IN THE INDUSTRIAL COURT OF ESWATINI

HELD AT MBABANE CASE NO: 10/2023

In the matter between:

LEMOHANG MTSHALI Applicant

And

MATSAPHA TOWN COUNCIL 1st Respondent

SIFISO P. DLAMINI NO. 2nd Respondent

Neutral citation: Lemohang Mtshali and 3 others v Matsapha Town Council and Another 10/2023 [2023] SZIC 72 (09 August 2023)

Coram: **L.L. HLOPHE–JUDGE**
(Sitting with Mr. M.P. Dlamini and Mr. E.L.B. Dlamini – Nominated Members of the Court)

LAST HEARD: 27 April, 2023

DATE DELIVERED: 09th August 2023

Summary: ***Labour Law- Review –error of law – employer breached Standing Orders/Code in cross appealing employee sanction imposed by disciplinary hearing Chairperson-employee not advised of possibility of the sanction being increased on appeal- audi alteram partem not observed.***

Held: The respondent as the employer did not have a right to appeal ordinarily, unless the disciplinary code between the parties provide for such right-even then the accused employee should be warned or advised if the disciplinary chairman contemplates imposing a harsher penalty. This would enable the employee to make an election whether to withdraw its appeal or to retain it.

JUDGEMENT

INTRODUCTION

[1] The Applicant brought these proceedings under a certificate of urgency seeking the following orders:-

1. **Dispensing with the normal provisions of the rules of this Court relating to form, service and time limits and hearing this matter as an urgent one.**

[2] That a *rule nisi* be hereby issued calling upon the Respondents to show cause on a date to be fixed by the above Honourable Court why an Order in the following terms should not be made final:

2.1 Reviewing and setting aside the findings and recommendations made by the 2nd Respondent in his judgement of the Applicant's disciplinary hearing.

2.2 Declaring that the termination of the Applicant's contract of employment is invalid and unlawful.

2.3 Directing that the letter of termination of the Applicant's contract of employment dated 5th January 2023 be hereby set aside.

2.4 Directing the 1st Respondent to allow the Applicant back to work in her position.

2.5 In the alternative, directing the 1st respondent to pay the Applicant's salary and all her employment benefits for the balance of her contract of employment which comes to an end on the 31st January 2024.

2.6 Directing the 1st Respondent to prepare and file a record of the disciplinary hearing that was chaired by the 2nd Respondent.

2.7 Directing the Respondent to pay the costs of this application.

[3] The Application is supported by the founding affidavit of the Applicant, Lemohang Mtshali, who describes herself as a widow. She further reveals that she was employed by the Respondent on a fixed term contract before she had her services terminated by the 1st Respondent following a recommendation of the chairman of the appeal hearing, the 2nd Respondent. The Second Respondent made the recommendation referred to above. This was in the course of his chairing an appeal hearing the Applicant had brought against a decision of a disciplinary hearing, which had recommended a final written warning as a sanction against her. Applicant was then prompted to note an appeal as a result. Her noting the appeal triggered the 1st Respondent, who had already accepted the decision of the Chairman of the disciplinary hearing recommending against her a final written warning, to purport to cross appeal against the decision of the Chairman of the disciplinary hearing.

[4] It is also not in dispute that the disciplinary Code of the first respondent on its face only envisages an appeal being made by an employee (a person in the

position of the Applicant herein) and it is completely silent on an appeal or cross- appeal by the employer, (an entity in the position of the first respondent herein . As regards, an appeal of a disciplinary code states that same shall be lodged by the employee. It then sets the time lines when the appeal would have to be noted by the employee or former employee,it however says nothing about the filing of an appeal or a cross appeal by a person or entity in the position of the employer. It also says a lot about the time lines for the filing of whatever document by the employee against an employer at the undertaking concerned, in furtherance of the appeal it is completely silent about the same exercise being carried out at the instance of the employer. The person in a similar position as the respondent herein.

