

Russell / Aspen Pharmacare [2025] 5 BALR 496 (NBCCI)

Arbitration Law Reports

Division: National Bargaining Council for the Chemical Industry

Case No: CHEM284-23/24

Date: 21/02/2025

Before: SM Malgas, Arbitrator

Keywords

Referral in terms of section 191(5)(a)(i) of the LRA

Dismissal — Substantive fairness — Misconduct — Bullying — Manager dismissed on strength of complaints by subordinates about his attempts to ensure that their performance complied with company policy — Bullying not proved and dismissal unfair.

Editor's Summary

The applicant, then the respondent's warehouse manager, was dismissed after two of his subordinates lodged grievances against him for workplace bullying, and a third complained about his conduct. The applicant claimed that he had done nothing more than attempt to ensure that the many employees who worked in the respondent's warehouse were doing their work properly, and that the incidents on which the complainants had relied were seen out of context.

The Commissioner noted that the onus rested on the respondent to prove that the applicant had breached the provisions of the Code of Good Practice: Prevention and Elimination of Harassment. According to the code, workplace bullying "may involve aggressive behaviour in which someone repeatedly causes another person injury or discomfort". There was no indication in the evidence that the applicant had abused his power. The two complainants had perceived being asked questions about their performance as bullying. One of the complainants, who had since resigned, contradicted himself by saying in one breath that the applicant had been unfriendly from the outset, and in the next that he had initially been friendly. It was clear that this complainant had tried to bolster his case during the arbitration by exaggerating the applicant's conduct. Instructing an employee to perform his work according to policy does not amount to bullying. The second complainant had admitted that she was not performing her work properly, and the third complainant had not testified. It could not be concluded from the evidence that the applicant had either bullied or in any way harassed anyone.

The applicant's dismissal was ruled substantively unfair and he was reinstated, with back pay limited by the time it had taken for the arbitration to be completed.

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Award

Details of hearing and representation

- [1] This matter was set down for an arbitration hearing on 4 and 26 November 2024 and again on 24 January 2025 at the MEIBC offices in Gqeberha under the auspices of the NBCCI. The applicant, Mr Henry Russell, was in attendance and he was represented by Mr K Adams a union official from Ceppwawu. The

Issue to be decided

- [2] I am required to determine whether the dismissal of the applicant was procedurally and substantively fair.
- [3] The procedural issue raised by the applicant is that at the disciplinary hearing, the respondent relied on a final written warning which expired.
- [4] With regard to the substantive fairness of the dismissal, the issue is whether or not the applicant breached the rule or standards regulating conduct in the workplace.

[5] The applicant was employed by the respondent on 1 April 1995. He was dismissed on 13 December 2023 for misconduct relating to workplace bullying and harassment. At the time of his dismissal he held the position of warehouse manager. His salary was R86 868,74 per month. Two subordinates of the applicant lodged grievances against him during June 2023. A grievance hearing was held during July 2023 and the recommended outcome was a formal disciplinary enquiry against the applicant. The disciplinary enquiry took place during November 2023 where the applicant was found guilty of workplace bullying and harassment and dismissed on 13 December 2023. The applicant seeks retrospective reinstatement as a relief.

Survey of evidence and argument

[6] I have considered all the evidence and argument, but because the Labour Relations Act 66 of 1995 (“LRA”) requires only brief reasons (section 138(7) of the LRA) I have only referred to the evidence and argument that I regard as necessary to substantiate my findings and the determination of the dispute.

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Respondent's first witness: Ms Philda Magielies

- [7] Ms Magielies testified as follows. She commenced services with the respondent during 2007. She currently serves in the AOS warehouse as a clerical assistant for receiving since 3 October 2022. The applicant was the warehouse manager. She reports to Mr Preston, the supervisor, who reported to the applicant at the time of the applicant's dismissal. When she joined the warehouse during October 2022 they used the system called Baan and early in 2023 the respondent changed its system from Baan to Sap system and the latter was a different system to Baan. On 1 June 2023 she lodged a formal grievance against the applicant as it reflects on page 43 of the respondent's bundle. She wanted to lodge a grievance for a long time but she gave the applicant the benefit of the doubt. On 31 May 2023 an incident occurred where she decided that she had enough and which lead to the formal grievance being filed. What the applicant expected her to do was unacceptable considering that she was still on a learning curve as she started working in the warehouse from October 2022. The spreadsheet which she was working on was already a mess and finance was sending emails of stock which arrived before she started working at the warehouse, the balances of items that needed to be booked in and she did not have a clue what happened to those items. Her supervisor had his own work to do. She had to learn everything in a short period of time in order to make the spreadsheet up to date. Every day at the end of her shift, she would send the spreadsheet to her supervisor and to the applicant and the next day she would start booking in stock again, therefore, the spreadsheet which she sends to the applicant the previous day end of shift would not be updated. The applicant would call her in and shout at her in front of her colleagues that the spreadsheet is not updated because according to him all the stock was not on the spreadsheet. The applicant did not investigate the reasons and he did not give her time to explain herself. He would send emails that the supplier must be paid and the respondent's account would be blocked because the stock was not booked in. The applicant was never satisfied with the spreadsheets.

