitting of charges, as all the allegations refer to the same incident and the same individual.
4. The Applicant was employed by the Respondent from the 1st of August 2020 as Deputy Director, Corrective Bargaining. She earned R778080.00 per annum at the time of dismissal.
5. The Respondent applied to the Council for a postponement at the commencement of the proceedings, as the Respondent averred that there was short service of the Notice of Set Down on parties. The Council ruled that this was not the case and informed the parties that the matter would proceed on 27 June 2023. The Respondent previously applied for Legal Representation, which application was granted.
6. The Respondent once again applied for a postponement, based on the fact that the Advocate that the Respondent appointed to represent them, was in a motor vehicle accident on Sunday 25 June 2023. The Respondent did not apply to the Council for a postponement on this basis, nor did the Respondent attempt to reach an agreement with the Applicant, regarding a postponement.
7. Instead, the Respondent's attorneys, who incidentally also represented the Respondent, during the request for Legal Representation, applied orally for a postponement at the commencement of the proceedings on Tuesday 27 June 2023.
8. The Respondent's application for a postponement is not compliant with Rule 23 of the Council's Rules for the Conduct of Proceedings before the Council. I cannot deal with the application for postponement. In terms of Rule 23(6) of the Council's Rules, only the Council can adjudicate on an application for postponement in case where a party to a dispute fails to comply with the time-periods referred to in sub-rules 1,2,3 or 4. The arbitration must therefore take place on the scheduled date, unless the Council rules otherwise. There was no application before the Council for a postponement, relating to Advocate Mapoma's medical incapacity to attend the proceedings.
9. Mr Dyanivane from the State Attorney remained in attendance, during the arbitration hearing, whilst he stated he is not ready to proceed with the matter on his own, in spite thereof that he is an attorney in the office of the State Attorney, charged with the matter.

SURVEY OF EVIDENCE AND ARGUMENTS

10. APPLICANT'S CASE

11. **Rebecca Christine Mohammed** testified that she was employed by the Respondent in the capacity of a Deputy Director for Collective Bargaining. She was appointed on the 1st of August 2020, the Director at the time, Mr. Joey Roman was the spokesperson for Collective Bargaining. The Applicant stood in when he was not available. The Applicant also represented the Respondent at National Bargaining, she served on the EXCO of the National Bargaining Council.

Charge 1

"In terms of Annexure A of Resolution 1/2003, read with paragraph 4.4.11 of the code of conduct for the Public Service – it is alleged that you made yourself guilty of an act of misconduct when you via email handover on 31 January 2022 following, failed to give honest and impartial advice to your higher authority (Director: Employee Relations Chief Director: People Management) regarding your instruction to Ms L. Abrahams, a duly appointed DoH investigator, to not consult the "alleged perpetrators" in the departmental investigation into Dr Kasilembo's allegation / complaint of sexual harassment."

12. The Applicant was found guilty of this charge.
13. The Applicant was the Acting Director from the 10th of January until 28th of January 2022, whilst Mr Roman was on leave. The Applicant drafted an email to Mr. Roman on the 30th of January 2022, which she send to him on the 31st of January 2022, with an update on all the cases. In terms of charge 1, Ms L Abrahams is alleged to be the duly appointed DOH investigator. She was not the appointed investigating officer ; she was appointed as the sexual harassment officer.
14. In terms of paragraph 8.4 the Respondent's Sexual Harassment Policy, the designated sexual harassment contact officer, is the first point of contact, after the Respondent has received a sexual harassment complaint. Dr Kasilembo was the complainant against Professor Saleigh Adams, there was more than one complaint.
15. The designated sexual harassment officer must assess the complaint. The sexual harassment policy makes provision for both a formal and informal process. If the complainant elects to follow the formal route, there is no need for the designated sexual harassment officer to speak to the alleged perpetrators.

The Applicant told Ms. Abrahams, as the complainant decided to follow the formal route, there is no need for her to speak to the alleged perpetrators. An investigation officer must then be appointed.

