



ARBITRATION AWARD

Case No: **PSHS629-24/25**

Commissioner: **John Mashika**

Date of award: **12 September 2025**

In the matter between

PSA obo February, Roger Kurt

Applicant

and

Department of Health – Western Cape

Respondent

Details of the parties and representation

1. The matter was scheduled for an arbitration process on 7 April 2025, 19 July 2025 and 27 August 2025 at the Worcester Provincial Hospital in the Western Cape Province. It was referred in terms of section 191(5) (a) (i) of the Labour Relations Act 66 of 1995 (the LRA) and relates to the alleged unfair dismissal of the applicant.
2. The applicant in this matter is Roger Kurt February. He was represented in these proceedings by Angelo Fisher, an official of the Public Servants Association of South Africa (PSA).
3. The respondent is Department of Health- Western Cape. It was represented by Girchwin Philander, its Assistant Director: Labour Relations.
4. The proceedings were digitally and manually recorded. Written closing arguments were submitted on 3 September 2025 as agreed with the parties.

5. Parties submitted bundles of documents which were marked and referred to as bundle A (94 pages) and R (58 pages)

Issues to be decided

6. I must decide whether the dismissal of the applicant was substantively and procedurally fair in terms of section 188 (1) (a) (i) of the LRA.
7. In the event I find in the applicant's favour, he requested that I order the respondent to retrospectively reinstate him.

Background to the dispute

8. The applicant was employed on 1 June 2007 and dismissed on 2 August 2024. His dismissal was confirmed on appeal on 30 September 2024. He was an Administrative Clerk in the Human Resources Development office (HRD). He earned a monthly salary of R21 287.50 (Twenty-One Thousand Two Hundred and Eighty-Seven Rand Fifty Cents).
9. The respondent is a Provincial Department responsible for health services in the Western Cape Province. The two charges that led to the dismissal of the applicant are:
 - i) on 11 January 2024 he made threatening remarks in the presence of Christo van der Westhuizen and Cornelius Nel that if Unathi Phanziso does not withdraw her complainant of racial discrimination against Kevin McKay he will lodge a complaint of sexual harassment against her;
 - ii) that on 11 January 2024 he made a false impression during a meeting with Christo van der Westhuizen and Cornelius Nel that he was an intern representative whereas he was acting in a trade union representative capacity of Kevin McKay whom allegations of racial discrimination were made.
10. In his opening remarks the applicant conceded to having made the remarks contained in the first charges to van der Westhuizen and Nel. In uttering these words, he was only conveying what McKay told him he will do. In respect to the second charge his case is that he was not in the meeting with Nel and van der

Westhuizen as McKay's representative. He was there to resolve the issue of Phanziso who was an Intern placed at the workshop. This is because part of his duties was to attend to Interns issues.

11. He further contends that his dismissal is procedurally unfair as the first charge imitates harassment, and it not being framed as such prejudiced him. He further stated that no reason was provided by the respondent for the decision it arrived at.

Survey of evidence and argument

Respondent's evidence

12. The respondent led its case through the testimonies of Christo Lombard van der Westhuizen (Maintenance Manager), Cornelius Petrus Nel (Artisan Foreman – Electrical Department), Zandile Kwinana (Deputy Director: Human Resources and Facilities) and Xolisa Xontana (its erstwhile Employee Relations Officer).
13. Van der Westhuizen testified that he knows that the applicant deals with Intern issues. On 11 January 2024 he was approached by the applicant for a meeting. The applicant was with McKay. The applicant sought to understand what had transpired in December 2023 between McKay and other employees where McKay had allegedly made racial remarks.
14. The impression he got was that the applicant was representing McKay even though he had informed him that he was representing the Interns. He came to this conclusion because when workshop employees need assistance they approach the applicant.
15. In this meeting the applicant had informed him that Phanziso had opened a case against McKay; and McKay was intending to also open a case of sexual harassment against her. This he will do if Phanziso does not withdraw her case against McKay. Phanziso was called to the meeting and asked about the December 2023 incident and what she wanted out of it. Phanziso stated that she needed an apology from McKay as it would seem he apologized to everyone but her. McKay was called into the meeting, and he apologized to Phanziso. At the time Phanziso was not in a good state as she was shaking. After the apology he heard that Phanziso had gone to Xontana to withdraw the case against McKay.

