GENERAL PUBLIC SERVICE SECTOR BARGAINING COUNCIL

# IN THE GENERAL PUBLIC SERVICE SECTOR BARGAINING COUNCIL HELD AT CERES

Case No GPBC1146-2016

*In the matter between*

**PSA obo HANSE** Applicant

and

**DEPARTMENT OF CORRECTIONAL SERVICES** Respondent

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**ARBITRATOR:** Adv D P Van Tonder

**HEARD:** 13 October 2016; 25 November 2016
6 February 2017

**FINALISED:** 20 February 2017

**DELIVERED:** 23 February 2017

***SUMMARY:*** ***Labour Relations Act 66 of 1995 – Section 186(2)) – Alleged Unfair Labour Practice – Disciplinary action short of dismissal/suspension – Breach of security rules resulting in the escape of a prisoner – Sanction of one month suspension without pay***

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## ARBITRATION AWARD

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## I THE PARTIES

### *Applicant*

[1] The applicant is PSA, a trade union registered in terms of the LRA, who has referred a dispute on behalf of its member Mr Hanse. The applicant was represented by Mr Strydom from PSA. Although PSA is technically the applicant, I will for ease of reference in this award refer to Mr Hanse as the applicant.

### *Respondent*

[2] Respondent is the Department of Correctional Services. On 13 October 2016 respondent was represented by Mr Xaphe, on 25 November 2016 it was represented by Mr Le Roux and on 6 February 2017 it was represented by Mr Luphondo, who are all employees of respondent.

## II PROCEDURAL HISTORY

[3] This matter was conciliated before another panellist but could not be settled. When the matter first came before me for arbitration on 13 October 2016, it was postponed at the request of respondent. Evidence was heard on 25 November 2016 and 6 February 2017 in Ceres. The proceedings were digitally recorded. The arbitration was finalised when I received the final written closing arguments via the GPSSBC on 20 February 2017.

## III THE ISSUES TO BE DETERMINED

[4] I am required to determine whether an unfair labour practice relating to disciplinary action short of dismissal was committed by the respondent, and if so, the appropriate relief.

## IV BACKGROUND TO THE DISPUTE

[5] Applicant has been employed by respondent since November 1987. He is currently employed as a correctional services official grade 1 and is based at the Warmbokkeveld Correctional Centre in Ceres. On 11 September 2015 an offender escaped from the Warmbokkeveld Correctional Centre. Applicant was charged with misconduct in a disciplinary hearing. The charge sheet reads as follows:

> Charge: You Mr. Hanse P.S. (Persal no. 12273813) is hereby formally charged for contravening the Code of Conduct, Resolution 1/2006, Annexure A, paragraph (ii) for allegedly breaching the security measures of Warmbokkeveld Correctional Centre by placing objects in the doorframes of two (2) doors at the reception area on 2015/09/11 at about 07H36 and about 08H58 which prevented the doors from properly closing and locking which directly lead to the escape of offender van Wyk (Prison no. 215827816) on 2015/09/11 at about 15H28 from the reception area at Warmbokkeveld Correctional Centre.

[6] Following a disciplinary hearing presided over by Mr Stemmet and initiated by Mr Le Roux, applicant was convicted of the charge. During February 2016 the chairperson imposed a sanction of 3 months suspension without pay. On appeal the conviction was confirmed, but the sanction was reduced to 1 month suspension without pay. At the time of his conviction applicant was a first offender.