16. The Applicant concedes that she told Ms. Abrahams not to speak to the alleged perpetrators. The Applicant was found not guilty on **charge 3** which is a duplication of charge 1, yet she was found guilty on charge 1. The Applicant believes that she followed the correct procedure.
17. **Charge 5** is the same charge as charges 1 & 3; therefore, she should have been found not guilty on charge 5 as well.
18. Although the Applicant was not Abrahams's supervisor at the time, she was the Acting Director at the time. Abrahams had to investigate whether there were any grounds for an investigation. She recommended that the person should be placed under precautionary suspension and a further investigation must take place. Mr. Willem Smal informed the Applicant that Ms. Rene Watt was appointed as the investigating officer to deal with the allegations. The Applicant did not deal with the matter any further after Mr. Roman's return to work on the 31st of January 2022.
19. After Rene Watt was appointed, another person was appointed as investigating officer, the Applicant is unsure of the reasons for this appointment. Dr Kasilembo was subsequently also charged with misconduct and dismissed, details of which are unknown to the Applicant.

Charge 2

"In terms of Annexure A of Resolution 1/2003, read with paragraph 4.4.9 of the code of conduct for the Public Service – it is alleged that you made yourself guilty of an act of misconduct that between the period February 2022 to date, you failed to act with transparency by not disclosing material and relevant information to your higher authority. (Director: Employee Relations and Chief Director: People Management) of your receipt of evidence via WhatsApp directly from the complainant (Dr Kasilembo) in an internal departmental investigation into Dr Kasilembo's sexual harassment / rape complaint(s) and allegation(s)."

20. The Applicant was found guilty on this charge.
21. The Applicant testified that Dr Kasilembo lodged a grievance in September 2021, before the Applicant was appointed as the Acting Director. She received an email from the National Department of Health

about this case, because Dr Kasilembo alleged that the Department of Health was not doing anything about the complaint. The Applicant testified that sexual harassment is not a grievance, it is a case of misconduct. Abrahams told the Applicant that she had an initial consultation with Dr Kasilembo.

22. The Applicant called all of the relevant parties into a meeting on the 17th of January 2022, the Respondent has 30 days to deal with a grievance, the 30-day time period had already lapsed without it being resolved. The Applicant gave instructions for the grievance to be closed and that Dr Kasilembo must lodge a complaint instead, which she did.
23. The Applicant received a request from Grootte Schuur Hospital the previous Friday to have Dr Kasilembo suspended. The Applicant wrote a long email with questions that she needed them to answer, before she could consider the precautionary suspension of Dr Kasilembo. She copied Mr. Willem Small in the email, as she knew that he was going to deal with the matter. Mr Willem Small told the Applicant that Grootte Schuur was not happy with her reply, whereafter the Applicant suggested that they should set up an MS Teams meeting with Dr Kasilembo to discuss the matter, which they did.
24. Dr Kasilembo arrived with a legal representative, who has not allowed to attend the proceedings, as it was an internal grievance. The Applicant explained to Dr Kasilembo that it is not a grievance, but that she should lodge a complaint instead. Dr Kasilembo said that she understood this and told the Applicant that it was the first time somebody explained this to her. Dr Kasilembo agreed to lodge a complaint instead, she was clearly traumatised. Ms L Abrahams was appointed on the 18th of January 2022, as she was on leave until the 25th of January 2022.
25. The Applicant asked Dr Kasilembo to co-operate with Ms Abrahams, they met on the 26th of January 2022. Abrahams wanted to speak to the alleged perpetrator, but the Applicant told her she did not have to speak to the alleged perpetrator. The Applicant told Mr Roman on his return, that the matter is under investigation.
26. They received an email from Dr Kasilembo's lawyers on the 31st of January 2022, the Applicant was concerned about the contents of Advocate Nyman's email, she was trying to tell the employer how to do their job. Professor Saleigh Adams, the alleged perpetrator was also included in this email, which concerned the Applicant. A meeting followed with the CEO of the Grootte Schuur, Dr Patel and Mercy Lazerus, Peoples' Manager at Grootte Schuur Hospital on the 2nd of February 2022 to discuss the email

received from Advocate Nyman. It was clear that they had performance issues with Dr Kasilembo. The Applicant pointed out to them, that the issues must be separated.