- [8] The incident of 31 May 2023 which gave rise to the formal grievance was as follows: Mr Riaan Pienaar, the head of logistics, sent her an email stating that Arem Pax Foils, one of the suppliers, would block the account if the stock was not booked in. She did not notice that the applicant was not copied in on the email and she performed the instruction of Mr Pienaar. The applicant came in and Mr Preston called her to the office and she went to the office. The applicant told her that the spreadsheet was not updated and she told him that she was busy booking the stock as instructed by Mr Pienaar. The applicant then told her that she should not listen to Mr Pienaar as he, the applicant, is the warehouse manager. She informed the applicant that there was an email sent by Mr Pienaar and that she was busy with the instructions of Mr Pienaar as per the email. The applicant told her that if the spreadsheet is not updated, people would lose their jobs. She then looked at Mr Preston but Mr Preston kept quiet and he did not even try to explain the email of Mr Pienaar. There was another incident on a separate occasion where the applicant asked her in the presence

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of Mr Preston whether she had matric and she responded in the positive. The applicant said that she was not thinking like someone who had matric. She laughed about it and then the applicant said that she was not serious about her work and that is why she was always in a backlog.

- [9] There was another incident of 7 September 2023. She was off for three days and when she returned to work the applicant told her that there was stock which needed to be booked in and she said yes, she was aware, however, she was busy with other stock which came in prior to the stock referred to by the applicant. She told him that she was busy with the suppliers because there were queries. The following day Mr Preston asked her if she saw the email and she said no. Mr Preston then forwarded the email to her and also printed the email for her. Mr Preston told her that the stock needed to be booked in and she said okay. She told Mr Preston that the applicant also told her the previous day about the stock that needed to be booked in. She further testified that with the new Sap system, all stock had to be on plastic pallets. Mr Preston and the applicant knew they had a shortage of plastic pallets and the stock they wanted her to book in was not on plastic pallets, it was on wooden pallets. When she came from lunch the applicant asked her if she saw the email and she said yes. He asked her if she booked the stock. She told him that the stock was still on wooden pallets and she was waiting for the stock to be over packed. The applicant shouted at her and her colleague Gaygene showed the applicant with her fingers to keep quiet. She then continued with her work. She testified that the procedure is that she cannot book in the stock which is on wooden pallets.
- [10] During cross-examination it was put to Ms Magielies that she is stubborn and she did not want to listen or follow the instructions of the applicant. She stated that the applicant used to tell her many times that she was not listening to him, however, according to her the applicant was also not listening to her when she tried to explain herself. She further stated that the applicant does not understand the procedures of her functions and the differences with regards to the old and new system. She acknowledged that the applicant was in charge and responsible for the warehouse and that she was supposed to listen to the applicant as the warehouse manager. She stated that the applicant was part of the anti-bullying committee but the applicant harassed and shouts at his subordinates. It was put to Ms Magielies that the applicant's biggest concern he had with her was the spreadsheet and the updating of the spreadsheet and the applicant needed the spreadsheet for his meetings. The applicant confirmed this statement. It was further put to Ms Magielies that sometimes Mr Preston had to remind her to update the spreadsheet. She confirmed this. She stated that the applicant was never satisfied with the spreadsheet. The applicant had a problem on how she updated the spreadsheet because what the applicant physically saw in receiving was not reflecting on the spreadsheet. She did not book the deliveries of the previous day on the spreadsheet, so therefore when she sent the spreadsheet to the applicant at the end of the shift, those deliveries would not reflect on the spreadsheet, she would do those deliveries on the spreadsheet the following day. She acknowledged that

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updating the spreadsheet is very important. She stated that the concern which the applicant had with the spreadsheet is if she did not book the stock in on time, the respondent's account would be blocked which means that they would not get their stock for the following month. She further stated that the importance of the spreadsheet is to keep record of the stock received and the date when it was booked in on the system and the queries. It was put to Ms Magielies that the applicant was counselling and addressing her performance and behaviour issues. Ms Magielies stated that when she commenced services in the

warehouse during October 2022, the receiving department was already in a backlog and she did not receive proper training on the old system. She had done the work according to what Mr Preston showed her. It was put to Ms Magielies that her grievance against the applicant was incorrectly captured because her issues were lack of training and capacity in the warehouse. She confirmed that she did not receive proper training when she commenced services in the warehouse department. She also stated that she could not book the stock in on time as requested by the applicant because there were no plastic pallets to over pack the stock. There was a lack of resources. The first month of service in the warehouse was fine. The problem started in November 2022 with the influx of work and lack of resources. The applicant's main issue with her was the updating of the spreadsheet.