[5] Narrating the case for the reliefs sought, the applicant informed this court that it so happened that around February 2021, she contracted covid-19 which necessitated that she isolates and stay away from work for a certain number of days in line with the policies of the state and the employer to ensure the control of the spread of the disease It was during the period of her being away from work that her mother passed on and was to be buried in Lesotho owing to her position at her home or within the family, she was the one to ensure she got a decent funeral or a proper sendoff.

[6] Although she had reported the said news to her superiors via email, and had also applied for a compassionate leave, she had taken for granted and proceeded to absent herself without first having been granted the said leave officially.

[7] She was on her way to Lesotho for her mother's burial when she was called by her immediate supervisor to report to work. She said she explained the position telephonically, that she was already on her way to Lesotho to bury her mother. She said that an understanding had been struck in terms of which she was to proceed and have the matter addressed when she came back. We hasten to clarify that this area of her evidence is not common ground. The respondent's version is that she refused to return and proceeded with her journey without approval such that a misconduct was committed, for which she had to face a disciplinary hearing on her return.

[8] The Applicant contends further that when she came back, she was charged with three offences which included insubordination, gross negligence and desertion. These charges were contained in a letter dated 17th September 2021. During the hearing, the Applicant contends that certain irregularities occurred, which prompted her to challenge the proceedings under Industrial Court case number 10/2022.The challenge was successful as the disciplinary proceedings were set aside and the court ordered that the disciplinary process be commenced *de novo* before a new Chairperson.

[9] On the 7th March 2022, the Applicant was served with new charges which were in reaction to the court order referred to. This disciplinary process comprised a team of independent persons and legal practitioners. Sikhumbuzo Simelane was appointed as the Chairman. Mr H.N Mdladla was appointed as the initiator. The Chairman and the initiator were apparently appointed by the 1st Respondent as the employer of the Applicant. Mr L. Simelane on the other hand represented the Applicant. When the disciplinary process commenced in March 2022, the Applicant pleaded not guilty.

[10] The Charges were contained in a letter dated the 7th March 2022.They were specifically set out as follows in summary:-

10.1 It was alleged that on the 18th August 2021, the applicant had ignored an instruction by her employer, by failing to return to work despite her having been telephoned by her immediate supervisor to return to work.

10.2 It was further alleged that the applicant had repeatedly refused to submit her current financial year's PMS contract despite being followed up and called upon to submit the same.

10.3 Gross Negligence

In that;-

10.3.1 The Applicant allegedly failed to implement the project known as hazardous waste transfer station despite that funds allocation for same was confirmed by EEA around the 19th July 2022.

10.3.2 The Applicant had allegedly not implemented the Matsapha nursery development project notwithstanding the fact that correspondence towards implementation of the project was communicated by the 11th June 2021.

10.4 Desertion

10.4.1 The Applicant had allegedly deserted her work between the 10th August 2021 and 24th August 2021, by failing to report for work, thereby absenting herself without authority from her supervisor.

[11] The Chairman of the disciplinary hearing acquitted the applicant of the two offences under the heading of insubordination and that under desertion. He also could not find her guilty on both offences under the sub-headings of gross negligence but he instead found her guilty of the lessor offence of negligence (referred to as ordinary negligence) on both such offences.

[12] The Appellant was dissatisfied with the decision of the Chairman a *quo*. This was on her being found guilty of ordinary negligence and also as regards the sanction of final written warning as it was allegedly contrary to what the disciplinary Code provided it is a sanction for a just offender in the case ordinary negligence, which is in reality that of negligence. The parties were in agreement the sanction to be imposed against a just offender found guilty of negligence was a written warning.

[13] The common cause position is that after the sanction had been handed down the employer (the 1st Respondent herein), wrote to the Applicant and confirmed that she had accepted the decision and recommendation of the Chairman a quo. In fact the respondent implemented the recommendation as can be seen in its advising the applicant that she had been found guilty of the lessor form of negligence instead of gross negligence and she was being sanctioned by means of a final written warning.

