PHSDSBC

Public Health and Social Development Sectoral Bargaining Council

ARBITRATION AWARD

Case No: **PSHS564-23/24**

Commissioner: **Zuko Macingwane**

Date of award: **6 April 2025**

In the matter between:

PSA OBO DIKELE PETRUS BOKABA Applicant

and

DEPARTMENT OF HEALTH – NORTH WEST Respondent

Details of the parties and representation

1. This matter was set down for arbitration before me on 20 August 2024, 30 October 2024, 1 November 2024, 21 and 22 January 2025 and finalized on 18 March 2025. The arbitration was held at the Respondent's provincial offices in Mafikeng.

2. The Applicant, Mr. Dikele Petrus Bokaba, appeared in person and was represented by Mr. Kabelo Moalosi, the Labour Relations Officer of the Public Servants Association of South Africa (PSA). The Respondent, Department of Health- North West, was represented by Mr. Ramotse Makonehatse, a Deputy Director: Labour Relations.

3. The proceedings were both digitally and manually recorded. Both parties submitted bundles of documents in support of their respective cases. The Applicant's bundles were marked "A", "A2" and "A3" while the Respondent's bundles were marked "R", "R1", "R2" and "R3". The parties agreed to submit closing arguments in writing by 25 March 2025. Both parties submitted their closing arguments on time.

Issues to be decided

4. I am required to determine whether the Applicant was unfairly dismissed or not. The Applicant challenged both the procedure and the substance. He sought a relief of retrospective reinstatement.

Preliminary issues

5. The Applicant raised a preliminary point related to double jeopardy since he felt that he was tried twice for the same charge, in that he was previously dismissed by the Respondent in the year 2021, but was later reinstated through a Labour Court order that was dated 26 March 2021.

6. At the Applicant's request, Mr. Mahlo, the chairperson of the disciplinary hearing earlier ruled on 29 March 2022 that the matter of the Applicant and the issues related to his charges should be dealt with in the form of an Inquiry by Arbitrator. However, Mr. Mahlo later changed his decision on the same date, and ruled that the matter should proceed as a disciplinary hearing without allowing parties to make any submissions and/ or without giving the parties notice of the same.

7. The Respondent opposed the preliminary issues raised by the Respondent.

8. I ruled that the parties should deal with the matter through the testimony and oral evidence should be led since both issues border on issues related to the alleged procedural unfairness, and I also considered that the chairperson of the disciplinary hearing is among the witnesses who testified. I have pronounced on this issue in the analysis of evidence and arguments in this arbitration award.

Background to the issue

9. The Respondent is a public health institution. The Applicant commenced working for the Respondent on 22 June 1992. He was dismissed on 30 August 2023, following a disciplinary hearing/ inquiry. At the time of the dismissal, he held a position of Deputy Director: Labour Relations, earning a gross remuneration of R987 189.00 (Nine Hundred and Eighty-Seven Thousand One Hundred and Eighty-Nine Rands) per annum (R82 265.75 per month).

10. There were 5 charges levelled against the Applicant. However, he was found guilty of charge of four charges, which are charges 2, 3, 4 and 5.

11. He was found guilty of the following charges: Charge: 2- Failure to investigate the grievance submitted and lodged by the then Director: Information Management, one Dr LD Metsileng: During 25 March to 15 May 2019, you unilaterally and without appropriate authorization and the approval of the accounting officer, intentionally and wilfully terminated the grievance investigation and/ or process relating to the grievance lodged by the then Director: Information Management, one Dr LD Metsileng.

12. Charge 3: Gross dishonesty: On or about the 15th May 2019 you intentionally and/ or wilfully acted in a dishonest manner by giving an impression to the then Director: Information Management, one Dr LD Metsileng that the NWDOH was not willing to make documents available to enable you to investigate the grievance lodged.

13. Charge 4: Failure to exercise your fiduciary duty: On or about 15 May 2019 you intentionally and/ or wilfully failed to exercise your fiduciary duty when you advised the then Director: Information Management, one Dr LD Metsileng may approach the PHSDSBC against the NWDOH which resulted to a huge cost of R231 937.62 incurred by the Department in favour of Dr. Metsileng.

14. Charge 5: Gross insubordination or alternatively refusal or failure to carry out a lawful, valid and reasonable instruction: On or about the 13 January 2021 and 22 January 2021 you defied to obey and comply with a lawful, valid and reasonable instruction of the Director Labour Relations of deployment to provide, oversee, monitor and guide all labour relations in RSM District for the NW Department of Health.