Respondent's second witness: Mr Kwanele Dlamini

[11] Mr Dlamini testified as follows: He served at the respondent as a pharmacist in the warehouse since August 2022. The applicant was his manager and at the time when he commenced services he had a professional relationship with the applicant, however, he noted that the working environment was hostile because his first meeting with the applicant was intimidating as the applicant asked questions to everyone and expected answers. He could sense tension and fear by the other employees in the meeting as the applicant made gestures and he never experienced such unprofessional conduct. He lodged a formal written grievance against the applicant which grievance reflects on page 44. The reason he lodged a grievance was related to an incident which occurred on 19 June 2023. They were two pharmacists, he and Ms Ayesha. He was responsible for operations at unit 1 and 4, whilst Ayesha was responsible for operations at unit 2 and 3. Production unit 2 dispensary made a request for Meprobamate at unit 2 warehouse for which Ms Ayesha was responsible for. Meprobamate was stored off site. When it came on site, it was unrestricted on the system which means that the stock was in good quality to be used by production as Ms Ayesha was able to receipt the stock on the system. At that stage they used the Sap system. The problem started when Ms Ayesha wanted to transfer the product to production, then the system restricted it showing that there was a quality issue with the product. Therefore the product was not transferred to production. Ms Ayesha sent an email to the quality control manager, to the production manager and the applicant was copied in the email. Mr Dlamini testified further, on

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20 June 2023, he arrived at unit 2 warehouse and as he was preparing his desk, the applicant came into his office and asked him why the product was not transferred to production. Mr Boysen was also in the office at that stage and other employees arrived because it was just after 8am. The applicant did not grant him any time to respond. The applicant's tone was aggressive, loud and he appeared very angry. The applicant told him that he was not performing and that there was a previous pharmacist, an older lady, who performed better than him. The applicant also said that he was tired of his (Mr Dlamini's) attitude. The applicant said that he must get the problem sorted in a shouting tone. Mr Dlamini stated that those words were traumatic for him because those words demoralised him, damaged his professional image, undermined him and humiliated him. He perceived the warehouse workspace as toxic because it was not conducive to work based on the intimidating environment created by the applicant. The applicant then had a talk with Mr Boysen and thereafter left to his office. He, Mr Dlamini then followed the applicant to his office and asked him if he could have a few minutes with him. He told the applicant that he was not happy that the applicant commented on his performance in the presence of the other colleagues and that he was not appreciative of his tone used. The applicant said that his words came out wrong. He, Mr Dlamini then left the department and went to the health centre because he wanted the matter to be closed. At the health centre he relayed his experience to the nurse and he was given pills to calm himself. The nurse told him that he was not physically sick, he should go back to his department. As he was going to unit 1, he informed Ms Ayesha of his experience with the applicant. Ms Ayesha informed him that she went offsite in the morning to get new stock for production. He did not realise that he was failing to cope at work and he went to the health centre again. He informed the nurse that he was not coping because he had never experience such humiliation and he requested to be discharged from duties in order to go to his doctor. The nurse informed him that she does not have the power to release him from duties. The nurse then contacted Mr Riaan, the applicant's manager, and recommended that he (Mr Dlamini) be allowed to leave for that day. He left and he went straight to his doctor who booked him off for three days, 21, 22 and 23 June 2023. He sent an email to the applicant and copied Mr Riaan, informing the applicant that he was not appreciative of the manner in which the applicant spoke to him. He had to record it because he heard that the applicant was chairing disciplinary hearings and if an employee levels allegations against the applicant, there is a potential that the employee would lose his job and he still needed his job. On Monday, 26 June 2023, when he returned to work, he lodged the formal grievance against the applicant.

- [12] On 6 June 2023 they had a meeting on Teams regarding poor work performance. The stores controllers (supervisors) and the pharmacists were part of the meeting on Teams. The applicant was not happy with the overall performance of the warehouse which included the performances of the pharmacists and stores controllers. In that meeting the applicant expressed his dissatisfaction about their performances without allowing inputs from the team. Mr Dlamini stated that there was no specific issue with any specific person. It was the applicant not granting anyone a

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chance to speak. Mr Dlamini further testified regarding an incident of 14 June 2023. He received stock from a supplier during February 2023 and he noticed that there were visual quality issues because the expiry date and batch number was written in watermark. He sent an email to procurement, to the quality department and to the applicant. At that stage they used a system called Baan. Recommendation from quality was that he should accept the stock on the system with certain exceptions. He therefore booked the stock. The transition from Baan to Sap happened around April or May 2023 so all information on Baan must be migrated to Sap which happened automatically. The applicant then received a call from Ms Venter querying the discrepancy of the stock on the system. The applicant then contacted him as the applicant was very unhappy about receiving a call from Ms Venter. As soon as he answered the call the applicant shouted at him aggressively, asking him why he received a call from Ms Venter and the applicant said that he must get the matter sorted. He arranged a meeting with the applicant, Ms Venter and Mr Graham. The applicant did not attend the meeting. They could not resolve the problem because they just migrated to Sap and the matter was escalated to Mr Riaan and it was established that it was a technical issue.