[14] The Applicant noted an appeal after this decision of the Chairman a quo had been communicated to her on the grounds set out above, particularly that the Chairman had ignored the provisions of the disciplinary code and imposed a severe sanction than that the code provided for.

[15] It was upon receiving the letter recording and notifying the first respondent of the Applicants' appeal that the former advised the latter by means of a letter, and through the former's attorney who had acted as an initiator, that the first respondent was filing a cross appeal.

[16] When the appeal hearing commenced, an outside and independent chairman in the second respondent was appointed. The initiator representing the employer and the outside attorney representing the employee, remained as they were during the hearing a quo.

[17] After hearing the appeal and cross appeal, the second respondent, as the Chairman of the appeal disciplinary hearing, dismissed the appeal and went on to uphold the cross appeal. He then concluded that it was inappropriate for the Chairman *a quo* to find the accused employee guilty of ordinary negligence instead of gross negligence. He then reinstated the charge of gross negligence for which he found the applicant guilty of same, whereas it is common cause that in terms of the disciplinary code, the sanction for gross negligence in the case of a first offender is a final written warning. The Second Respondent decided to ignore that provision and instead recommended a dismissal, arguing there were exceptional circumstances which in his view justified a dismissal.

[18] It was in line with this conclusion that the applicant instituted these proceedings, seeking *inter alia* an order reviewing and setting aside the decision of the Second Respondent, declaring that the cancellation of the

Applicant's contract of employment is invalid and unlawful, directing that the letter of termination of the Applicant's contract of employment be set aside, that the Applicant was to be allowed back to her work, in the alternative that the Applicant be paid her salary and all her employment benefits for the remainder of her contract of employment which was due to come to an end on the 31st January 2024. Lastly, that the Respondent's pay the costs of this application.

[19] As grounds for the review and the other reliefs sought, the Applicant contends that the decision of the Chairman of the disciplinary appeal hearing was unlawful and invalid. It was invalid because it was taken contrary to the provisions of the disciplinary Code and also because it was taken in violation of the law.

19.1 The decision to terminate her services, the Applicant contended, was taken as a result of a cross-appeal made by an employer who had no such power in terms of the disciplinary Code, as it was silent on an employer appealing or cross appealing.

19.2 Further the cross appeal filed by the employer, even assuming it was permissible in law, could no longer avail the First Respondent because it had already accepted the sanction of a final warning imposed by the disciplinary hearing Chairperson. The decision of the disciplinary hearing Chairman had already been accepted and implemented by the employer as can be seen from the letter of the employer to the employee informing her of the outcome of the disciplinary hearing.

19.3 The Applicant contended further that it was not open to the First Respondent as the employer to appeal a decision of the disciplinary hearing Chairman. As such action was equivalent to the employer

appealing its own decision given that the entire disciplinary process was carried out at its behest, including the fact that the Chairman was appointed by it.

19.4 The other ground was that the finding of gross negligence had sought to tunnel the decision of the disciplinary hearing Chairman on a misdirection and for otherwise no clear evidential basis. For instance the Chairman of the appeal simply contended that the Chairman of the disciplinary hearing had found the Applicant guilty of an offence she had not been charged with. This ignored a founded principle of our law that where the charge preferred in a disciplinary hearing is not proved, but a lesser one is, she can be found guilty of the lesser one proved; hence the Chairman of the hearing finding the Applicant guilty of the proved offence of ordinary negligence which simply meant, negligence.

19.5 In any event, it was allegedly also irregular that even after his having found the applicant guilty of negligence, the Chairman of the appeal hearing imposed a sanction beyond that which the disciplinary Code provided as a sanction for that offence. Whilst the disciplinary Code makes it clear that upon being found guilty on a gross negligence charge the sanction should be a final written warning, The Chairman of the appeal decided to impose a much severe one, namely that of a dismissal notwithstanding that no tangible prejudice on Respondents projects could be associated with the Applicant's alleged misconduct.