## V THE EVIDENCE

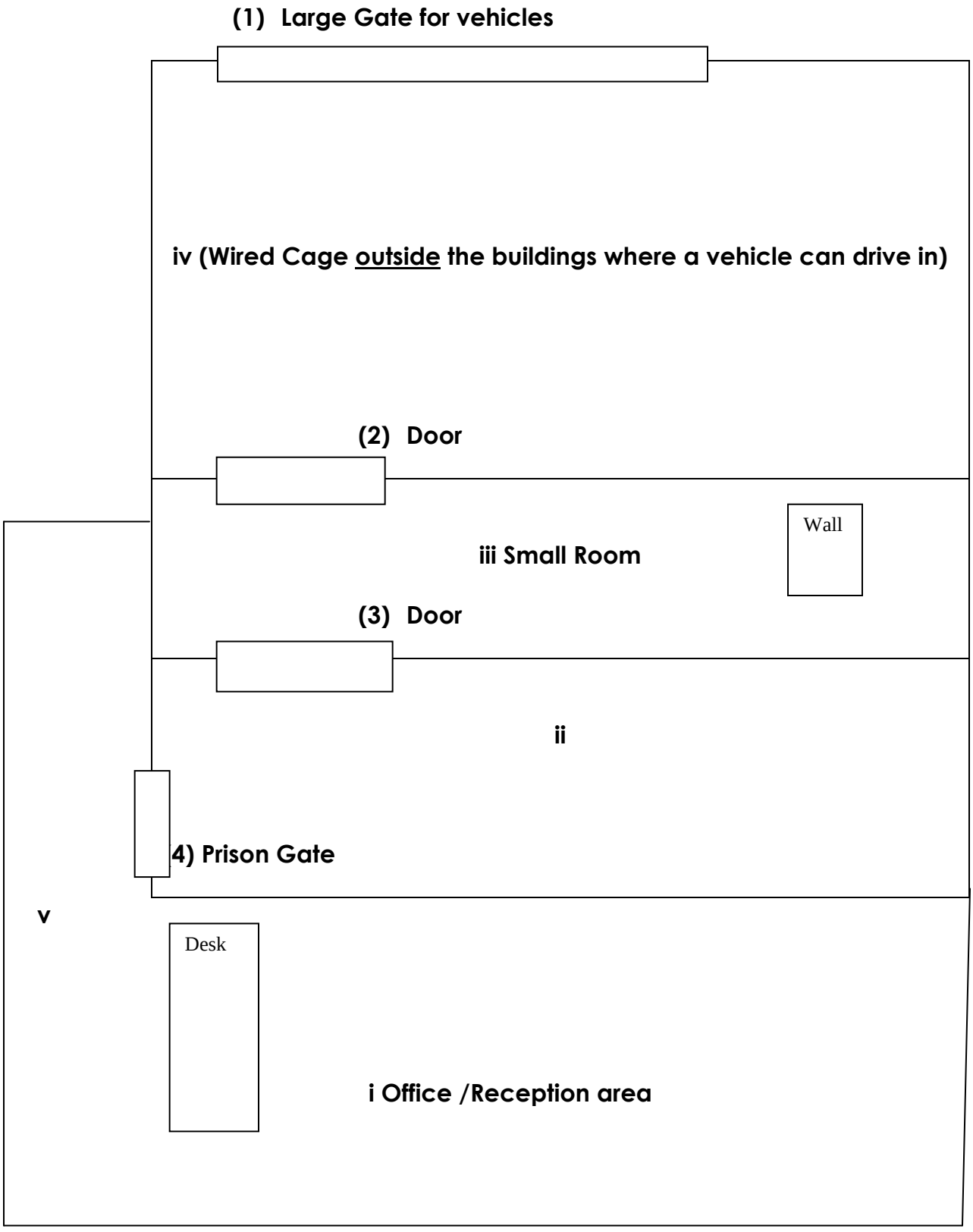
### Documentary evidence

[7] Two main bundles of documents were submitted as evidence and several further documents were submitted during the arbitration hearing. I will refer to documents if and where necessary during my discussion of the evidence and arguments. Video footage of the escape was also viewed and handed in as exhibits on DVD.

### Inspection in loco

[8] On 25 November 2016 and again on 6 February 2016 we conducted an inspection *in loco* of the area where the escape took place. The rough sketch[1] that we agreed on and which reflects the area which we saw during the inspection *in loco* more or less looks as follows:

[1] Marked "D"


(1) Large Gate for vehicles
iv (Wired Cage outside the buildings where a vehicle can drive in)
(2) Door
Wall
iii Small Room
(3) Door
ii
4) Prison Gate
v
Desk
i Office /Reception area

**Common cause issues**

[9] The area as reflected on the sketch (D) is a high security area where prisoners are admitted to the prison or where they move through when they are discharged or when taken to court or somewhere else. Prisoners can only enter and leave the prison through this area.

[10] It is common cause that on 11 September 2015 applicant was on duty at the Warm Bokkeveld Correctional Centre between 7:00 and 14:00 and that the prisoner Mr Van Wyk escaped at approximately 15:28 that day. It is father common cause that early the morning after he reported for duty in the reception area (area i on the sketch), applicant placed an object on the ground between the door and the frame of door 2 and another object on the ground between the door and the frame of door 3, which prevented these doors from fully closing. These doors generally lock automatically when closed and must then be unlocked again. The objects remained in the doors, preventing them from fully closing and locking until the inmate Mr Van Wyk escaped at 15:28 that afternoon.

[11] After 15:00 that afternoon a SAPS vehicle came in from court with prisoners and entered the cage (area iv on the sketch). While the vehicle was stationed in the cage, gate 1 was closed and locked.

[12] The inmate Mr Van Wyk who was awaiting trial and who had just returned from court, escaped from inside the prison building by moving from area ii through the unlocked door number 3 and then moved through area iii into area iv (the cage) through the unlocked door number 2. [2]

[13] Once the inmate was in area iv (the cage), the video footage shows that he was directly behind the police van and then disappears out view of the camera behind the police vehicle. The police vehicle then left the cage after gate 1 opened, and eventually the van left through the main exit of the correctional facility. It is common cause that the inmate escaped with the SAPS vehicle, but is it is unclear whether he climbed into the back of the bakkie or whether he was hanging underneath the bakkie during his escape.

[2] It needs to be noted that the prisoner came out of door 2 twice. The first time he was outside the building and inside the cage briefly, and then disappeared inside into area iii again. Later just a few seconds after SAPS officials exited the building through door 2, the prisoner again exits through door 2 and disappears out of sight of the camera behind the SAPS van.

**Evidence on behalf of applicant**

[14] **Petrus Stefanus Hanse**, the applicant testified that he was stationed in the office of the reception area on 11 September 2015. He has been working in reception for more than 15 years. He is aware that as a rule, doors in the prison may not stay open and must be locked. During cross-examination he admitted that it was wrong to leave the doors open.

[15] He explained that the reason why he placed the objects in the doors that day was for the sake of work flow. The electronic security system of the doors were not working. The doors have been designed to open electronically, but because this system was not functioning, the doors had to be manually locked and unlocked with keys. This was done on a daily basis. The official who arrived first in the morning would place objects in the doors so that they do not lock. Everybody who worked in that area was aware of this. Even the acting head of prison Mr Norman was aware of this. His supervisor in the reception area Mr Radi was also aware of this. In elaborating what he means by saying that he left the doors open for the sake of work flow, he explained that it would delay the work if the doors had to be locked and unlocked by him every time that officials and prisoners had to move through these gates. The SAPS who brought in prisoners or collected prisoners would have had to wait long. Furthermore the keys get stuck in the doors when they are used too often.