- [13] There was another incident on 17 May 2023. Aspen has a plant in East London ("EL"). On 17 May he and Ms Ayesha had a scheduled meeting at 9am at unit 1 with Lauren to established SOP for EL and PE. They were about to start the meeting when the applicant walked into the room. There were two administrators on the side of the room busy with Sap. As the applicant entered the room he asked them why he received a call from Mr Mike. Mr Mike is the risk and security manager who usually assists them to transfer stock to EL because he oversees PE and EL. Apparently there was stock which had to be transferred to EL according to Mr Mike. The manner in which the applicant conducted himself when he entered the meeting was unprofessional because he disregarded the meeting. He reprimanded them in front of other colleagues in a shouting tone not giving them a chance to clarify the matter. He was embarrassed and humiliated. They were not informed of a request that was made regarding the stock for EL as there was no communication that stock needed to be transferred to EL. The standard practice is that a request would be made by the EL pharmacist to the PE pharmacist and then they would prepare the documents for signature by the responsible pharmacists of PE and EL. Mr Bosman would sign for the release of the stock on site. Mr Mike would usually assist them or someone from security in dispatching the stock. Mr Dlamini stated that there was no official request made. EL informed Mr Mike because Mr Mike was in EL and he delegated it to his team but his team did not inform them (him and Ms Ayesha).

- [14] Mr Dlamini testified further that the applicant sent him an email regarding an issue of the deviation which was allocated to him. The email read as follows: *"Hi Kwanele, we seemed to be going in circles, with closing the deviation."* Mr Dlamini stated that he understood the urgency of closing the deviation because there are deadlines but it would have been unethical to close the deviation without the investigation being concluded. The applicant called him into an airlock to discuss the issue regarding the

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deviation. He explained to the applicant that he needed support. The applicant was angry and appeared intimidating and his gestures and tone were unprofessional. Mr Dlamini testified that all the above issues affected him deeply as it was not conducive for him to perform his duties freely and without fear taking into account the hostile environment created by the applicant. After he visited the doctor, the doctor scheduled another appointment to examine him again. The recommendation made by the doctor was, as much as she gave him a low dose of medication it seemed that his situation became worse and the doctor referred him to a psychologist. Page 8 is the letter issued by his doctor referring him to the psychologist. The referral letter states: *"acute stress anxiety work related, please kindly assist."* He had different sessions with the psychologist and his situation became worse. The psychologist letter dated 21 Sept 2023 appears on page 6 which he submitted to the health centre of the respondent. Although the respondent assisted with the internal process which took place at that time, his health was affected such that he could no longer perform his duties so he had to resign. His resignation letter dated 1 December 2023 reflects on page 1 of the bundle.

[15] During cross-examination it was put to Mr Dlamini that his reasons for resigning are not related to the applicant because the applicant is not responsible for his growth and development. It was further put to Mr Dlamini that at the grievance hearing his reasons for resigning was that he should not be reporting to the applicant as the applicant is a non-pharmacist and the applicant is not on the same educational level as him. It was put to Mr Dlamini that from 26 June 2023 when he lodged the grievance until he resigned he worked with the applicant. It was also put to Mr Dlamini that he undermined the applicant and disrespected the applicant as reflected by the findings of the chairperson of the grievance hearing on page 94. Mr Dlamini stated that he underwent the corrective counselling as recommended by the chairperson. Mr Dlamini was referred to page 61 paragraph 4.40 where he stated at the grievance hearing that when he commenced services, he initially had a good relationship with the applicant. At this arbitration hearing he stated that shortly after his commencement his very first meeting with the applicant was aggressive, intimidating gestures and unprofessional conduct by the applicant. It was put to Mr Dlamini that his versions are contradicting. It was further put to Mr Dlamini that the problems started with his performance. Mr Dlamini stated that in none of the meetings did the applicant indicate that he was not performing. He was over performing because he went outside his scope of practice to uphold the objectives of the business. When the applicant gave his performance review in the airlock, he was given 2 out of 5 which he was not happy with and he delivered his file to the applicant and the applicant changed the score to 3 out of 5. Mr Dlamini stated that he has WhatsApp messages with the applicant enlightening him of a project aimed to ensure the growth of the warehouse. He sent a message to the applicant at 4am in the morning requesting to have a meeting, which the applicant allowed, and he went with his power point and projected it to the applicant. There was a meeting with the Sap Team and the applicant invited him to the meeting because the applicant wanted him to

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present his power point presentation and he presented it which was adopted by the business. It was then put to Mr Dlamini that he was overreacting during his evidence-in-chief where he tried to portray the applicant as a bully, as unreasonable and an unprofessional person. It was also put to Mr Dlamini that there was no bullying as the applicant merely gave him instructions to get the problems sorted. Mr Dlamini stated that the applicant is a dictator because he wants to speak alone without granting the employees a chance to speak or to give their inputs like it was evident in the meeting of 6 June 2023, With regards to the deviation, it was put to Mr Dlamini that the applicant was concerned about the closing of the deviation and the applicant merely raised his concern to Mr Dlamini which does not constitute bullying. Mr Dlamini stated that even if there was a deadline for the deviation, he could not close the deviation without the investigation being concluded. Mr Dlamini also stated that when the deviation was re-assigned to him, the deadline already passed. Mr Dlamini further stated that the approach of the applicant was unprofessional. It was put to Mr Dlamini that he did not want to accept the fact that the applicant was in charge of the warehouse and he did not want to take instructions from the applicant. It was further put to Mr Dlamini that the applicant was in charge of seven warehouses and fifty-eight employees reported to him and he was responsible and accountable for the seven warehouses.