19.6 Whereas the Applicant was allegedly dismissed in terms of **Section 36(a) of the Employment Act 1980 (as amended)**, that conclusion is not supported by the evidence before us. Whilst the section in question applies in a case where the employees conduct had failed to improve

notwithstanding a warning, it cannot be disputed that applicant had a clean record as she had no previous warnings against her name.

19.7 The chairman of the appeal seemed to have ignored that in terms of **Section 42(1) of the Employment Act** , a dismissal of an employee cannot follow as a matter of course but it has to be shown that when taking into account all the circumstances of the matter it was fair and reasonable to dismiss the employees services. The Applicant remained at work throughout her disciplinary process and the Respondent itself accepted and implemented the decision reached by the Chairman of the disciplinary hearing. The employer only changed his mind and cross appealed after the employee had exercised her right to appeal the decision of the disciplinary chairman. Those circumstances alone make a sanction of a dismissal completely disproportionate to the offence with which she was charged.

19.8 The decision of the appeal Chairman, in so far as it ignored the provisions of the disciplinary Code, was invalid which in law entitled the applicant to approach this court directly without first having had to comply with **Part VIII of the Industrial Relations Act 2000.(as amended).**

[20] As indicated, the 1st Respondent opposed the application, and prayed that it be dismissed. The case for the Respondent started off with points *in limine* being raised before turning to the merits. The following represents Respondents' case:-

20.1 It was argued that this court has no review powers to set aside the decision of an employer who had decided to terminate the services of an employee.

20.2 It was further contended that the Industrial Court was a creature of statute which did not have review powers. The proper procedure, it was contended, was for the Applicant to follow the provisions of **Part VIII of the Industrial Relations Act 2000.(as amended)**, once the status of the Applicant had changed from that of an employee, following her dismissal.

20.3 The question whether the Applicant was unfairly dismissed, including the question whether or not the said dismissal was fair or unfair on account of following or not following the disciplinary Code were both questions for determination by the court. This, according to the Respondent could follow after the matter had undergone conciliation under **Part VIII of the Industrial Relations Act 2000(as amended).**As such the matter was prematurely before court.

20.4 The Respondent had allegedly not acted unlawfully in terminating the Applicant's services. When the Applicant filed an appeal against the decision of the Chairman *a quo*, the Respondent opposed the same and noted a cross appeal, in terms of which it argued for the conviction of gross negligence.

20.5 It was contended that in terms of the disciplinary Code, particularly at clause 16.7.1.6. It was the power of the chairman of a disciplinary hearing to come up with a verdict or recommendation, or to confirm, vary or reverse the decision of the initial hearing. The point being made here was that the Second Respondent as the Chairman of the appeal disciplinary process, acted within his rights to reverse the decision of the Chairman a quo.

20.6 The Applicant allegedly refused to be rehabilitated to salvage what was an irretrievably broken down employment relationship. Otherwise, the

convictions for misconduct, as well as how or who should appeal against a decision of the disciplinary chairperson.

[22] The parties in this matter are agreed on what the sanction to be imposed in the case of a finding of guilt against an employee in the event of him having been charged with gross negligence was. That sanction, in terms of the Code is a final written warning. In fact the disciplinary code, describes the offence of gross negligence as follows:-

> *''16.3.6 Gross Negligence; serious failure by an employee to comply with a standard of care that the employee would reasonably be expected to provide in the completion and fulfilment of his/her duties and or tasks. Generally, has the result of incurring substantial losses on the company.''*

21.1 A first misconduct of gross negligence per the disciplinary code would attract a final written warning and a restitution of the council's property in line with **Section 57(2) of the Employment Act.**

22.2 This disciplinary code provides further that it is only in case of a second conviction of the offence of gross negligence that the employee would be dismissed for a misconduct `based on gross negligence as afore stated.