[16] For the following reasons he does not agree that his actions caused the escape. Even when doors 2 and 3 are unlocked, a prisoner can still not escape when he moves through these doors because he will then be in the cage area (area iv on the sketch) which has a locked gate (gate 1 on the sketch). Once gate 1 is opened, and the prisoner leaves the cage area, he is still within the fenced premises of the prison. In order for the prisoner to leave the prison premises, he needs to move through the controlled exit gate. Furthermore, he went off duty already at 14:00 that day and cannot be held responsible for an escape that happened after 15:00 when many other officials had in the meantime moved through doors 2 and 3 before the escape took place.

[17] According to the charge sheet the prisoner escaped at 15:28 but according to the SAPS body receipt the prisoner was only signed over to the prison officials at 15:31.[3] This means that the prisoner was still the responsibility of the SAPS when he escaped. The SAPS therefore had to ensure that he was safeguarded.

[3] Exhibit E

[18] A colleague Ms Msweli was on duty at the exit control gate where the SAPS vehicle left the premises with the prisoner who escaped. She opened the gate. Although she was charged for dereliction of duties she only received a final written warning. This is unfair.

[19] According to applicant there were several factors that contributed to the escape namely:

- The negligence of the SAPS who still officially had control over the prisoner when he escaped through door 2;
- The negligence of Ms Msweli at the main gate who did not search the SAPS vehicle and who opened the main gate which resulted in the prisoner leaving the prison premises;
- The fact that there were not sufficient officials on duty in the reception area;
- The members on duty who should have ensured that the number of prisoners in the area corresponded with the numbers on the body receipts;
- The official who opened gate 1 who should have first checked on the monitors that it was safe to open gate 1 before opening it;
- The fact that there was no guard at gate 4 at the time.

[20] During cross-examination applicant admitted that he had the keys of door 2 and 3 in his possession that morning and used those keys to unlock the doors. It was only the electronic system to open the doors which did not work. He also admitted that after an official removed the object preventing door 3 from closing, which resulted in it automatically locking again, he again unlocked this door and placed the obstacle back to prevent the door from locking. He also admitted that by placing the obstacles in the door he created an opportunity for the prisoner to get to the cage. He however maintained that once in the cage, the prisoner could not escape unless somebody opened gate 1 as well the main exit gate. Sometime after the escape, the key broke off in door number 3, and as a result this door is now standing open all the time as it has not been fixed yet. Since the escape they have been keeping door number 2 locked. Each time that somebody needs to move through this door, it is unlocked with the key and immediately thereafter it is closed and locked again. This has been the practice since the escape.

[21] The sanction of one month suspension without pay was enforced during August 2016. He asked for an order directing the employer to pay to him the basic salary and benefits that he had lost due to the one month suspension without pay.

[22] **Benjamin Norman** testified that he was employed as acting head of the Warmbokkeveld Correctional Centre during 2015. He retired shortly before he gave evidence on 25 November 2016. He only heard about the escape on 12 September 2015 when it was discovered.

[23] The Warmbokkeveld Correctional centre is a newly build facility which has been designed so that doors and gates are unlocked electronically from a control room where there are CCTV monitors to see who is at the door or gate. The problem is that that the electronic system often malfunctions and then officials have to use keys to unlock the doors. As a result it came to his attention that members started to put obstructions in some of the doors to prevent them from locking. He is aware that this was the case with door 3. He was not aware that obstructions were placed in door 2 as well. That was not permissible. Had he been aware that door 2 was also standing open, he would have given an instruction to secure it. Later during re-examination he said that even when both doors 2 and 3 were open, gate 1 was still locked which means that a prisoner could not escape. Door 3 has been broken for more than a year already because the key broke off in the lock and therefore it is now standing open permanently. In the 30 years that he has been working for respondent he has never heard of a rule that doors in a prison may remain open.

**Evidence on behalf of respondent**

[24] **Mariana Elizabeth Van Zyl** testified that she has been employed by respondent for 31 years. She is employed as assistant persal controller in HR. She is responsible for implementing deductions from salaries. After she received an instruction to implement applicant's one month suspension without pay during 2016, she effected it. The result was that applicant received no remuneration or benefits for that month, and third parties such as applicant's pension fund, medical aid and insurance companies also received nothing from respondent on behalf of applicant. The amount of basic salary including housing subsidy that applicant lost for the month of his suspension is R26 807,75. The employer's contribution to the medical aid which the employer did not pay over that month was R2633. As no contributions were made to the medical aid on behalf of applicant that month, his membership was terminated, but he was later readmitted as a member. The employer's contribution to the pension fund which the employer did not pay over that month was R4097,23.

[25] **Reon Le Roux** testified that he has been employed by respondent for more than 30 years. He has been investigating cases on behalf of respondent for more than 6 years and has done more than 700 investigations. After the escape which took place at Warmbokkeveld in September 2015 he was appointed as investigating officer.