27. They met with Ms Abrahams, and she discussed her initial report with them. One of the complaints by Dr Kasilembo was that she was called a "bitch" by the surgeons, they told her that is just the way they speak there.
28. Apparently there was an article in the Newspaper, Dr Kasilembo went to the Newspaper stating that the Respondent did nothing about the complaints. Roman asked Ms Abrahams to tell Dr Kasilembo not to speak to the Newspapers. Ms Abrahams didn't feel comfortable to do so, as it would appear that she was siding with the employer. Ms Abrahams asked the Applicant to speak to Dr Kasilembo instead.
29. Ms Abrahams finished the interview with Dr Kasilembo, during which the Applicant was present. Dr Kasilembo was late for the interviews, she said she went to the Police Station to lodge a complaint. That was the end of the interview, the Applicant was no longer involved after this.
30. The Applicant received messages from Dr Kasilembo on the 17th of February 2022 , which messages she forwarded to Ms Abrahams on the 18th of February 2022, who had not completed her report yet at that stage. These messages were not included in Ms Abrahams's report, she had already submitted her report to Mr Roman by the time that the Applicant sent the messages to Ms Abrahams.
31. Mr. Roman became aware of these WhatsApp messages when the Applicant told Jason Fry, the then appointed investigating officer about the WhatsApp messages when he interviewed the Applicant during May 2022. The Applicant told him that the messages were very personal. She asked Dr Kasilembo whether she wanted Mr Roman to see these messages. The Applicant did not send these messages to Mr Roman. The Applicant has no knowledge of whether Ms Abrahams was subjected to disciplinary charges.

Charge 4

"In terms of Annexure A of Resolution 1/2003, it is alleged that you made yourself guilty of an act of misconduct when you failed to act in good faith towards your employer thereby prejudicing the administration, discipline or efficiency of the department, office or institution of the State." The Applicant was found guilty of these charges.

32. The Applicant does not understand what this charge was about, it was never clarified to her during the disciplinary hearing. The Respondent alleged that her instruction to Ms Abrahams not to consult with the perpetrators was not in line with the policy.
33. According to the Applicant, the policy is not consistently applied by the Respondent. The Applicant did not arrange for other witnesses to attend the hearing, as they believed the matter would be postponed once again, as the Respondent's legal representative informed her the previous day of Advocate Mapoma's accident, although he did not ask her whether the Applicant would agree to a postponement, this was not discussed at all.
34. Mr Dyalivane stated that he is not in a position to cross examine the witness and he once again asked for an adjournment. Mr Dyalivane stated that he became aware of the appointed advocate's inability to attend to the proceedings the previous afternoon
35. I did not grant a postponement for the reasons stated in paragraph 8 above
36. It is recorded that Mr Dyalivane, is an attorney and he was present throughout the proceedings, but he was completely unprepared to the matter. His conduct is highly unacceptable, given his qualifications and position.
37. The Applicant's representative confirmed that there was no agreement about a postponement regarding the medical certificate and the Respondent's representative did not request her to agree to a postponement regarding the medical reasons. She was just informed that the advocate was involved in a motor vehicle accident in Durban on Sunday 25 June 2023. Mr Dyalivane confirmed that he emailed the medical certificate to Ms Adams, at 16:23 the previous day, but he did not request a postponement.

ANALYSIS OF EVIDENCE AND ARGUMENT

38. The Applicant was charged with the following 5 charges of misconduct:

Charge 1 – In terms of Annexure A of Resolution 1/2003, read with paragraph 4.4.11 of the code of conduct for the Public Service – it is alleged that you made yourself guilty of an act of misconduct when you via email

handover on 31 January 2022 following, failed to give honest and impartial advice to your higher authority (Director: Employee Relations Chief Director: People Management) regarding your instruction to Ms L. Abrahams, a duly appointed DoH investigator, to not consult the “alleged perpetrators” in the departmental investigation into Dr Kasilembo’s allegation / complaint of sexual harassment.

Charge 2 – In terms of Annexure A of Resolution 1/2003, read with paragraph 4.4.9 of the code of conduct for the Public Service – it is alleged that you made yourself guilty of an act of misconduct that between the period February 2022 to date, you failed to act with transparency by not disclosing material and relevant information to your higher authority (Director: Employee Relations and Chief Director: People Management) of your receipt of evidence via WhatsApp directly from the complainant (Dr Kasilembo) in an internal departmental investigation into Dr Kasilembo’s sexual harassment / rape complaint(s) and allegation(s).

Charge 3 – In terms of Annexure A of Resolution 1/2003, read with paragraph 15 of the Sexual Harassment Policy of the PGWC, is alleged that you made yourself guilty of an act of misconduct between the period of January 2022 to February 2022, you issued an unprocedural instruction to Lameze Abrahams, a duly appointed DoH investigator, not to consult “the alleged perpetrators” in an internal sexual harassment departmental investigation.

Charge 4 – In terms of Annexure A of Resolution 1/2003, it is alleged that you made yourself guilty of an act of misconduct when you failed to act in good faith towards your employer thereby prejudicing the administration, discipline or efficiency of the department, office or institution of the State.