15. He felt aggrieved because of the developments surrounding the outcome of the said disciplinary hearing and the appeal thereof. Thus, the dispute was referred for conciliation on 29 September 2023. The Applicant sought the relief of being reinstated retrospectively. The matter was scheduled for conciliation on 26 October 2023. It remained unresolved, and the Applicant applied for arbitration on 14 November 2023. The first date of arbitration was scheduled for 5 December 2023 before Commissioner Allan Kyne. The Applicant withdrew his case on 28 November 2023. He subsequently applied for the reinstitution of the proceedings. I issued a ruling on 14 June 2024, granting the said application.

Summary of the evidence and argument

16. It is not my intention to traverse the voluminous evidence led in all its detail, save those aspects which are relevant to the issues in dispute, and which shall assist in making a final determination in the matter. For a full record of all evidence, the parties should refer to the digital recordings of the arbitration hearing, which are available from the Council.

17. There are 5 witnesses in total who testified in the arbitration proceedings. All witnesses testified under oath. The Respondent called 4 witnesses to testify, while the Applicant was the sole person to testify in support of his case. The witnesses of the Respondent were Pogiso Monchusi, its Director: Labour Relations, Radipali Samuel Lenong, its Director: Human Resources Planning, Organizational Development and Human Resources Systems, Walter Kepadisa its Assistant Director: Human Resources Management and Matlane Jeremiah Mahlo, a Family Advocate at the Department of Justice and Constitutional Development in Limpopo, who was the chairperson of the disciplinary hearing.

Respondent's evidence

18. The Respondent's evidence is that the dismissal of the Applicant is both procedurally and substantively fair because there was a fair reason for the Applicant's dismissal and a fair procedure was followed. The Applicant committed the misconduct in question.

19. The point in limine raised by the Applicant's representative about Mr. Mahlo, the chairperson of the disciplinary hearing's lack of jurisdiction to preside over his disciplinary hearing due to being in the same grade as the initiator was addressed, dealt with and resolved during the disciplinary hearing. Mr. Mahlo explained that initially when he was appointed as a family advocate, he was a Deputy Director at level 11. Later on, the DPSA introduced the OSD, and they were then moved to a different level, and subsequently, the notch and the grades changed.

20. As Family Advocate, they received a huge increment. They were no longer categorized based on levels 1-11, but now on grades LP7 and LP8. By the time he chaired the disciplinary hearing of the Applicant, he was at LP8: Grade 2. He produced a salary advice to that effect and his notch was at around R1.2 million rands per annum. He was at a higher level in both the grade and salary compared to the initiator, who was also a Deputy Director and the initiator's notch was at R896 000.00 per annum. He qualified to preside over the disciplinary hearing of the Applicant.

21. Mr. Mahlo confirmed that during the disciplinary hearing, the Applicant raised a point that his matter be dealt as an Inquiry by Arbitrator, as opposed to a disciplinary hearing. The Respondent disputed the said preliminary point and insisted that it be held as a disciplinary hearing. On 29 March 2022, Mr. Mahlo initially ruled that the matter of the Applicant be dealt with as an Inquiry by Arbitrator, but he later issued another ruling, stating that it should continue to be heldwith as a disciplinary hearing.

22. He issued the second ruling upon realizing that he had made an error because the provisions of Section 188A of the Labour Relations Act (the LRA) provided that an Inquiry by Arbitrator should only be held by consent of the parties. He did not have power to rule that the matter be held as an Inquiry by Arbitrator in absence of the consent by both parties, hence he changed his earlier ruling. The second ruling invalidated the first ruling because he lacked the power to instruct the Respondent to hold an Inquiry by Arbitrator.

23. He issued the outcome of the disciplinary hearing, having considered the versions and closing arguments of both parties. He was not biased. The issue of biasness was not raised by the parties during the disciplinary hearing, and there was no application for his recusal. He issued an appropriate sanction. He felt a sanction of dismissal was appropriate because the Applicant was dishonest in his actions.

24. Dr Metsileng lodged a grievance about not being shortlisted for a chief director position, since he felt that he should have been given a fair chance since he believed that he met the requirements of the said position. The Applicant was dishonest in advising Dr Metsileng, who was an SMS Level 13 employee, and also the aggrieved employee, that the Respondent refused and was reluctant to issue him with minutes of the interviews and all the documents and information that would have helped him in investigating the grievance of Dr, Metsileng.