16. Nel's evidence was in large parts the same as that of van der Westhuizen in respect of what transpired in their meeting with the applicant, McKay and Phanziso. He however also stated that he felt that the applicant represented both McKay and Phanziso, but more McKay. He further stated that he cannot say in what capacity the applicant was there for. He also acknowledged that Phanziso was not in a good state when narrating the December 2023 incident as she cried.
17. Xontana testified that on 11 January 2024 he received a complainant from Phanziso about racial harassment that McKay had referred to her using the kaffir word. He referred the issue to Kwinana. Later in the day Phanziso came to him looking agitated and stated that she wanted to withdraw the matter. She informed him that the applicant had called her to a meeting and told her that if she does not withdraw her complaint McKay will lodge a sexual harassment case against her. He again took this to Kwinana.
18. In cross examination he conceded that in terms of the applicant's performance agreement, he had to ensure the development of Interns (page 33 of bundle A).
19. Kwinana confirmed that the December 2023 issue came to her attention through Xontana; and while the matter was being investigated, she learned that Phanziso had sought to withdraw the matter. She then reached out to her and received an email where Phanziso told her about the meeting at the workshop (page 7 of bundle R). She also preferred an email to the applicant to get an understanding of what the meeting was all about (pages 8-11 of bundle R).
20. In as far as she is concerned there is no correlation between the applicant's job as Clerk in the HRD department and Interns; except a coordinating role. He had no reason to involve himself with the McKay matter as the issue at hand did not call for a meeting. According to her the words that the applicant had uttered were threatening to the receiver. The respondent is mandated in terms of Occupational, Health and Safety Act to ensure that employees are safe. The conduct of the applicant had the potential to scare employees from lodging complaints.
21. In cross examination she stated that the applicant, when he involved himself with the McKay issue, was interfering, even if he was acting in his capacity as a shop steward. The issue he was involving himself with fell within management delegation and was very serious. Though the threatening words were said to Nel and van der Westhuizen, and these words were not about them, they did not file a complaint.

Applicant's evidence

22. He testified for his case and called Kevin Christiaan McKay (former Electrical Handyman) and Roshen Ahmed-Meyson (Senior Administrative Officer: HRD) as his witnesses.
23. The applicant testified that on 11 January 2024 while in his office he was approached by McKay who told him that his supervisor, Nel had just told him that Phanziso had laid a complaint against him about the December 2023 incident. McKay went further to inform him that if Phanziso continues with her complaint, he will proceed with a sexual harassment case against her. He advised McKay that they should go to van der Westhuizen and Nel as the issue was serious. He was responsible for the Interns, and as such he wanted to have a word with Phanziso.
24. He duly informed both van der Westhuizen and Nel about the issue, and that McKay will lodge a sexual harassment case against Phanziso if she proceeds with her case. Both Nel and van der Westhuizen agreed that the people who were involved in the December 2023 issue be called and spoken to. During this meeting he never created an impression that he was performing shop steward duties. If he was representing McKay, he would not have involved Nel and van der Westhuizen. The reason he did not inform McKay to take up his issue with Nel by himself was because he (McKay) had mentioned Phanziso, whom he is responsible for.
25. In cross examination he stated that he had involved himself on the issue as there was a complaint from an Intern and the HRD did not know about it. He conceded that he did encourage Phanziso to withdraw the complaint if she was satisfied with the apology that she had received from McKay. If he had wanted to threaten Phanziso he would have made the remarks directly to her. Even when called to a meeting Phanziso did not even know of the sexual harassment issue.
26. McKay's evidence is basically the same as that of the applicant on how he narrated the issue to him and what transpired during the meetings. According to him, the applicant did not make the threat, he only narrated what he told him he would do if Phanziso continues with her complaint. He was, however, not present in the meeting when the applicant uttered these words to van der Westhuizen and Nel.
27. One of the four (4) charges that led to his dismissal was about the threatening remarks he made (same charge as charge 1 of the applicant). He pleaded guilty in the internal disciplinary hearing and was dismissed.

28. Ahmed-Meyson testified on the fact that in terms of the applicant's performance plan he was mandated to intervene in Intern issues. Normally, when Interns have issues, they approach HRD. They do not go to the employee relations office. She agreed that HRD cannot interfere in formal investigations.

Analysis of evidence and argument

29. Section 188 (1) (b) of the LRA provides that *"a dismissal that is not automatically unfair, is unfair if the employer fails to prove- that the dismissal was effected in accordance with a fair procedure."*

30. At the start of the proceedings the applicant hinted at the fact that his dismissal was not only substantively unfair but was also procedurally unfair. The grounds provided for this challenge were that the first charge imitates harassment, and it not being framed as such prejudiced him. He also stated that no reason was provided for the decision the respondent arrived at.