Applicant's evidence: Mr Henry Russell

[16] The applicant testified as follows. He managed seven warehouses and fifty-eight employees reported to him. He had a good relationship with all his employees. Ms Magielies commenced services in the warehouse on 1 October 2022 as a coordinator in the receiving department. The pickers in the receiving department are primarily responsible for receiving the items, checking them for quality purposes, checking the quantities, filling in the paperwork and for taking the paperwork from the supplier to Ms Magielies. Her responsibility was then to take the paperwork and to make sure that it is properly signed and to load it on the spreadsheet and that is the spreadsheet she uses to book the items on the system. Initially there were no concerns with Ms Magielies because she had done her work according to the plans. The problems started just before she lodged the grievance. The applicant stated that Ms Magielies came across as a stubborn person and she did not want to follow instructions from him nor her controller/supervisor. The spreadsheet is very important because it indicates which items arrived on site, it indicates which items is in the store and it shows which items had been booked in versus those which had not been booked in yet. It allowed the finance department to pay the supplier for those items which had been booked in because on a daily basis finance would check the items receipted versus the items that were supposed to be paid to the supplier. That is the reconciliation which finance does with the items on the spreadsheet. The spreadsheet is also important because based on planning there were items which they waited for in order to proceed with production. He had concerns regarding the work of Ms Magielies in respect of the spreadsheet. On a

weekly basis he had to intervene because he either received calls or emails from the finance department or from his

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manager to check whether the stock arrived on site and if they arrived on site, why was it not booked in by Ms Magielies. A further concern was if the stock arrived on site it delayed payment for the suppliers.

- [17] Ms Magielies raised a grievance against him and said that he insulted her by telling her that she does not think like a person who had matric. Ms Magielies did not paint a true picture because he never spoke directly to her about matric. The controller and his team had a collective agreement that the items with queries or problems must be clearly identified and placed in front of the office. He and the controller had a discussion about the poor identification of the items and he made a comment to the controller by saying that the manner in which the employees identified the items was not indicative that they passed matric because they did not identify the items as per the collective agreement with the controller. At that stage Ms Magielies walked past him and the controller whilst they had this discussion about the poor identification of the stock. It was a discussion about a standard agreed upon by the team which was not adhered to. Ms Magielies claimed that he threatened her with the loss of her job. The applicant stated that it is easy to say you have been harassed or bullied if you do not sketch the background or the context of what was said. During the meetings they had, he explained the negative impact not only on them but also on him if they continue not to book in the items and not to have it on the spreadsheet and not knowing if the items had been delivered. Suppliers would not be paid and production would be impacted. He explained to them that some of them would be accountable or some may either go to a disciplinary hearing, or the company may decide to downscale employees if targets are not met. This is the background and context of what he said.
- [18] Mr Dlamini commenced services on 1 August 2022 in the warehouse. They had a good relationship until the grievance was filed. He was surprised when the grievance was filed because he was not aware of the issues raised by Mr Dlamini. He realised when the grievance was filed that Mr Dlamini did not want to report to him because Mr Dlamini went to HR and he asked them to review the reporting structure of the warehouse because Mr Dlamini felt that he was not supposed to report to him given the fact that Mr Dlamini had a degree and he had a diploma, despite his many years of experience. The applicant testified that the issue of 14 June 2023 was regarding a product, mercaptopurine, which was incorrectly booked in on the system. He received an email from the IT department indicating that they were highlighting it to his level again after previous incidents. A lady called him regarding the issue and he told the lady that he was under the impression that the problem was resolved. He then contacted Mr Dlamini and asked why he had not sorted out the issue. Mr Dlamini explained what the problem was and he felt that part of the problem was IT. He then requested Mr Dlamini to meet with the lady and to resolve the problem because after numerous emails and calls the problem was not resolved. The applicant stated that he was surprised when this issue was part of the grievance and the charge sheet alleging that he shouted at the applicant over the phone. The applicant testified that the

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issue of 19–20 June 2023 was regarding meprobamate which Mr Dlamini was supposed to transfer to production. He asked Mr Dlamini and Ms Ayesha about the issue because he received a call from production that they were still waiting for the material. He asked them why did they not supply the stock to production and they explained that they could not supply it because there was a delay on quality assurance's side. He asked them why they had not highlighted the delay to production. With regard to the allegation of him comparing Mr Dlamini to another pharmacist the applicant stated that people are different but they must work according to the targets of the business. He stated that he mentioned to Mr Dlamini and to Ms Ayesha that there were different pharmacists previously in the warehouse and those pharmacists always worked alone covering the same warehouses and he never had any complaints from the pharmacists or from customers. By saying this to them he tried to demonstrate the seriousness of the situation of their work output based on the fact that there were two of them in comparison to previously when there was only one pharmacist.