25. There was no valid reason for the Applicant to terminate the grievance of Dr. Metsileng and to communicate the outcome of the grievance directly to him, he did not have power to do so because Dr. Metsileng was an SMS member.

26. Given that the aggrieved was an SMS Member, the expected procedure and requirement was for the Applicant to inform his supervisor, Mr. Lenong about the progress of the grievance in a form of a report in a form of a recommendation, the report would then be approved, the HoD and the MEC would also have to approve the recommendation.

27. The Applicant did not properly investigate the grievance referred on 25 March 2019 by Dr. Metsileng. On 27 March 2019, the Administrator gave an instruction that the Applicant be issued with the information required, which was related to the said grievance. On 15 May 2019, the Applicant informed the aggrieved that the Respondent will not continue with his grievance. The power to communicate the outcome of the grievance of an SMS member only vested with the executing authority and/ or the HoD as per chapter 10 of the SMS handbook, not the Applicant.

28. The Applicant was supposed to inform Mr. Lenong, his then supervisor/ manager about the progress of his investigation, before issuing the outcome to the aggrieved SMS member. The administrator had authorized the Applicant access to the said information. He never discussed the challenges he experienced. There was no refusal to issue him with the documents he required, but there were delays in issuing him with the file and the information. There was also no need to subpoena documents because no one refused to issue them to him. If there was frustration and shortcomings in the efforts by the Applicant to secure the said information, he required in order to properly investigate the grievance, he should have opted for the agreement on the extension of the time to investigate the grievance.

29. The Applicant advised Dr. Metsileng to refer his matter to the Council without properly exhausting the internal measures, and such costed the Respondent so much, since it ended up settling the case of Dr. Metsileng at the Council. The Applicant is responsible for such cost because, they would not have been incurred if the Applicant had escalated the issue to the executing authority, instead of aborting the investigation.

30. Mr. Monchusi was fully appraised of the charges levelled against the Applicant, and he testified at the disciplinary hearing of the Applicant. The Applicant did not issue the investigation report to the executing authority. He aborted the investigation. The Applicant knew about the rules in terms of dealing with grievances of the SMS members.

31. As from July 2019, the Applicant reported to Adv Monchusi, but before that, he was reporting to Mr. Lenong. The Applicant was expected to conclude a performance agreement and the workplan with Adv Monchusi. The Applicant's duty entailed managing grievances within 30 to 45 days, and such weighed about 20 % in his performance agreement.

32. The Applicant failed to obey the valid and reasonable instruction after Adv Monchusi had informed him that he has to be responsible for the Dr Ruth Sekgomotsi Mopati (RSM) district and had to oversee the

work performed in that region. Adv Monchusi held a meeting in a form of the discussion with the Applicant, gave him a background about the challenges the Respondent was facing in its districts. He did not recognize Adv Monchusi to be his supervisor.

33. He then communicated the said instruction to the Applicant after Ms. Hunter, the Administrator at the time, Mr. Lenong, the Chief Director: Human Resources had agreed with him that there should be configuration of functions within the department, and the communicated changes in the areas of responsibility of all the Labour Relations Deputy Directors. The said decision was taken as a response to the challenges of the Respondent since it was put under administration.

34. This happened after the Applicant had been informed by Adv Monchusi that he should be effective and efficient for cost focus, and had to be deployed to the RSM district. Such an instruction was also issued in writing. He was issued with dispute files, instructions to investigate matters and grievances as well as arbitrations, but he did none.

35. He responded to Adv Monchusi in a demeaning manner, and he refused to sign the documents related to the said redeployment. He said he will weigh his options, and revert back to him. The Applicant did not revert back to him as promised, instead, he sent letters to the Respondent through his attorneys, rejecting the deployment, saying the deployment is an unfair labour practice.

36. It is not true that the Respondent's act of issuing charge 5 to the Applicant was double jeopardy because the Labour Court only dealt with the issue of procedural unfairness, and did not deal with the merits of the dispute. The Labour Court reinstated the Applicant because it ruled that there was procedural unfairness on the part of the Respondent when it terminated the services of the Applicant without convening a disciplinary hearing.