[23] It is not in dispute that this is the area where the Respondent's deviated deliberately and perhaps unjustifiably from the disciplinary code aforesaid. This deviation from the disciplinary code is in our view significant in the determination of the present matter. It, on its face suggests that the sanction as imposed by the appeal structure of the disciplinary process was invalid if it

failed to adhere to the source document. We say the sanction contained in the disciplinary code was from a source document because the necessary inference is that where there is an existing disciplinary code, all matters of discipline ought to be dealt with in line with the said disciplinary code. Anything outside the agreed provisions of the disciplinary code on how the relationship of the parties is to be governed amounts to a nullity and or an invalidity.

[24] We note that in the matter at hand the Chairman of the disciplinary inquiry *a quo*, had found the Applicant guilty of a lesser offence of negligence instead of the gross negligence then charged. It is worthy of note that the Chairperson of the appeal hearing does not eloquently spell out where or how he faulted the initial Chairperson in terms of the material in front of him. It seems to have concluded that simply because the chairperson had found the accused employee guilty of a lesser offence than the one with which she had been charged; then he deserved a corrected sanction through the initial charge of gross negligence being reinstated and the sanction of dismissal being imposed.

[25] The settled position of our law is that there is nothing untoward in the disciplinary inquiry coming to a finding that only a lesser offence than the one charged had been proved and then going on to impose an appropriate lesser offence as suggested by the disciplinary code. This principle of law is well settled. The truth is that the law does not envisage a more severe sanction to be imposed.

[26] Commenting on these situations, the renowned writer **John Grogan**, in his book titled, ***Dismissal* 2nd Edition, Juta 2014,** said the following; - ***"whether an appeal tribunal may impose a more severe sanction than that decided by the presiding officer of the disciplinary hearing is debatable. Unless the contrary is indicated by the applicable disciplinary code, there seems no reason why the presiding officer in an appeal hearing should not impose a more severe penalty. Appellate courts are permitted to impose harsher penalties on convicted persons who decide to exercise their rights of appeal. This is based on the principle that an appellate court is required to reconsider the merits. There is no reason why the same principles should not apply in the employment sphere, provided that an increase of penalty at the appeal stage is not prohibited by the applicable disciplinary code.(own emphasis added)***

In the criminal justice system the state is permitted to appeal against verdicts and sentences imposed by lower courts. May an employer similarly appeal against the finding of a disciplinary office? An answer in the affirmative may seem to have anomalous implication. When presiding officers exercise their functions at the behest of employers, they do so in the name of the institution. An appeal by the employer would accordingly be an appeal against its own decision. Furthermore, once presiding officers have discharged their functions, they are said to be Functus officio and cannot revisit their own decisions. In the absence of the rights of appeal, the employer itself effectively becomes Functus Officio in respect of the initial verdict and sanction. The Labour Appeal Court has held that to increase a sanction on appeal is impermissible unless such action is sanctioned by a code and, even then, the employee should be warned of the possibility that the sanction may be increased"(emphasis added).

[27] It becomes clear that the whole notion of varying a sanction to a more severe one is more agreeable in theory than in practice if one considers the foregoing excerpt. This is because while there may be nothing to stop it in principle, it becomes very difficult to implement in practice because for that to be done, it must be in the context of an appeal. The position is now settled that an employer may not appeal the decision of the Chairman of a disciplinary inquiry. As indicated in the above excerpt. this is because it is in law taken to be the employer appealing his own decision against himself given that the Chairman of the inquiry would have done whatever he would have done at the behest of the employer who would have appointed him in the first place.

[28] In **Rennie's Distribution Services v Dieter Bierman N.O and others (2008) 29 ILJ 3021 (LC) 1 [2009] 7 BLLR 685 (LC).** The Labour Court of South Africa concluded that, to increase a sanction on appeal was impermissible unless such action is sanctioned by a code, and even then the employee should be warned of the possibility that the sanction may increase. See also **John Grogan in his book: *Dismissals* 2nd Edition Juta at page 304.**

[29] We therefore have to agree with the Applicant's submission that it was improper for the Chairman of the appeal hearing to purport to impose a harsher sentence than that first imposed by the Chairman of the disciplinary inquiry and secondly that which exceeded the one provided by the Disciplinary code.