- [19] Ms Ayesha never lodged a grievance against him. He was however charged for an incident regarding Ms Ayesha. He was very surprised when he noticed a complaint on the charge sheet because Ms Ayesha never highlighted or mentioned anything to him regarding any concerns before she was called as a witness in the grievance hearing. Ms Ayesha was pregnant when she was on a contract and she wanted to have an ablution facility that was closer to the warehouse that she could use. He then investigated the possibility and he consulted with the engineering and with security and the decision was made that she could use the

ablution in the security block that visitors also used. Ms Ayesha was not happy with this outcome as she wanted a personal ablution facility because she was pregnant and she wanted something more private. He then referred her to the health centre and the health centre sister gave him feedback and said that Ms Ayesha was unreasonable, she wanted special treatment and there was nothing that the health centre could do for her. The sister specifically mentioned the following words, "Ms Ayesha was not sick, she was just pregnant". So, before those words were mentioned to him, it was told to Ms Ayesha by the sister involved during their consultation.

- [20] The applicant testified about the stock that had to be transferred to EL. The stock needed to be picked by the pharmacists. Due to the sensitivity around the security related issues of the stock, he was never involved in the planning of getting the stock to EL. However, on the day in question Mr Mike, the regional risk and security manager, contacted him at past 8am and informed him that he did not highlight the previous delays to him but this was the third incident where there was a delay in picking the items for EL which was supposed to leave the PE site at 5am. He had the responsibility as the warehouse manager to take it up with the pharmacists and that is what he did. If he did not address the problem with them, he would have run the risk of being held accountable as the manager. During the grievance hearing Mr Dlamini insulted him by stating that he should not be reporting to him; that his qualification is higher than the

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applicant's and he requested HR to review the reporting structure because he felt that as a pharmacist he should not be reporting to the applicant who holds a diploma in logistics. Mr Dlamini further insulted Mr Mike, the regional risk and security manager by calling him a security guard and the presiding officer intervened and in her finding she recommended that Mr Dlamini should be issued with corrective counselling. The applicant stated that he felt disappointed and insulted by the submissions of Mr Dlamini because he never experienced something like that in his years of service as no employee ever questioned his credentials. His dismissal was a painful exercise and it took him time to find mental stability. He never even thought that he would lose his job after thirty years of employment services. He was five years short of his retirement.

- [21] During cross-examination the applicant was referred to page 33 which is a final written warning issued to him during October 2021 for workplace bullying. The applicant acknowledged the final written warning and stated that there was no hearing held before the final written warning was issued. He further stated that according to Aspen policies, this warning should not have been on his record. It expired long ago, it was only valid for six months. Procedurally the warning was incorrectly submitted in this case. He confirmed that he is aware of the rules against workplace bullying. He was part of the change champions anti-bullying and anti-harassment committee. The applicant acknowledged that employees are expected to go to him for guidance on how to lodge a complaint if they feel they were bullied. The applicant was referred to the incident of EL and he stated that Mr Dlamini was untruthful because their training had not started when he addressed them. Furthermore, Mr Mike would not call him for stock to be delivered to EL if all the paperwork was not done. When Mr Mike is involved in the delivery of the stock, then the pre-requisite procedures have been taken care of. It was put to the applicant that Mr Dlamini testified that he shouted at him, he humiliated him in the presence of other employees. The applicant stated that those allegations are not true as Mr Dlamini lied to say that he stood 10 meters away and shouted because the office is not even 10 meters, it is 6 by 6 meters as he took the measurements of the office.

Analysis of evidence and argument

- [22] In terms of section 185 of the LRA every employee has the right not to be unfairly dismissed or to be subjected to an unfair labour practice. In terms of section 188(1) of the LRA, a dismissal is unfair if the employer fails to prove that the reason for dismissal is a fair reason related to the employee's conduct or capacity and that the dismissal was effected in accordance with a fair procedure. Section 192 of the LRA states that if the existence of a dismissal is established, the employer must prove that the dismissal is fair.
- [23] The applicant was charged and dismissed for workplace bullying and or harassment. It is the applicant's case that he is not guilty of the charges against him. The respondent must therefore prove that the applicant is guilty, in other words, that the applicant contravened the rules or

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standards regulating conduct in the workplace. The respondent must prove that the applicant breached the provisions of the Code of Good Practice: Prevention and Elimination of Harassment. The Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000 defines harassment as follows:

“Unwanted conduct which is persistent or serious and demeans, humiliates or creates a hostile or intimidating environment or is calculated to induce submission by actual or threatened adverse consequences and which is related to –

(a) sex, gender or sexual orientation, or

(b) a person's membership or presumed membership of a group identified by one or more of the prohibited grounds or a characteristic associated with such group”.

[24] Item 4.5.4 of the Code of Good Practice: Prevention and Elimination of Harassment (“The Code”) provides as follows:

“The following factors may be relevant to the issue of whether harassment has occurred –

4.5.4.1 the context of the harassment;

4.5.4.2 the circumstances of the complainant and the impact that the conduct has had on an employee; and

4.5.4.3 the respective positions of the harasser and complainant.”

[25] Harassment includes violence, physical abuse, psychological abuse, emotional abuse, sexual abuse and gender-based abuse. It includes the use of physical force or power, whether threatened or actual, against another person or against a group or community. Harassment against employees in the workplace is abuse of power. Item 4.7.7 of The Code provides as follows: “Bullying – where harassment involves the abuse of coercive power by an individual or group of individuals in the workplace. Workplace bullying may involve aggressive behaviour in which someone repeatedly causes another person injury or discomfort”. In the case before me there is no evidence to show that the applicant abused his power.