37. After the Applicant came back from his suspension on 12 August 2020, he did not render any services for the Respondent. He would not be seen, and his whereabouts were unknown. He did not take any instruction issued by Adv Monchusi to him. All other 4 Deputy Directors would go and do work at the other districts, and do the forecast reporting, but the Applicant refused to do any work allocated to him.

Applicant's evidence

38. Mr. Petrus Dikele Bokaba, the Applicant, testified under oath. In his testimony, he was of the view that his dismissal was both procedurally and substantively unfair. He did not commit any misconduct.

39. The Respondent unfairly dismissed him. It should have called him and spoke to him about its concerns regarding the manner at which he handled Dr. Metsileng's grievance and the manner it took or perceived his response to the changes that were being made in his functions, instead of dismissing him.

40. The Applicant disputed the version of the Respondent that suggest that he aborted the investigation of the grievance of Dr. Metsileng. He submitted that after Ms. Hunter, the then Administrator, had instructed that he be issued with the file regarding the minutes of the shortlisting in the position of Chief Director, he followed up and applied all measures to receive the file in order to investigate, but all in vain. The Administrator indicated that Mr. Lenong will provide him with the file, but that did not happen, despite his numerous follow-ups, which were both in writing and in person.

41. He followed up with Mr. Lenong, Mr. Kepadisa and also with Mr. Madoda, the Director at the MEC's office. Mr. Madoda intimated to him that the attitude of Ms. Hunter was that the said grievance was of no consequence, and will not affect them in effecting the appointment of the Chief Director. The Chief Director's position was filled-in and a chief director was appointed while he was still busy sourcing the documents for the investigation of Dr. Metsileng's grievance.

42. Neither Mr. Lenong nor Mr. Kepadisa showed signs of being willing to send the file to him. He was sent from pillar to post without being given the required file. There was lack of cooperation and interest on the part of the Respondent. Mr. Kepadisa only promised to forward the file to him, but he did not do as promised. He demonstrated through the emails he sent to Mr. Kepadisa on 4 and 8 April 2019, and the promise of Mr. Kepadisa. He did everything to his ability to deal with the grievance, but documents were not coming forth. On 6 May 2019, he sent an email to Ms. Hunter, demonstrating his frustration of not receiving the file, but she did not reply to his email. He could not investigate the matter without the required documents.

43. It is then that he communicated with Dr. Metsileng in writing, and also advised him to refer the matter to the Council, should he wish to pursue the matter further. His understanding was that the Respondent would have an opportunity to defend the matter at the Council. There is nothing untoward in his action

of informing the aggrieved employee of the recourse. He did not see the reason why the Respondent opted to reach a monetary settlement with Dr. Metsileng at arbitration, instead of proceeding with the arbitration and disclose the reasons for the non-shortlisting of Dr. Metsileng. The Applicant also submitted that he does not know why he has to take the blame because he was not involved in the decision to settle the case of Dr Metsileng at arbitration. He was not even part of the arbitration.

44. He conceded that if the grievance is not resolved, it should be sent to the executing authority. He conceded that he was informed that the chairperson of the short-listing panel was Kgosi Mothlabane, a Deputy Director General. He could not rely on the short-listing panel without the shortlisting minutes, credentials of the shortlisted employees and the whole application of Dr. Metsileng.

45. As regards to charge 5, he did not refuse the instruction of Adv Monchusi. He never had discussions with Adv Monchusi regarding the substance of the letter he gave him, which was about the contemplated changes in his work functions. He informed Adv Monchusi that he will take the letter and revert back to him. He did not see the need to sign that letter. He could not accept that instruction because it was a demotion and he was not happy about it, since it meant that the Respondent was removing some of his functions. Adv Monchusi ended up taking over his functions.

46. Adv Monchusi had no authority to delegate duties as he deemed fit, but things were supposed to be done based on the performance contract, and there should have been consultation. He refused a demotion, not an instruction. The communication and functions he was made to execute were not in the structure of the department. He would report for work, but the Adv Monchusi did no allocate work for him.

47. Charge 5 is about double jeopardy because the Labour Court had earlier pronounced on the very same matter, that his dismissal was unlawful based on the procedure that was not followed by the Respondent. He felt that the Respondent punished him twice for the same offence. He conceded that substantive issues were not raised by the Labour Court.