[26] As part of his investigation he viewed all the video footage from the CCTV cameras for 11 September 2015 for the entire reception area. Early that morning applicant unlocked doors 2 and 3 with a key and placed obstructions at doors 2 and 3 so that they cannot close. This is not permissible because all doors in a prison must at all times be locked. At 8:30 a SAPS official removed the obstruction at door 3. That door then locked. At 8:56 applicant approached door 3 with an offender and discovered that it was locked again. Applicant disappeared and came back with the key and unlocked door 3 again. In the presence of the offender applicant then again placed an obstruction in door 3 preventing it from fully closing and locking.

[27] Applicant went off duty at approximately 14:00. At 15:26 the SAPS arrived with a vehicle which they parked in the cage (area iv). The SAPS entered through doors 2 and 3 and went into the reception area. There were 7 inmates that the SAPS brought in from court. At some stage, while the SAPS is still inside the reception area, an inmate who had just been brought in by the SAPS came through door 3 from area ii into area iii. He then went through door 2 into area iv (the cage). The prisoner bent down behind the bakkie (SAPS vehicle). The prisoner went back into area iii through door 2. The prisoner must have remained in area iii because he never moved through door 3 again.

[28] Later the SAPS members left the building through door 2 just before they drive off with the SAPS vehicle. Seconds after the members of the SAPS left through door 2, the prisoner also leaves through door 2 and enters the cage (area iv) where he disappears behind the SAPS vehicle. He is never seen after that day on the video footage again. Gate 1 was then opened and the SAPS vehicle left the cage. All this is visible on the video footage.

[29] During his investigation he could not establish who the official is who pressed the remote control and opened gate 1 for the SAPS that afternoon. Nobody in the reception area was prepared to talk to him. If everything worked correctly an official in the reception should have looked at the monitor to observe the cage before opening gate 1 with a remote control for the SAPS. However, he could not establish whether the monitor was working that day or whether officials in the reception area were watching the monitor before opening gate 1.

[30] Earlier that day at approximately 9:00 the video footage also shows that Mr Radi (who was the supervisor at the reception) moved through doors 3 and 2 while the obstructions were placed there.

[31] Ms Msweli who opened the main exit gate for the SAPS vehicle was only charged for dereliction of duties. Her misconduct was not as serious as that of applicant and the employer asked the chairperson to impose a final written warning for Ms Msweli. This was indeed the sanction that was imposed on her. The misconduct of Ms Msweli consisted of allowing both gates at the main exit to be open at the same time and failing to search the SAPS vehicle. However, her actions did not contribute to the escape of the prisoner. Even if the prisoner who escaped was in the back of the bakkie, she would never have known that he is escaping because her duty was to not count the prisoners in the vehicle and compare them with lists of prisoners who are leaving the prison. That is not done at the main exit gate.

[32] He was the initiator in the cases of applicant and Ms Msweli and the chairperson in both cases was Mr Stemmet. They hearing of Ms Msweli took place first. She pleaded guilty. Thereafter the hearing of applicant took place. Asked how the chairperson Mr Stemmet knew during the hearing of Ms Msweli that there was an escape at the prison when no such evidence was presented during her hearing, he responded that he does not know.

[33] In his view the excuses that applicant made for his conduct, namely that he did it to facilitate work flow and because he was scared that the keys may break, are not acceptable reasons for breaching security rules and leaving doors open. He is of the view that the conduct of applicant directly caused the escape of the prisoner Mr Van Wyk. It caused great embarrassment to the employer because the escape was reported in the local newspaper and questions were even asked about it in parliament.

[34] **Robert John Stemmet** testified that he has been employed by respondent for 36 years. He is a deputy director and head of the Worcester male correctional centre. He has been in that position for 16 years. He has acted as presiding officer in disciplinary hearings since 1990.

[35] He was the chairperson of the disciplinary hearings of Ms Msweli and applicant. There were separate hearings for these two officials. Asked how he was aware during the hearing of Ms Msweli that an escape had taken place on 11 September 2015 as this was not placed before him during that hearing, he explained that in the management meeting in Worcester, all escapes in the district must be discussed and that they were therefore informed of the escape in a management meeting. They were however not provided with details of the escape and neither were they informed who the officials are who were involved in the escape.

[36] Ms Msweli pleaded guilty and he imposed a final written warning as sanction which he believes was an appropriate sanction. Although her conduct amounted to dereliction of duties when she left both gates at the main exit gate open at the same time, her conduct did not contribute to the escape of the prisoner. It was not her duty to count the prisoners in the SAPS vehicle and make sure that the number corresponds with the body receipts and other documents in possession of the SAPS. That is not being done at the exit gates. He knows this because he is the head of a correctional facility.

[37] Applicant's conduct was much more serious than the conduct of Ms Msweli. His actions directly resulted in the escape. He accepts that one can never say that an escape could never have taken place had applicant not acted in the manner that he did. However, applicant's conduct made it easier for the offender to escape. The rule is that doors in a prison may not stand open. It is the duty of applicant and all other officials to safeguard offenders and ensure that they do not escape from prison.

[38] Applicant's excuse that he had to do what he had done for the sake of the flow of the work is not acceptable. An official is not allowed to discredit the security system merely for the sake of the flow of the work.

[39] This escape caused great embarrassment to the employer because there were enquiries from the community and questions were even asked about it in parliament. The reason why this was such a sensitive issue is because the Warmbokkeveld prison was built not too long ago as a state of the art new generation correctional facility at great costs and here a prisoner escaped from it by simply walking out through the doors.