31. These points were not sufficiently clarified; but importantly, no evidence was led on them. Even in his closing argument he did not address the issue. The respondent did give a general exposition of what procedural fairness is in its closing argument. However, this does not serve any purpose, and as such I shall not pronounce myself on the point as it is apparent that it was abandoned.

32. To the extent necessary, it is apposite to indicate that the dismissal of the applicant is procedurally fair.

33. Turning to the substantive fairness of the dismissal, item 7 (a) (iii) of schedule 8 to 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 its subsection (b) (iv) provides that if a rule or standard was contravened, whether or not - dismissal was an appropriate sanction for the contravention of the rule or standard."*

34. It is apposite and fair to state that the manner the respondent resolved to deal with the 11 January 2024 incident is concerning. On 11 and 12 January 2024 the employee relations officer and human resources manager became aware of allegations of racial utterances and sexual harassment. Whether these allegations were true or not, it was for the respondent to investigate them and not to prefer to deal with one and leave the other unattended.

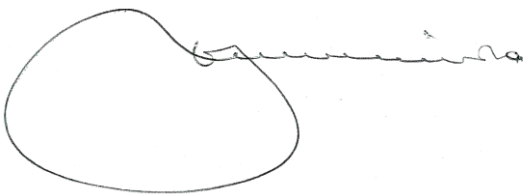
35. The racial issue was dealt with and the sexual harassment one was not and not reason was provided for this. The only deduction I can make is that possibly the respondent formed a view that this allegation was used as leverage by the applicant and McKay to have the racial allegation withdrawn.
36. The approach was wrong. This is so as both these allegations are of a very serious nature. The Constitutional Court in *McGregor v Public Health and Social Development Sectoral Bargaining Council and Others* (CCT 270/20) [2021] ZACC 14 (17 June 2021), referring with approval to paragraph 20 of the *Motsamai v Everite Building Products (Pty) Ltd* [2011] 2 BLLR 144 (LAC) described *sexual harassment as the most heinous misconduct that plagues a workplace*". The same court in *Rustenburg Platinum Mine v SAEWA obo Bester and Others* (2018) 39 ILJ 1503 (CC) stated that *our courts have made it clear, and rightly so, that racism in the workplace cannot be tolerated (paragraph 56)*.
37. It is against this backdrop that I hold a view that both these allegations should have been investigated; and possibly, an answer as to whether Phanziso did commit sexual harassment or not may have given credence to the threat allegations.
38. Be that as it may, the hurdle the respondent had to content with is whether the charges it preferred on the applicant were properly considered. And it would seem the answer to this lies in its closing argument where it referred to the following passage from *EOH Abantu (Pty) Ltd v Commission for Conciliation, Mediation and Arbitration and Others* (2019) 40 ILJ 2477 (LAC):
- "However, by the same token, courts and arbitrators must not adopt too formalistic or technical an approach. It normally will be sufficient if the employee has adequate notice and information to ascertain what act of misconduct he is alleged to have committed. The categorisation by the employer of the alleged misconduct is of less importance.*
39. Much as it is correct not to adopt a *formalistic or technical approach*, it will also be unfair not to fully interrogate what the charge preferred on the employee sought to suggest. The first charge preferred on the applicant is that he made threatening remarks. The remarks it is alleged he made are not denied. The question is, were there words uttered a threat, and if they were, to who was the threat made to, and are they threats that can be attributed to the applicant. Over and above this, were they threats that could have extinguished the allegations of racial utterance made by McKay. And lastly, can these be the kind of threat that should attract a dismissal sanction.