[30] This position was expressed as follows in **Marina Opperman v CCMA and 2 others LC case no. C530/2014**, where Steenkamp J. quoted Basson J. IN UASA abo Melville and SA Airways Technical (Pty) Ltd (2000)11 AMSSA and stated the following at paragraph 18 of the judgment:- ***"..... Basson J. Expressly held that except where express provision is made for such a power, a chairperson on appeal does not have the necessary power to consider imposing a harsher sanction. Secondly, even if it has such a power the chairperson must adhere to the fundamental principles of natural justice which require that the audi alteram partem must be afforded to an employee who may be prejudiced by the imposition of a more severe sanction. In this case, Harmony Gold's disciplinary Code did not give the chairperson on appeal the express power to increase the sanction on appeal and what is more, Miss Opperman was not given the opportunity to make submissions why a harsher penalty should not be imposed."***

[31] The Respondent had otherwise raised several points of law on the basis of which it sought to have the application dismissed without the merits having been dealt with. We make the observation that it is difficult in a matter like this to separate it into points of law and merits. This is so because it all turns on the points of law and the one we have dealt with above goes to the thrust of the dispute and determines the matter. We will nonetheless deal with the points of law below, which may lead to a similar result.

[32] The first point raised was that of urgency; it being contended that although the matter was brought as one of urgency, there was nothing urgent about it, supposedly because the applicant had already been dismissed and therefore

that at the heart of it, she was not different from all those dismissed employees who are still awaiting their day in the court following normal proceedings.

[33] This particular point has been a subject of numerous judgments or rulings of this Court and the Courts above it. Of course the position started off as a hard one where once dismissed, an employee could not be allowed to institute an urgent application challenging the dismissal. That position evolved obviously because of its apparent harshness on the employees particularly where the dismissal had been effected contrary to law or was downright invalid because it was against the provisions of a disciplinary code in place. The current position is that where the dismissal was unlawful or invalid, then the employer cannot rely on the fact that a dismissal had already been effected. In other words the unlawfulness or invalidity of the dismissal becomes an exceptional circumstance to allow the moving of the proceedings urgently to court. See in this regard such judgments as that following;- ***Swaziland Agricultural and Plantsations Workers Union (SAPWU) v United Plantations IC 79/98*** as well as ***Swaziland Media Publishers v Workers Union Industrial Court case no 179/199*** on the original position and such cases as ***Eswatini Civil Aviation Authrity v Sabelo Dlamini ICA***.

[34] In this matter, it cannot be denied that the dismissal was invalid because it had been done despite a clear provision of the disciplinary code that a sanction for a misconduct as the one the Applicant had been charged with attracted a final written warning for a first time offender like the Applicant but the employer ignored the same.

[35] Otherwise the position on whether or not this Court has jurisdiction to hear the matter without going through conciliation, is no longer an issue following the judgment in ***Eswatini Civil Aviation Authrity v Sabelo Dlamini ICA***. The judgment is now authority for the point that where an invalid or unlawful decision had been taken to dismiss an employee from work, he is not bound to follow the rigors of **Part VIII of the Industrial Relations Act 2000 (as amended).**

[36] It is clear that the points raised by the Respondent to try and have the application not heard cannot succeed. The point we referred to or dealt with above to the effect that the cross appeal relied upon to come up with the decision of imposing the harsher verdict of a dismissal of the Applicant as a sanction was taken contrary to the principles of Labour Law. The law prohibits an appeal or cross appeal by an employer unless the disciplinary code provides otherwise, and the employee is warned of such an eventuality as being contemplated by the Chairman of the hearing.