48. Mr. Mahlo had no authority to change the ruling that he had earlier issued regarding allowing the matter to be dealt with through an Inquiry by Arbitrator. He conceded that it is not the employee that has to apply for an Inquiry by Arbitrator. He confirmed that the Respondent opposed his request for the Inquiry by Arbitrator. He conceded that without consent of both parties, there can be no Inquiry by Arbitrator.

49. The chairperson and the initiator were at the same level, and therefore, the initiator was not supposed to have presided over his disciplinary hearing. The chairperson did not qualify to preside over his disciplinary hearing, since he was not properly appointed because both the chairperson and the initiator were deputy directors. He sought a relief of retrospective reinstatement.

Analysis of the evidence and arguments

50. Section 192(2) of the Labour Relations Act 66 of 1995 (the LRA) places the onus on the Applicant to establish the existence of dismissal. Once that has been established, the onus shifts to the employer party to prove, on a balance of probabilities, that the dismissal was for a fair reason and that a fair procedure was followed, with due regard to the Code of Good Practice: Dismissals as contained in Schedule 8 to the LRA (the Code).

51. Section 138(6) of the LRA places an obligation on Commissioners and Panellists to take into account any Code of Good Practice (Code) that has been issued by NEDLAC and the guidelines published by the CCMA that are relevant to a matter being considered in the arbitration proceedings. I have considered the Code and the CCMA guidelines.

52. I pause to mention that whereas the arbitration is a hearing de novo and that all the evidence has to be led, and has been led afresh, what transpired at the disciplinary hearing has been considered.

53. The heads of argument are now a product of record. It will not serve any purpose to repeat what is contained in them. However, I have considered them, and the evidence led.

54. I must state that the jurisdiction conferred to me in this matter is to determine the fairness of the dismissal of the Applicant, not a review of the charges levelled against the Applicant. I will only pronounce on issues which I have the requisite jurisdiction to pronounce on.

55. It is common cause that the Applicant was notified of the charges in writing. He was aware of his rights, including the right to have a representative. He had sufficient time to prepare for the charges and he was aware of all the charges. Initially, there were five charges levelled against the Applicant, however, the Applicant answered to four charges. He pleaded not guilty to the charges at the disciplinary hearing. He was found guilty on four charges.

56. The Applicant admitted to having sent correspondence to Dr. Metsileng, advising him about the termination of the investigation of his grievance and about the recourse to refer it to the Council. It is common cause that the Respondent settled the unfair labour practice case related to promotion that was referred by Dr. Metsileng to the Council. It is also common cause that the Applicant was reporting to Mr. Lenong during the time of the termination of the investigation of Dr. Metsileng's grievance. The offence in charge 5 is the same as the one which was the subject of the Labour Court proceedings, which set aside the earlier dismissal of the Applicant. Charge 5 was amended during the disciplinary hearing of the Applicant, and it included 22 January 2022.

57. At the disciplinary hearing, the Applicant raised a preliminary point regarding the chairperson's power to preside over his disciplinary hearing, and about the grade of the chairperson compared to the initiator. It is also common cause that during the alleged misconduct in charge 2, Mr. Monchusi was not yet an employee of the Respondent.

58. What is in dispute is whether the Applicant's dismissal was procedurally and substantively fair or not. Other disputed issues are as follows: Was the chairperson fair at the disciplinary proceedings when he presided over the disciplinary hearing of the Applicant since, as per the Applicant, he was a Deputy Director, while the initiator was also a Deputy Director. Was the chairperson at the same grade as the initiator, or at a higher grade compared to the initiator?

59. Was the chairperson unfair when he initially ruled that the matter should be held as an Inquiry by Arbitrator, and later changed his earlier ruling, stating that the matter should continue as a disciplinary hearing? Should the earlier ruling prevail or not? Was there double jeopardy in charge 5 or not, and whether the Applicant was tried twice for the same offence? Was there splitting of charges 2, 3 and 4 or not, and whether the issue about the splitting of the charges was raised at the disciplinary hearing of the Applicant or not?

60. Did the Applicant break a rule or standard regulating the workplace or not, did he commit any wrongdoing related to the charges or not? Did the Applicant have power to terminate a grievance of an SMS member or such had to be done by the executing authority? Was the Applicant wrong when he advised Dr. Metsileng about the outcome of the grievance, or Dr Metsileng was supposed to be informed by the executive authority (MEC) or the Head of Department (HoD). Is the evidence of Adv Monchusi, hearsay evidence since he testified on issues regarding the grievance of Dr. Metsileng and happenings which

occurred while he was not yet working for the Respondent? Was the sanction reasonable, fair and appropriate?