40. The remarks made by the applicant were made to van der Westhuizen and Nel. Phanziso was not present when these remarks were made. The version of McKay that when these remarks were made he was not present in the meeting was not disputed. Van der Westhuizen and Nel provided different versions as to when these remarks were made. Nel stated that the remarks were made after McKay had apologised to Phanziso; and were made to him and van der Westhuizen. On the other hand, van der Westhuizen stated that they were made at the start of their meeting before Phanziso was called.
41. If it is to be accepted that the remarks were made after the apology; it will be incorrect to suggest that the withdrawal by Phanziso was made because of a threat. Phanziso did not testify in these proceedings, and as such there is no evidence before to support the conclusion that she was threatened to withdraw her complaint. However, the evidence provided indicates that she sought to withdraw her complaint after being asked by the applicant to withdraw it because she had accepted the apology.
42. My take is that the applicant was wrong in doing this. It was not his place to suggest this; and this is what I believe the respondent should have taken issue with. Much as I appreciate the fact that any person in the applicant's position would have suggested a withdrawal as the concern Phanziso had with McKay was resolved, the applicant was not an ordinary employee, he was a shop steward who should have known that allegations of racial discrimination should not be resolved by a mere apology.
43. Another concern I have with this charge being preferred on the applicant is that McKay faced a similar charge, and it alongside the other three charges preferred on him led to his dismissal. The implication of this is that in dismissing McKay the respondent accepted that he was the one who made the threat. It further accepted that when the applicant uttered these words, he was conveying what McKay told him he will do. As such the respondent cannot then attribute the threat to the applicant given the context within which they made.
44. The applicant, in his closing argument stated that *from the evidence presented by the Employer's witnesses, inference can be drawn that both the above-mentioned charges were based on the assumption, perception and subjectivity of the Employer's witnesses.*
45. I accept this conclusion as correct. This acceptance stems also from the view I have on the second charge that the applicant created a false impression to van der Westhuizen and Nel that he was representing Phanziso. A lot was said about the role he was playing on the day, that is whether he was McKay's representative or was that of Phanziso. My view is that he was not representing Phanziso but he had involved himself in her issue because his performance contract enjoins him to "*ensure complaint resolution to prevent escalation into grievance procedures*". This standard pertains to Interns.

46. Kwinana sought to suggest that this performance standard does not imply that the applicant should have involved himself with this issue. The applicant's manager Ahmed-Meyson said he had tasked him to. It is the manager's version that I can accept because the performance contract was entered into by her and the applicant. It is only the two of them who can talk about the terms of the contract and its implications.
47. The applicant contended that he was not there to represent McKay as he belonged to another trade union and not the PSA. van der Westhuizen and Nel assumed that he was representing McKay. This assumption, all things considered, was not misplaced. This is so as they are accustomed to the applicant representing employees as a shop steward. On the day he approached them being in the company of McKay. When the meeting was concluded, the concern that McKay had brought to him had been resolved at the 'workshop level'. And this is what McKay wanted. The applicant may not have done this as a shop steward, but he did represent McKay, or at least his interests.
48. Now, having accepted that he was representing McKay, I should accept that when he made the remarks he made, he was within his right to do that because representatives are generally creatures of instructions and are bound to convey instructions received from those they represent. And the respondent should be alive to this fact.
49. On this basis, I am not convinced that he misrepresented facts. He stated the reason of being there, Nel and van der Westhuizen accepted this reason as they knew that he was responsible for Interns; and regularly represented employees. Both could not have been misled. In fact, van der Westhuizen formed a view that the applicant *was suitable to do this as he was a shop steward*.
50. It is therefore my considered view that the dismissal of the applicant was substantively unfair.
51. The applicant requested to be reinstated in the event I find in his favour. This is a primary remedy in terms of section 193 of the LRA. There is nothing to suggest that he cannot have a working relationship with the respondent.
52. To that end I shall order that he be retrospectively reinstated to the position he held before he dismissal and be back paid an amount of R265 273.49 (Two Hundred and Sixty-Five Thousand Two Hundred and Seventy-Three Rand Forty-Nine Cents), that is $R21\,287.50 \times 12 \text{ months} + R9\,823.49$ ($R21\,287.50 / 21.67 \times 10 \text{ days}$). This is the salary he would have earned from 2 August 2024 to 12 September 2025. The necessary increments attended to his earnings are to be factored in.

Award

53. The dismissal of the applicant, Roger Kurt February, by the respondent, the Department of Health: Western Cape, is substantively unfair and procedurally fair.
54. The respondent is ordered to retrospectively reinstate the applicant to the position he held before the dismissal.
55. The applicant must report for duty on 1 October 2025.
56. The respondent is further ordered to backpay the applicant an amount of R265 273.49 (Two Hundred and Sixty-Five Thousand Two Hundred and Seventy-Three Rand Forty-Nine Cents) as computed in paragraph 52 above.
57. The above amount must be paid to him on or before 15 October 2025.

A handwritten signature in black ink, consisting of a large, loopy initial 'J' followed by a series of connected loops and a final flourish.

JOHN MASHIKA
PHSDSBC PANELIST