[37] There are two other abstract points we feel call for a comment. It is the fact that the cross appeal by the Respondent as the employer, was notified firstly after the employer had already accepted the decision of the Chairperson of the disciplinary hearing. Respondent believed that she was being found guilty of a lesser offence, than the gross negligence charge and further that she was being sanctioned to a final written warning. It is not in dispute that after this decision had been issued, the employer accepted it and wrote to the applicant communicating that position to her. We agree with the applicant that as soon as the Respondent as the employer accepted the decision by the Chairperson of the initial disciplinary inquiry, it was no longer open to the employer to

again note a cross appeal just because it now had an appeal by the employee. There can be no doubt the 1sr Respondent had already acquiesced to the decision of the Chairperson and therefore could not in law challenge it. As in attempting to do so, he was approbating and reprobating which the law does not countenance.

[38] Lastly, we also agree with the contention by the applicant that in so far as the Second Respondent indicated in his ruling that his decision was in line with **Section 36(9) of the Employment Act**, it was then clear that the purported dismissal could not be upheld because as shown when that section was brought in, the Respondents were aware or ought to have been aware, a dismissal would follow only as a sequel to a record where there had been another warning from which applicant vowed not to have improved. It is undisputed here that up until the disciplinary hearing resulting in the final written warning there was no record of any prior warning against applicant. Hence the need to give here at least a final written warning and certainly not a dismissal.

[39] Further still, the position of our law is that for an employee to be dismissed it must not only be because the dismissal complies with one of the grounds provided in **Section 36 of the Employment Act of 1980** but it must be because taking into account all the circumstances of the matter it was fair and reasonable to dismiss the employee. This is per **Section 42 of the Employment Act of 1980**. The reality is that when one turns to the circumstances of the matter even assuming there was compliance with section 36 of the Employment act, there is no basis to make the dismissal fair and reasonable in the circumstances when considering that the evidence could not show any financial loss suffered by the employer as a result of the misconduct

contemplated. That the relationship was intact could be seen from the fact that throughout the investigation and disciplinary process, the Applicant was never suspended. In fact, the Respondent is shown to have been angered by the Applicant exercising her right to appeal to them saying she was refusing to accept the outcome of the process and also to contend that the relationship had become intolerable. We should highlight here that we see this as being a dramatization by the Respondents and not to be real. This is confirmed when the decision of the Respondents to appeal the decision of the initial hearing was taken only after the applicant had appealed. It is as such our finding that the applicant should be allowed to return to her work place, be paid all her salaries and benefits for the entire period she was not at work.

[40] We make this order being fully aware we could have been requested to send it back to another disciplinary appeal process constituted differently at least. We however refrain from doing so, on account of the fact that the structure is unnecessary and will only frustrate these proceeding. We only clarify that the Respondents record would have to reflect a sanction of a written warning for the offences of negligence she had been found guilty of in the first place. There was no sound basis for the finding that whilst she is found guilty of an offence in which a sanction of a warning was appropriate for the disciplinary code, she had to be sanctioned to a final written warning which otherwise was not covered in the disciplinary code.

[41] Consequently, and for the foregoing reasons, the Applicant's application succeeds.

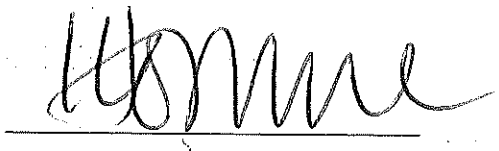
[41.1] The decision of the Appeal Chairperson is set aside.

[41.2] The decision of the Appeal hearing is altered to read that the decision of the Appeal Chairman imposing a sanction of a dismissal against the Applicant herein is set aside as having no legal basis.

[41.3] Instead of that, the sanction is substituted in order that the decision of the Appeal hearing is to read that, the Applicant is given the sanction of a Written Warning on each count in line with the disciplinary code.

[41.4] There is no order as to costs.

The members agree.



L. L. HLOPHE

JUDGE- INDUSTRIAL COURT

FOR APPLICANT: Innocent Mahlalela
(L.M. Simelane and Associates)

FOR RESPONDENT: HlomendlininMdladla
(H. N. Mdladla and Associates)