Charge 5 – In terms of Annexure A of Resolution 1/2003, it is alleged that you made yourself guilty of an act of misconduct when you acted improperly for reasons other than incapacity by not promoting and/or adhering to the provisions of the sexual harassment policy of the PGWC to uphold rights of all involved per the departmental investigation into Dr Kasilembo’s allegations of sexual harassment.

39. The Applicant was found guilty of charges 1,2 4,5 and not guilty of Charge 3. The Applicant was dismissed on 23 January 2023, after her appeal failed.

40. Charge 1: The Applicant was appointed as the Acting Director from 10 January 2022 to 28 January 2022, when Mr Roman went on leave. The Applicant gave Mr Roman an update on his return from leave, on all cases and matters she had dealt with during his absence. This communication was done via email on 31 January 2022. In Charge 1 reference is made to the higher authority as the Director: Employee Relations

and Chief Director: People Management, whereas this title belongs to Ms Arries, and Ms Arries was not the Applicant's direct supervisor. The Applicant reported to Mr Roman as her immediate higher authority.

41. Charge 3: the Applicant was found not guilty of "*issued an unprocedural instruction to Lameze Abrahams*".
42. In terms of charge 1, the Applicant is charged with the following: "you should have "advised" her higher authority on, that being "regarding your instruction to Ms L. Abrahams, a duly appointed Department of Health, investigator, to not consult the "alleged perpetrators" in the departmental investigation into Dr Kasilembo's allegation / complaint of sexual harassment".
43. Ms Abrahams was not appointed as an investigating officer, but she was appointed as a sexual harassment contact officer, this is confirmed by Ms Abrahams letter of appointment, where the following is stated: "*appointed as a sexual harassment officer in terms of the Sexual Harassment Policy...*" The relevance of the difference between an Investigating Officer (IO) and a Sexual Harassment officer or Sexual Harassment contact officer, is that an IO investigates in accordance with the Disciplinary Code, whereas a SHCO finds authority in the Sexual Harassment policy. Considering that the Sexual Harassment Policy is cited in the Appointment letter, it is clearly evident that Ms Abrahams is appointed as a Sexual Harassment Contact Officer and not an Investigating Officer.
44. In terms of paragraph 8.4 of the Respondent's the Sexual Harassment policy, the role of a designated Sexual Harassment Contact Officer (SHCO) the SHCO is the first point of contact after a complaint of sexual harassment has been received from an employee. The SHCO must take statement from the complainant, make an assessment on the person's mental state, and assess whether there is a case to be investigated or determine whether the complainant is making up a story, etc. After this assessment, a SHCO drafts a report to the Director Employee Relations and makes recommendations on whether any further action should be taken.
45. The Sexual Harassment Policy, more particularly paragraph 2.1 thereof makes provision for both a formal and informal process. In case of an informal process, the SHCO speaks to the alleged perpetrators by meeting with them in order to determine whether the complaint can be resolved internally. However, the formal process does not provide for a consultation process with the alleged perpetrators.
46. It is common cause that Dr Kasilembo requested a formal process be conducted. The Respondent failed to prove that there is a rule or in terms of the Sexual Harassment Policy or any other policy that a

consultation must take place with the alleged perpetrator(s) in a formal process of a sexual harassment complaint.

47. It is not necessary to interview (consult) the alleged perpetrator in a sexual harassment complaint, therefore the Applicant is found not guilty of the charges of misconduct levelled against her, as she did not contravene any rule, nor did she tender any unlawful or unreasonable advice to Ms Abrahams not to consult the alleged perpetrators at that point.
48. Charges 3 and 5 relate to the same incident with respect to the "instruction" which the Applicant gave to Ms Abrahams. The Applicant was found not guilty of Charge 3; therefore, the Applicant is not guilty of charges 1 and 5.
49. Charge 2, the WhatsApp messages specifically the messages sent on 17 February 2022, the Applicant testified that she was on leave beginning the 18 February 2022, and at the time of the first message on 17 February 2022 received at 16:03, she had already left the workplace.
50. Dr Kasilembo lodged a grievance in September 2021, and when the Applicant acted in the Director post in January 2022, she became aware of this outstanding matter via an email from National Department of Health. The Applicant realized that it was a case of a sexual harassment complaint, and that a sexual harassment allegation should not be treated as a grievance, but as a sexual harassment complaint instead. Another concern was that the complaint/grievance had been lodged in September of the previous year already, and it was January at that time, meaning the matter has been long outstanding. The Applicant then discussed the way forward and it was agreed that discussion with the Deputy Director: Grievances, Ms Zoliswa, Ms Xolelwa (who investigated the grievance), herself, and the complainant, Dr Kasilembo be held.
51. The Applicant received a request from Groote Schuur Hospital the previous week to have Dr Kasilembo suspended. The Applicant had some questions which she directed to the hospital before deciding whether a precautionary suspension of Dr Kasilembo was necessary.
52. On 17 February 2022 with the WhatsApp messages referred to in the charges where when Dr Kasilembo made specific allegations about the rape. The Applicant forwarded all the messages to Ms Abrahams. As the Applicant was no longer involved with the matter as she was not the Acting Director after Mr Roman's return from leave. The Applicant reported these messages to Mr Jason Fry (Investigation Officer