[26] From the evidence it is clear that there are two conflicting versions in respect of the context of the alleged harassment. The respondent must prove that the applicant harassed and or bullied Ms Magielies and Mr Dlamini. The applicant's case is that the incidents which the respondent's witnesses perceived as harassment was when he merely questioned their non-performance or raised his concerns about deadlines and their work output or him requesting and instructing them to resolve issues. He did not scream or shout towards the respondent's witnesses and the respondent must therefore prove this conduct. In the case of *Stellenbosch Farmers' Winery Group Ltd and another v Martell et Cie and others* 2003 (1) SA 11 (SCA) [also reported at [2002] JOL 10175 (SCA) – Ed] (handed down on 6 September 2002), the Supreme Court of Appeal held that where a Commissioner is faced with two conflicting versions before him the Commissioner must make a finding on the credibility of witnesses and on the probabilities of the two versions to determine where the truth lies. The question that should be answered is whether the probabilities favour the party that bears the onus of proof. The Court further held that the credibility of a witness is in an extricable manner bound to the

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consideration of the probabilities of the case, the Commissioner should therefore resort to credibility where the probabilities fail to point which version embraces the truth more. The Supreme Court of Appeal explained the technique generally used by Courts in resolving factual disputes as one involving the making of findings on:

- (a) The credibility of the various factual witnesses. This will depend on the Court's impression about the veracity of the witness, which in turn will depend on a variety of subsidiary factors such as:
- (i) The witness candour and demeanour in the witness box;
 - (ii) His bias, latent and blatant;

- (iii) Internal contradiction in his evidence;
 - (iv) External contradictions with what was pleaded or put on his behalf;
 - (v) The probability or improbability of particular aspects of his version;
 - (vi) The calibre and cogency of his performance compared to that of other witnesses testifying about the same incident or events.
- (b) The reliability of the witness, which turns on the factors listed in (a)(ii), (iv) and (v) above, as well as the following:-
- (i) The opportunities he had to experience or observe the event in question;
 - (ii) The quality, integrity and independence of his recollection of each event in question.
- (c) The probabilities of each conflicting version. This requires an analysis and evaluation of the probability or improbability of each party's version on each of the disputed issues.

In the final step the Court/Commissioner will then determine whether the party burdened with the onus of proof has succeeded in discharging it.

- [27] Mr Dlamini contradicted himself by saying that initially he and the applicant had a good and professional relationship but with the same breath he stated that his very first meeting with the applicant, shortly after he commenced services, was unprofessional, intimidating, created a hostile environment, fear and tension and unacceptable gestures. In other words, Mr Dlamini is saying that at the start they had a good relationship and at the first meeting the applicant harassed him and created a hostile, intimidating environment. This is a material contradiction by Mr Dlamini because there could not have been a good relationship and a hostile environment at the same starting time of employment. It is these contradictions which negatively affects the credibility and reliability of a witness' evidence. Furthermore, Mr Dlamini stated that the applicant never allowed him or the employees any opportunity to speak or to give their input but with the same breath he said that during their first meeting the applicant asked questions to the employees. This is another inconsistent submission by Mr Dlamini. Moreover, on Mr Dlamini's own version, he requested to have a meeting with the applicant to project his power point

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presentation which was granted and additionally Mr Dlamini was invited by the applicant to project his power point presentation to the business. This submission by Mr Dlamini is inconsistent with his submission that he was not granted an opportunity to give his input in the business. Mr Dlamini stated that he sent a WhatsApp message to the applicant at 4am in the morning but with the same breath he claims that he was intimidated and harassed from the onset at his first meeting with the applicant. Logically this does not make sense. During cross examination Mr Dlamini stated that the applicant did not inform him of his non-performance in any of their meetings because he was over performing. However, in his evidence in chief he testified that the applicant addressed the team about their overall performance on 6 June 2023. Furthermore, he stated that the applicant was dissatisfied with their overall performances. Moreover, Mr Dlamini also stated that the applicant made a public comment about his performance. Additionally, Mr Dlamini stated that the applicant gave his performance review in an airlock where the applicant gave him a score of 2/5 which was below satisfactory. So, on the one hand, Mr Dlamini said that in none of their meetings did the applicant address their performances and on the other hand he said that the applicant expressed his dissatisfaction about their performances during their Teams meeting. Another contradicting version by Mr Dlamini which obviously questions the credibility of his evidence. During cross examination I noticed that Mr Dlamini was evasive in answering certain questions.