[40] He was of the view that applicant's conduct had broken the trust relationship and seriously considered to dismiss applicant. However because of his long service and mitigating circumstances, he decided not to dismiss applicant and he imposed a sanction of 3 months suspension without pay, which was later changed on appeal to one month suspension without pay.

## VI ARGUMENTS

[41] For the sake of brevity I do not intend to summarise the written arguments here as they form part of the record. On behalf of respondent it was submitted that the conviction and sanction should be confirmed. On behalf of applicant it was submitted that he is not guilty of any misconduct, and that the sanction was too harsh.

## VII DISCUSSION

[42] Section 186(2)(c) of the Labour Relations Act No 66 of 1995[4] creates an unfair labour practice and reads as follows:

> " '***Unfair Labour Practice***' means any unfair act or omission that arises between an employer and an employee involving...the unfair suspension of an employee or any other unfair disciplinary action short of dismissal in respect of an employee"

[43] An employee who alleges that he is the victim of an unfair labour practice bears the onus of proving all of the elements of her claim on a balance of probabilities.[5] The employee must prove not only the existence of the labour practice, but also that it is unfair.[6] In relation to both alleged procedural unfairness and alleged substantive unfairness, the onus in an unfair labour practice dispute is therefore on the employee to prove his claims on a balance of probabilities.

[4] hereinafter referred to as "the LRA"

[5] MISA obo Bezuidenhoudt v Stanmar Motors (JR 1326/2011) [2012] ZALCJHB 84; Grogan *Employment Rights* (Juta & Co, 2010 edition) 100; Basson et al *Essential Labour Law* (5th ed, 2009) 212; *Provincial Administration Western Cape (Department of Health & Social Services) v Bikwani & others* (2002) 23 ILJ 761 (LC) para 32; *Dempsey v Home & Property* (1995) 16 ILJ 378 (LAC); *Louw v Golden Arrow Bus Services (Pty) Ltd* [2000] 3 BLLR 311 (LC); *Woolworths (Pty) Ltd v Whitehead* [2000] 6 BLLR 640 (LAC); *Trade and Investment South Africa & another v GPSBC & others* [2005] 5 BLLR 517 (LC); *Pillay v Krishna* 1946 AD 946; *Fourie's Poulty Farm (Pty) Ltd t/a Chubby Chick v CCMA* [2001] 10 BLLR 1125 (LC); Randles v Chemical Specialities Ltd (2011) 32 ILJ 1397 (LC)

[6] Grogan *Employment Rights* (Juta & Co, 2010 edition) 100

**PROCEDURAL FAIRNESS**

[44] On behalf of applicant it was submitted that there was procedural unfairness because Mr Stemmet was the presiding officer in the matter of Ms Msweli and thereafter also acted as presiding officer in the case of applicant. Mr Strydom said that at the time of applicant's disciplinary hearing he was not yet aware that Mr Stemmet had acted as presiding officer in the previous matter and could therefore not have raised the issue of bias during the disciplinary hearing. He submitted that as a result of Mr Stemmet's prior knowledge of the case in that he presided over the case of Ms Msweli first, Mr Stemmet was biased. He referred to the guidelines for managers issued by respondent where it is stated that a presiding officer should recuse himself where he has prior knowledge of a case or where he had previously been involved in a case.

[45] The guidelines that Mr Strydom referred to are only guidelines and nothing more. It is not mandatory to follow them and they certainly do not reflect the position at common law. I am of the view that to make it mandatory for a presiding officer of a disciplinary hearing to recuse himself merely because he has some knowledge of the facts of the case, would amount to raising the bar too high. It all depends on the extent of his knowledge whether it could be said that a reasonable apprehension of bias exists.

[46] In the case of magistrates for example, it has been held that the mere fact that a magistrate has knowledge of the facts of a case and has expressed an opinion about the case is not in itself sufficient to raise a reasonable apprehension of bias resulting in his recusal even if he expressed the opinion in another case and even if the same parties and the same facts were involved. [7]

[47] Of further importance is the fact that disciplinary hearings are meant to be conducted with much less formality than trials presided over by magistrates and judges. [8] It would therefore be wrong to impose burdens on presiding officers in disciplinary hearings that are not even imposed on magistrates. Grogan observes that in disciplinary hearings some measure of institutionalised bias on the part of the presiding officer will always be there and is acceptable.[9] This principle was demonstrated in the case of *Loggenberg & others v Robberts*[10] where the presiding officer was part of the common structure and a member of the prison personnel division with alleged prior personal knowledge of the facts giving rise to the inquiry and particularly knowledge of what had happened to the warders' past grievances which in turn led to their strike.

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[7] R v Kah Coo 1919 TPD 311; Phillips v Hanau & Hoffa (1871) 2 Roscoe 1
[8] Avril Elizabeth Home for the Mentally Handicapped v Commission for Conciliation, Mediation & Arbitration & others (2006) 27 ILJ 1644 (LC) (relied on)
[9] Grogan Dismissal (2nd ed) at 295 and further
[10] Loggenberg & others v Robberts & others (case no 8496/90 11 December 1990 Van den Heever and Nel JJ)

[48] The Cape Provincial Division of the Supreme Court dismissed the application to review the presiding officer's decision not to recuse himself. Ms Justice Leonora van den Heever (Nel J concurring) held, with reference to *Mönnig & others v Council of Review*[11] that a disciplinary hearing conducted within the prison services is not a trial and that employees must accordingly tolerate some form of "institutional" or "departmental bias".