61. *Clause 7.3 (b) of the PSCBC Resolution 1 of 2003, titled "the Disciplinary Code", provides that the chairperson of a disciplinary hearing must be appointed by the employer and be an employee on a higher grade than the representative of the employer.*

62. Mr. Mahlo testified that initially when he was appointed as a family advocate, he was a Deputy Director at level 11. Later on, the DPSA introduced the OSD, and they were then moved to a different level, and subsequently, the notch and the grades changed.

63. As Family Advocates, they received a huge increment. They were no longer categorized based on levels 1 up to 11, but now on grades LP7 and LP8. By the time he chaired the disciplinary hearing of the Applicant, he was at LP8: Grade 2. He produced a salary advice to that effect, and his notch was at around R1.2 million rands per annum. He was at a higher level in both the grade and salary compared to the initiator, who was also a Deputy Director. The initiator's notch was at R896 000.00 per annum. He qualified to preside over the disciplinary hearing of the Applicant.

64. The Applicant only made averments, but did not substantiate more to counter the version of Mr. Mahlo in this regard. The Applicant did not demonstrate any prejudice suffered. It is therefore, my considered view that the version of the Respondent sounded more probable on a balance of probabilities in this regard, that Mr. Mahlo was on a higher grade than the initiator.

65. I could not find fault in the act of the chairperson having changed his earlier ruling about directing that the Respondent schedule an Inquiry by Arbitrator, and later changing the ruling and allowing the process to continue as a disciplinary hearing.

66. I am mindful of the functus officio argument of the Applicant in this regard and the authority referred to. I beg to differ with the Applicant in this regard.

67. Section 138 (1) of the LRA provides that the commissioner may conduct the arbitration in a manner that the commissioner considered appropriate in order to determine the dispute fairly and quickly, but must deal with the substantial merits of the dispute with the minimum of legal formalities.

68. Section 188A of the LRA talks of the requirement of the consent being reached for the matter to be scheduled as an Inquiry by Arbitrator. Therefore, absence of consent meant that the matter could not be scheduled as an Inquiry by Arbitrator. By extension, the chairperson of the disciplinary hearing had no power to order the Respondent to schedule the Inquiry by Arbitrator in absence of consent. The performance of the same was literally impossible.

69. It is my considered view that there was no double jeopardy in relation to charge 5 and the Labour Court pronouncement. The Applicant was never acquitted by the Labour Court in issues related to the substantive fairness of the dismissal. The Labour Court took issue with the fact that the Applicant was dismissed for allegations of insubordination without a disciplinary hearing being convened. The Labour Court only dealt with the procedural issues and the unlawfulness of the dismissal, and not unfairness of the dismissal. In this arbitration, the matter referred related to the fairness of the dismissal.

70. The evidence led suggests that the argument about the splitting of charges 2, 3 and 4 was never raised during the disciplinary hearing of the Applicant, and no evidence was led about it even during the cross-examination of the chairperson of the disciplinary hearing. It is my considered view that the averments have not been tested in this regard, and given that this issue was not raised during the disciplinary hearing of the Applicant, the horse has bolted.

71. It is therefore, my considered view that the Applicant's dismissal was procedurally fair.

72. I now turn to the substantive issues.

73. The technique for resolving factual disputes was laid out by the Supreme Court of Appeal in *Stellenbosch Farmer's Winery Group Ltd and Another v Martell & Cie SA and Others 2003 (1) SA 11 (SCA) at para 5* that the approach of the SCA is a comparison of inherent probabilities. It requires me to assess the (i) credibility of both witnesses, (ii) their reliability and (iii) the probabilities of their versions

74. I must discern which of the versions is more probable.

75. Regarding charge 2, the Respondent's contention is that there was no valid reason for the Applicant to terminate the grievance of Dr. Metsileng. He did not have power to do so because Dr. Metsileng was an SMS member, and such power was only vested with the executing authority and/ or the HoD as per chapter 10 of the SMS handbook. On the other hand, the Applicant insisted that he had discretion to

advise Dr. Metsileng about the outcome of the investigation and the recourse thereof. However, during cross-examination, the Applicant made certain concession during cross-examination regarding the executing authority having to be informed if the grievance is not finalized.