- [28] When perusing the minutes of the grievance hearing, the disciplinary hearing and the evidence of Mr Dlamini at the arbitration hearing, I noticed many contradicting versions of Mr Dlamini. It is clear that he was trying to portray the applicant as a very bad manager during the arbitration hearing. In comparing the bundle of evidence submitted by the respondent (the minutes of the hearings) with the oral evidence of Mr Dlamini at the arbitration hearing, it is evident that Mr Dlamini was untruthful with some of his submissions. At the enquiries Mr Dlamini stated that he explained to the applicant that there was a quality issue with the product but at the arbitration hearing Mr Dlamini stated that the applicant did not give him the chance to explain himself. At the arbitration hearing Mr Dlamini stated that there was no request made for the stock of 17 May 2023 to be transferred to EL but at the disciplinary enquiry he stated that there was a request made. At the arbitration Mr Dlamini tried to use more adjective words to paint a terrible character and

behaviour of the applicant but those adjectives were not mentioned by Mr Dlamini at the enquiries. In considering the total evidence before me, I find that the applicant did not harass or bully Mr Dlamini, the applicant merely gave him instructions to perform his duties because in the three incidents (17 May, 14 June and 19 June 2023) the products were not delivered as required and there were discrepancies regarding the products on 14 June 2023. The applicant just requested and instructed the pharmacists to resolve the problems and to get the work done. Instructing an employee to get the work done which was delayed, cannot be regarded as bullying or harassment in my view. I cannot accept Mr Dlamini's evidence that the applicant was shouting aggressively at him because Mr Dlamini's

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evidence is not reliable due to the various internal and external contradictions. There is no supporting proof before me to show that the applicant was shouting or screaming at Mr Dlamini. In fact, the applicant appears to be a calm and professional person when he tendered his evidence during the arbitration hearing with a very good character and personality. From the evidence it is clear that Mr Dlamini did not want to report to the applicant because of the difference in their educational qualifications. It is evident that he was reprimanded by the grievance chairperson due to his disrespectful conduct towards the applicant and the disrespectful comments he made about the applicant. Mr Dlamini acknowledged that he received counselling for his conduct and behaviour towards the applicant. On the issue of Mr Dlamini's medical condition, there is no date on the doctor's medical certificate which raises questions and moreover, medical certificates are regarded as hearsay evidence because the doctor and specialist has not tendered evidence before me. Mr Dlamini resigned by giving two month's notice to the respondent, it appears he did not lodge any constructive dismissal dispute and yet he claims a toxic and hostile working environment which does not make sense at all.

- [29] On the issues of Ms Magielies the evidence clearly shows that she did not perform her duties correctly in relation to the spreadsheet which was very important. She acknowledged that the applicant's biggest concern with her was the updating of the spreadsheet and that Mr Preston had to remind her at times of updating the spreadsheet. According to Ms Magielies there was a lack of resources, a lack of proper training when she commenced in the warehouse and lack of capacity and this may have influenced her performance. Moreover, there was a backlog when she started at the warehouse. When Ms Magielies was asked in evidence in chief to describe or to explain the bullying and harassment, she was unable to give an explanation of the alleged harassment. On that very note, the respondent failed its case. The total evidence of Ms Magielies for me does not reflect or prove harassment or bullying. There is no sufficient evidence to make such a finding. On her own version she did not do her work as required as she was busy with other instructions of Mr Pienaar. As a result of her not performing her duties, she was merely instructed by the applicant to do her work. With the evidence before me, I cannot find that the applicant harassed or bullied Ms Magielies or Mr Dlamini. In the premises I must conclude that the respondent failed to discharge the onus of proof and therefore I find that the applicant's dismissal was substantially unfair. On the issue of procedural fairness the applicant claims that his dismissal was procedurally unfair because the respondent included the final written warning during the enquiries. Whether the final written warning was included or not does not have a bearing on the procedural fairness of a dismissal. Procedural fairness entails an opportunity to state a case. It appears that the applicant was afforded such an opportunity to state his case. The procedural issue raised by the applicant is rejected because it does not fall within the ambit of item 4 of Schedule 8 of the LRA, the Code of Good Practice: Dismissal. Ms Ayesha did not testify at this arbitration and therefore I do not have her evidence to make any determination regarding her.

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- [30] The applicant sought retrospective reinstatement as a relief. I see no reason why the applicant should not be reinstated with retrospective effect considering the unfairness of the dismissal. Reinstatement is the primary remedy in terms of section 193 of the LRA. The applicant earned R86 868,74 per month and he was dismissed on 13 December 2023. The applicant lost thirteen months of salary as a result of the unfair dismissal. I will however not grant him the full back pay since I considered the conciliation period, the lengthy evidence presented, the many dates used for arbitration, the period used for written closing arguments, extension of the submission of the award and the time frames lapsed in scheduling the matter for conciliation and arbitrations. I am of the view that six months remuneration would be fair and equitable. Calculating six months' salary would be as follows: $R86\,868,74 \times 6 = R521\,212,44$.

Award

- [31] The dismissal of the applicant, Mr Henry Russell, by the respondent, Aspen Pharmacare (Pty) Ltd, was substantively unfair.
- [32] The respondent, Aspen Pharmacare (Pty) Ltd, must reinstate the applicant, Mr Henry Russell, into the same position he occupied and on the same terms and conditions as governed before the date of dismissal.
- [33] The respondent, Aspen Pharmacare (Pty) Ltd, must pay to the applicant, Mr Henry Russell, an amount of R521 212,44 as back pay by no later than 28 February 2025.
- [34] The applicant must report for duty on Monday 3 March 2025.

The following case was referred to in the above award:

Stellenbosch Farmers' Winery Group Ltd and another v Martell *et Cie* and others [2002] JOL 10175 (2003 (1) SA 508 11) (SCA)