[49] Mr Stemmet testified that he already knew before he presided over the case of Ms Msweli that an escape had taken place in September 2015 at the Warmbokkeveld Correctional Facility because it was mentioned in a management meeting. He said that all escapes in the region must be discussed at the management meetings. He testified that no further details were provided about the escape and they were not informed which officials were involved in the escape. When he was asked to preside over the case of Ms Msweli he was accordingly already aware that it related to the escape. I have no reason not to believe Mr Stemmet and I accept this version. In my view the information shared about the escape in the management meeting was so limited that it could hardly be suggested that a reasonable person would fear that he would be biased when he presided over applicant's case.

[11] Mönnig & others v Council of Review & others 1989 (4) SA 866 (C) at 879G-880B

[50] The minutes of the disciplinary hearing of Ms Msweli was handed over to Mr Strydom during the evidence of Mr Stemmet for cross-examination purposes. Based on what was put to Mr Stemmet by My Strydom after he had perused those minutes, it is clear that no information about the actual escape was placed before Mr Stemmet during that hearing where Ms Msweli pleaded guilty. In that hearing the emphasis appears to have been on the mitigating factors for purposes of imposing a sanction. The information placed before Mr Stemmet's in Ms Msweli's case was accordingly of such a nature that it could not possibly be suggested that merely because he presided over the case of Ms Msweli, therefore a reasonable person would fear that he would be biased in the subsequent case of applicant.

[51] Under these circumstances this argument about alleged bias must fail. Since no further points of alleged procedural unfairness was raised, I find that there was no procedural unfairness.

**SUBSTANTIVE FAIRNESS**

[52] In relation to substantive fairness, applicant claims that he is not guilty of misconduct, that there was inconsistency and that the sanction was too harsh. I will now proceed to discuss whether applicant is guilty of any misconduct.

[53] In an unfair dismissal dispute the onus is on the employer to prove the misconduct. However, because the onus is on an employee who refers an alleged unfair labour practice dispute to prove each and every element of the alleged unfair labour practice, the onus is not on the employer in this case, but on applicant to prove on a balance of probabilities that he is in fact not guilty of the charge.

[54] In essence the charge against applicant is that he breached security measures which led to the escape of a prisoner. In terms of our law no misconduct takes place unless the offender's conduct was unlawful and unless the offender has the necessary mens rea (in the form of intention or negligence). Hence these elements must by necessary implication be read into the charge. The further element of causation must also be read into the charge because it is alleged that applicant's conduct resulted in the escape of a prisoner. To summarise then, the charge against applicant consists of the following elements:

- the unlawful breach of security measures,
- which was either intentional or negligent,
- resulting in the escape of a prisoner.

[55] There are not really any significant factual disputes before me about what transpired on 11 September 2015. It is common cause that an inmate Mr Van Wyk who was awaiting trial and who was brought in by the SAPS from court into the reception area on 11 September 2015 escaped that day at approximately 15:28. Applicant who reported for duty that morning unlocked doors 2 and 3 and placed an obstruction in the door frames of door 2 and door 3, preventing these doors from fully closing and locking. Applicant went off duty at 14:00 that day at which stage both doors were still being prevented from closing due to the objects that applicant had placed in the door frames. The prisoner left the prison building through door 3 and door 2 which were still open at that stage due to the obstructions that applicant had placed there. Once the prisoner exited door 2 he was no longer inside a building, but inside a large cage where the SAPS vehicle was parked. Although nobody knows whether the prisoner climbed into the back of the bakkie or whether he crawled in underneath the bakkie and concealed himself underneath it, the video footage clearly shows that the last time that he appeared on any video footage is when he disappeared behind the police van shortly before the police van left the premises. It is further not in dispute that he was later re-arrested outside the prison premises. The only reasonable inference to draw is that he must have left the cage in or underneath the police vehicle.

[56] It is further common cause that shortly after the prisoner disappeared behind the police van in the cage, the gate of the cage was opened with a remote control and that the SAPS vehicle then left the cage and drove down the driveway up to the main exit gate of the prison, where Ms Msweli was on duty and where she opened the main gate for the SAPS, whereafter they left the prison premises.

*Was there an escape?*

[57] During the arbitration hearing there was a debate between Mr Strydom and Mr Le Roux as to what exactly the word escape means and when exactly it could be said that an escape has occurred. Mr Strydom suggested that until such time as the prisoner finds himself outside the fence of the prison, there is not yet an escape and but only an attempted escape.

[58] At common law an escape is defined as the unlawful attaining of liberty by a person who has been lawfully arrested or incarcerated. [12] In *R v Msuida* the court held that the essence of the offence of escape does not lie in the fact that the escaped prisoner was surrounded by walls or by a fence, but in the fact that he escaped from lawful custody. [13]

[12] Milton South African Criminal Law and Procedure Volume III at 223
[13] R v Msuida 1912 TPD at 419

[59] And in *R v Bergmann*[14] it was held out that an escape may either be achieved where the prisoner (1) removes himself from the range of the controlling fence or (2) removes himself from the controlling agent. It is therefore trite law that an escape does not necessarily occur once the prisoner finds himself outside the fences of a prison.