76. Having considered that Adv. Monchusi was fully appraised of the charges levelled against the Applicant, and he testified at the disciplinary hearing of the Applicant, and the issues he testified on at arbitration regarding charge 2 were the ones where Mr. Lenong, whom the probative value of the evidence of Advocate Monchusi depended on also testified at arbitration. Under those circumstances, the exception to the rules of evidence in relation to hearsay evidence were triggered. It follows that there was corroboration in the evidence of the Respondent in this regard.

77. It is also my considered view that the coherent and corroborated version of the Respondent's witnesses, Mr Lenong and Adv Monchusi regarding the obligation of the Applicant to have communicated the outcome of the investigation of the grievance to the executing authority, and the executing authority being the one that has power to issue the outcome of the grievance to SMS members suggest on a balance of probabilities that the Applicant committed the offence as alleged, and was guilty of the misconduct. It follows that the allegations against the Applicant in this regard were founded and substantiated.

78. I am therefore, convinced that the Applicant ought to have escalated the issues related to the grievance of Dr. Metsileng to the executing authority, and or should have considered an extension. However, such transgression does not justify a dismissal. It is not one of the charges which are within the category of gross misconduct.

In relation to charge 3, it is glaring in this arbitration award in the survey of evidence that the Applicant made attempts to secure the documents he required for conducting the investigation, but they did not come forth, despite the instruction for release by Ms. Hunter and promises made by Mr. Lenong and Mr. Kepadisa. The Applicant made follow-ups, but all in vain. He demonstrated his level of being frustrated by a delay in providing him with the said information. Such was also raised with Ms. Hunter, who did not respond to the Applicant's email. Mr. Lenong, a witness of the Respondent confirmed on record that Mr. Kepadisa failed the Applicant. One should not blame the Applicant, while he made efforts to secure the said information.

79. As regards to charge 4, the Applicant could not be faulted because he was neither involved in the shortlisting nor involved in the settlement agreement of the promotion dispute referred by Dr. Metsileng and drafting thereof. The Respondent exercised its discretion when it decided to settle the unfair labour practice dispute referred by Dr. Metsileng to the Council. The Applicant cannot be held responsible for the agreement that he was not part of. It is my considered view that the Applicant did not commit the alleged offence in this regard.

80. Mr. Monchusi's evidence is that he assumed the role of Director: Labour Relations on a one year fixed-term contract in July 2019, and at the time the Respondent was under administration with effect from May 2018. His fixed term contract was extended for another year. He was employed on a full-time basis as from January 2022. At the time of his employment, the Applicant was on a precautionary suspension. When the Applicant assumed his duties in August 2020, he was supposed to report to him, including the 4 other Deputy Directors.

81. He communicated the said instruction to the Applicant after Ms. Hunter, the Administrator at the time, Mr. Lenong, the Chief Director: Human Resources had agreed with him that there should be configuration of functions within the department, and he communicated changes in the areas of responsibility of all the Deputy Directors in the component of labour relations. The said decision was taken as a response to the challenges of the Respondent since it was put under administration.

82. This happened after the Applicant had been informed by Adv Monchusi that he should be effective and efficient for cost focus, and had to be deployed to the RSM district. Such an instruction was also issued in writing. He was issued with dispute files, instructions to investigate matters and grievances as well as arbitrations, but he did none.

83. He responded to Adv Monchusi in a demeaning manner, and he refused to sign the documents related to the said redeployment. He said he will weigh his options, and revert back to him. The Applicant did not revert back to him as promised, instead, he sent letters to the Respondent through his attorneys, rejecting the deployment, saying the deployment is an unfair labour practice.

84. On the other hand, it is the Applicant's version that he did not refuse the instruction of Adv Monchusi. He never had discussions with Adv Monchusi regarding the substance of the letter he gave him, which was about the contemplated changes in his work functions. He informed Adv Monchusi that he will take the letter and revert back to him. He did not see the need to sign that letter. He could not accept that

instruction because it was a demotion and he was not happy about it, since it meant that the Respondent was removing some of his functions. Adv Monchusi ended up taking over his functions.

85. Adv Monchusi had no authority to delegate duties as he deemed fit, but things were supposed to be done based on the performance contract, and there should have been consultation. He refused a demotion, not an instruction. The communication and functions he was made to execute were not in the structure of the department. He would report for work, but Adv Monchusi did no allocate work for him.