appointed on 07 March 2022 by the Department) in May 2022, when he informed her that he was the Investigation Officer appointed to investigate the sexual harassment complaints of Dr Kasilembo.

53. Charge 2 – the Applicant is charged with not reporting the information to her higher authority, there is however no rule in terms whereof the Applicant is required to report WhatsApp messages to a direct higher authority. The Applicant reported the WhatsApp messages to Ms Abrahams, the SHCO, who did not in turn share those messages with Mr Roman directly or in a report, in her capacity as the SHCO. I find the Applicant not guilty of Charge 2, as she did report the messages to Ms Abrahams and much later to Mr Fry.
54. I find that charge 4, is vague, the Applicant testified that she does not understand the charge, and it was never clarified in the disciplinary hearing either as to how exactly she “failed to act in good faith towards your employer thereby prejudicing the administration, discipline or efficiency of the department, office or institution of the State”. This evidence was not disputed under cross examination.
55. Charges 1, 3 and 5: all of the allegations refer to the same incident, using same or similar date references, same witnesses, and same individual in each charge being referenced but using a rearrangement of wording for the actual alleged misconduct. The Applicant was found not guilty of Charge 3, I find that there was a duplication of charges therefore the Applicant should have been found not guilty on charge 1 and 5, when she was found not guilty on Charge 3. This amounts to an unfair splitting / duplication of charges based on the same incident.
56. The following test applies to determine whether a splitting of charges took place:
- (a) If more than one action took place, were they continuous actions with a single intent? If the answer is yes, a conviction on both or all would amount to a splitting of charges.
 - (b) Do the charges emanate from the same incident? If the answer is yes, then the possibility exists that impermissible splitting of charges is present.
 - (c) Does evidence necessary to prove one charge necessarily involve evidence of the other at the same time? If the answer is yes, the two acts are to be considered one transaction (offense).

- (d) Will the evidence produced to prove the first charge be used again to prove the second or other charges? If the answer is yes, then the splitting of those charges will be impermissible.

57. In the matter of Ntshangase v Speciality Metals CC (1998) 9 (5) SALLR 81 (LC), Mhlambo J held that it is impermissible to split charges. In the matter of R v Sabuyi 1905 T5170 it was held that when a person commits two actions which are each independent crimes, but with a single intent, and both actions are necessary for intent, then it constitutes only one offense. In Specialised Belting & Hose (Pty) Ltd v Sello NO & others (LC case No JR3136/05, judgment 6 February 2009) the Labour Court dismissed the employer's application to review the award. One of the main reasons was that there had been a 'splitting of the charges. The court held that where an employee is charged with several acts of misconduct flowing from a single incident, this may amount to an unfair splitting of charges.

58. A sanction may be handed down on multiple charges, resulting in a more severe sanction than in an instance of a single charge.

59. I find that the Applicant's dismissal was substantively unfair based on my findings in paragraphs 38 to 57 above. There was no evidence substantiating procedural unfairness before me. I therefore find the Applicant's dismissal procedurally fair.

AWARD

60. The Applicant's dismissal was substantively unfair and procedurally fair.
61. The Respondent is ordered to reinstate the Applicant retrospectively without any loss of benefits to her former position and on terms that are no less favourable prior to the dismissal.
62. The Respondent is further ordered to pay the Applicant backpay in the amount of R64 840.00 calculated at R14 964.23 per week x 4.333 x 6 = R389 040.00 less statutory deductions. (Calculated from the date of dismissal on 23 January 2023 until the date of this Award, 19 July 2023).
63. The Respondent must make payment to the Applicant of the amount of R389 040.00 less statutory deductions, before or on the 2nd of August 2023.
64. The Applicant is ordered to report for duty on Tuesday 25 July 2023 at 8:00.



TERESA ERASMUS