[60] I have already accepted the evidence of Mr Stemmet that it is not the duty of or normal practice for the officials who are stationed at the main exit gate to control the entry and exit of prisoners. Their job is only to control the access and exit of vehicles. It seems to me therefore that once prisoner van Wyk left through door 2 and climbed into the back of the SAPS vehicle (or climbed in underneath it and concealed himself underneath the vehicle), he had already removed himself from the controlling agents (namely the prison authorities) as nobody knew any longer where he was and could no longer exercise any physical control over him. It therefore seems to me that it was at that stage already that there was a completed escape and not merely an attempted escape anymore. However, even if I were wrong in this respect, not much turns on it due to the fact that it is common cause that prisoner van Wyk did indeed leave the fenced area of the prison on 11 September and was later re-arrested outside the prison boundaries, which means that there was certainly an escape.

[14] R v Bergmann 1935 SWA 107 at 109

[61] Whether or not the prisoner was still attempting to escape or still in the process of escaping before he left the main exit gate, is not of particular relevance for purposes of determining applicant's guilt because the charge against him is that his actions led to the escape of this prisoner, and it is common cause that there was indeed an escape.

*Did applicant breach security measures?*

[62] Both Mr Le Roux and Mr Stemmet testified that doors 2 and doors 3 had to be locked at all times and that it was a security breach to leave them open and not to lock them. Even applicant and his witness Mr Norman agreed that prison doors must as a rule be locked. Mr Norman even testified that he was only aware of the fact that door 3 was standing open and that had he been aware that door 2 was standing open he would have instructed that it must be closed. I was not surprised by the evidence of the various witnesses in this regard. I would indeed have been surprised if anybody had testified that it does not constitute a security breach to leave doors in a prison unlocked in an area where offenders move through on a regular basis, particularly an exterior door such as door 2. It is just common sense that doors in prisons that can lock, are designed by the architects of the prison to remain locked and that to leave such doors unlocked constitutes a security breach when prisoners regularly moves through those doors.

[63] I am accordingly satisfied that by placing obstructions in the doorframes of doors 2 and 3 after unlocking them, applicant did in fact commit a security breach as intended in the Disciplinary Code.

*Mens rea (guilty mind in the form of intention or negligence)*

[64] It is not in dispute that applicant was well aware that as a rule doors must remain locked. In fact, if he gave any other version, I would not have believed him because surely any member of correctional services who has almost 30 years' service would be aware of this rule, which is after all only common sense. I am also satisfied that applicant knew very well when he placed the obstructions in the door frames that he was committing a breach of the security rules and doing wrong. He accordingly acted with the necessary intention to commit a breach of the security rules. This element of the offence has accordingly also been established.

*Unlawfulness*

[65] Conduct is generally unlawful where the offender has no lawful excuse for his conduct. Lawful conduct does not amount to any misconduct. Applicant did not suggest that he had permission to act in the manner that he did. He conceded that he is not aware of any policy or directive which permits prison doors to remain unlocked.

[66] The fact that officials, including some of applicant's superiors (like Mr Radi) were aware that the doors were standing open like this, does not mean that applicant had permission to do what he had done. Unless permission had been given by a high ranking official such as the head of the prison, applicant could surely not have thought that he had permission to act in this manner. The fact that many officials knew about this practice and the fact that other officials may have committed similar misconduct on other days may be mitigating factors when considering an appropriate sanction, but it cannot exclude the unlawfulness of applicant's conduct.

[67] During the arbitration hearing applicant's excuse for having acted in this manner, was that he had to do it in order to facilitate the workflow, otherwise the SAPS had to wait very long. I agree with Mr Stemmet and Mr Le Roux that this is no excuse for applicant's conduct. One cannot breach security measures and thereby discredit the security system of a prison simply for the sake of workflow. If one must choose between the two options, then security will and must always come first and if need be, the SAPS will have to wait in line for the prisoners to be processes while gates are being locked and unlocked with keys. The same applies to applicant's evidence that keys sometimes get stuck in the locks.

[68] During the disciplinary hearing, applicant apparently also said that he was afraid that the keys may break off in the locks if he used them too often. At the commencement of the arbitration Mr Strydom placed on record that applicant will raise this as a defence. This too cannot be an excuse for applicant's conduct. It is only common sense that the security in a prison can never be compromised merely because there is a fear that a key may break off in the lock. If the key breaks, then so be it, and then it must be dealt with through the necessary contingency measures at that stage.

[69] The excuses that applicant did what he had done due to fear that the keys may break off, or in order to facilitate work flow are accordingly not acceptable unlawfulness, although it could be considered as mitigating factors when considering an appropriate sanction.

[70] Under the circumstances I am satisfied that applicant had no lawful excuse for his conduct and that his conduct was unlawful.

*Causation*

[71] The charge against applicant is that his conduct directly led to the escape of an inmate. In essence this element is what is known in our law as causation. In order to determine whether the conduct of an accused has factually caused a particular result, the so-called *conditio sine qua non*[15] test is used.[16] Conduct is regarded as a *conditio sine qua non* for a situation (result) if the conduct cannot be "thought away" without the situation (result) disappearing at the same time.[17] However, once this test is satisfied it must also be clear that according to human experience, in the normal course of events, the act has the tendency to bring about that type of situation.[18] Only then can it base said that the conduct has caused the result or situation.

[72] After the inmate Mr van Wyk left door 2 and found himself underneath or inside the SAPS vehicle, there were only two things standing between him and his freedom and that was the door of the cage and the main exit gate. I have already held that I accept the evidence of Mr Stemmet that the officials at the main exit gate had no duty to control prisoners entering and leaving the prison but only to perform access control over the vehicles.