86. It is my considered view that it was within the Applicant's rights to consult with his lawyers and challenge the deployment if he was of the view that it was unfair. There was nothing untoward when the Applicant corresponded with the Respondent through his attorneys regarding the complaints and reservations he had about the changes in his work functions. I found no breach of the rule by the Applicant in this regard.

87. Charge 2 is not expressed as being of a gross nature. The Respondent neither presented evidence nor referred to its disciplinary code, code of conduct nor policy to demonstrate if the offence committed by the Applicant in that charge attracted a sanction of dismissal or not.

88. I have considered that there was no valid warning in place in the record of the Applicant at the time of dismissal. The evidence led seems to suggest a long unblemished service on the part of the Applicant. There was neither evidence by the Respondent about broken trust on the Applicant and evidence of not being reasonably practicable for the Applicant to be reinstated, nor evidence led regarding intolerability.

89. There was no evidence led for not having considered a disciplinary action short of dismissal. I am satisfied that in such absence of a reasonable and acceptable explanation by the Respondent of what informed its decision to dismiss, I am not convinced that the dismissal was a fair and competent sanction.

90. The evidence of the Applicant was not all about denying wrong doing, he made concessions in certain situations. Such, in my view does not by any stretch of imagination take away the part of the blame from the Applicant, but means that dismissal was harsh as a sanction and that trust can be restored.

91. Considering the length of service of the Applicant of approximately 31 years and his unblemished record at the time of dismissal, which suggests that there is no propensity to commit a misconduct, as well as

no evidence of being a serial transgressor, there is also no evidence led suggesting that his infraction was persistent, therefore, I am of the view that the sanction of dismissal was harsh.

92. I am of the view that in the circumstances, the trust is still intact. In my view, a penalty of dismissal under these circumstances does not fall within a reasonable band of penalties which are fair in the circumstances and is not an operational response from a risk management perspective. In presence of corrective and progressive disciplinary measures, which ensure that an employee can be reintegrated into the organization in the circumstances if the employment relationship can be restored to what it was prior to the misconduct in question.

93. A disciplinary measure should as sanction be a response to the contravention of the rule, and not be a matter of expressing moral outrage at all. I am satisfied after considering the evidence presented at arbitration and arguments that on a balance of probabilities, the reasons submitted by the Respondent for justifying the fairness of the dismissal are not persuasive and there is no plausible justification for the dismissal as a sanction.

94. I therefore, find that the dismissal of the Applicant procedurally fair and substantively unfair.

Remedy

95. Section 193 of the LRA provides that if an arbitrator appointed in terms of this Act finds that a dismissal is unfair, the arbitrator may order the employer to reinstate the employee from any date not earlier than the date of dismissal; order the employer to re-employ the employee, either in the work in which the employee was employed before the dismissal or in other reasonably suitable work on any terms and from any date not earlier than the date of dismissal; or order the employer to pay compensation to the employee.

96. The Applicant made it clear that he seeks retrospective reinstatement. However, considering that the Applicant is to blame in the delay in finalization of this matter since he withdrew his case on 28 November 2023 and later made an application for reinstituting the proceedings, the Respondent will not be liable for that period.

97. The reinstatement is therefore with the retrospective effect, but with limited back pay, given the period between the withdrawal of the dispute and reinstitution of the proceedings. The Respondent should not

be liable for the period from 28 November 2023, the date when the Applicant withdrew his dispute, up until 14 June 2024, the date when I issued a ruling reinstituting the proceedings. As result of back pay, the Applicant should be paid 12 months' salary calculated as follows: R82 265.75 x 12 = R987 189.00

Award

98. The dismissal of the Applicant, Mr. Dikele Petrus Bokaba is procedurally fair but substantively unfair.

99. The Respondent, Department of Health- North West, is ordered to re-instate the Applicant, Mr. Dikele Petrus Bokaba in his employ on terms and conditions no less favourable to him than those that governed the employment relationship immediately prior to his dismissal.

100. Mr. Dikele Petrus Bokaba is to tender his services to the Respondent on 14 April 2025.

101. As a result of back pay, the Respondent is ordered to pay the Applicant R987 189.00 (Nine Hundred and Eighty-Seven Thousand One Hundred and Eighty-Nine Rands), less statutory deductions, by no later than 15 May 2025, after which interest will accrue.

Zuko Macingwane