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[15] This means a condition without which it could not be, or but for... or without which there is nothing.
[16] Snyman Criminal Law (6th ed) at 79. This is the test for factual causation
[17] Snyman supra at 81
[18] Snyman supra at 85; This is the test for so-called legal causation

[73] While it is so that there is a camera inside the cage and a monitor in the reception area so that the official who opens the gate of the cage with a remote has a view of the inside of the cage, it is important to understand that whatever happens behind a stationary vehicle inside the cage will not be picked up by the camera as the view of the camera will be partially blocked by the vehicle. Secondly it is important to note that on the video footage it is clear that the prisoner only briefly makes his appearance on two occasions. He first comes out from door 2 for a few seconds and then goes back again. The second time that he comes out is a few second after the SAPS comes out from door 2, just before the vehicle drives away. Once again he is visible for only a few seconds before he disappears behind the vehicle and is never seen again on video footage. The third consideration to bear in mind is that we simply do not know whether the monitor in the reception area was working that day. However, even assuming that the monitor was working, then due to the angle of the camera and due to the fact that the prisoner only appears for seconds on the footage, it would mean that unless the official was looking at the monitor the entire time without blinking an eye, and without looking away, and attentively looking at the entire picture on the screen, he would not necessarily have seen the prisoner in the cage because he only appeared for a few seconds.

[74] Under these circumstances, it seems to me that once the inmate left through door 2 and concealed himself underneath or inside the vehicle, he was for all practical purposes a free man. I am satisfied that had it not been for the fact that door 3 and especially door 2 were standing open, the escape would not have happened. I am also satisfied that according to human experience, in the normal course of events, the fact that the prisoner escaped, is exactly the type of result that one may expect when you leave doors (particularly an exterior door) in high security areas of a prison open.

[75] During the course of his evidence applicant listed several other contributing factors that led to the escape of the prisoner. I have discussed them all during the summary of the evidence and see no need to repeat it here again. In this regard our law is clear. In order to find that a causal link was present between conduct and a result or situation, it is unnecessary to find that the accused's act was the ***sole*** cause of the situation; it is sufficient to find that the act was ***a*** cause (possibly one of many) of the situation.[19]

[19] Snyman supora at 89; S v Grobler 1974 (2) SA 663 (T) at 6678H

[76] Hence, while the fact that there were other contributing factors that led to the escape, may be mitigating factors when considering an appropriate sanction, it does not mean that the element of causation has not been established. I am satisfied that the element of causation has been proved and that applicant's conduct directly resulted in the escape.

*The effect of applicant's absence from work during the escape*

[77] Mr Strydom emphasized the fact that applicant was not on duty when the escape took place. It is indeed common cause that when the escape took place after 15:00, applicant was no longer on duty as he had gone off duty at 14:00. This however does not imply that he is not guilty of misconduct. Applicant breached security measures while he was still on duty, took no steps to rectify those security breaches before he went off duty, and those security breaches resulted in the escape.

*Conclusion on guilt*

[78] For these reasons I am satisfied that all the elements of the offence of which applicant was charged, have been proved on a balance of probabilities and that he was correctly convicted.

## VIII THE APPROPRIATENESS OF THE SANCTION

[79] The sanction that was imposed is one month's suspension without pay. On behalf of applicant it was submitted that this sanction was too severe. In terms of the Disciplinary Code of the employer, the employer may impose various sanctions including counselling, a verbal warning, a written warning, a final written warning, suspension without pay for no longer than 3 months, demotion and dismissal.[20]

[80] In determining the appropriateness of the sanction, I adopt the approach of the Constitutional Court in *Sidumo v Rustenburg Platinum Mines Ltd* (2007) 28 *ILJ* 2405 (CC). I also take into account the CCMA Guidelines on Misconduct Arbitrations.[21] While discipline is the prerogative of the employer, the employer must impose an appropriate and fair sanction. An arbitrator has to determine whether a sanction is fair or not. The arbitrator must consider all relevant circumstances and impose a fair sanction.[22] Ultimately, the arbitrator's sense of fairness is what must prevail and not the employer's view.[23] In judging the fairness of a sanction, an arbitrator must ultimately apply a moral or value judgment to the established facts and circumstances of the case.[24]

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[20] See Item 7 of the Code
[21] Published on 2 September 2011 Gazette No N**o**.34573
[22] *Sidumo v Rustenburg Platinum Mines Ltd* (2007) 28 *ILJ* 2405 (CC) at para 79
[23] Sidumo supra para 75
[24] *Boardman Brothers v Chemical Workers' Industrial Union* 1998 (3) SA 53 (SCA) 58B-C

[81] Determining whether an appropriate sanction was imposed involves three enquiries namely an enquiry into the gravity of the contravention, an enquiry into the consistency of application of the rule and sanction and an enquiry into the factors that may justify a different sanction.[25] In deciding on the appropriateness of a sanction, a consideration of the operational context of the misconduct as well as the operational implications or consequences thereof is required. [26] The arbitrator must give consideration to the position and interests of the employer, the employee and the public interest in order to make a balanced and equitable assessment. [27] Discipline must be corrective and is not intended to punish. [28]

*Gravity and nature of the misconduct*

[82] The misconduct of which applicant was convicted is indeed serious. According to the Correctional Services Act one of the core duties of all officials employed by respondent is to maintain and protect a peaceful and safe society by detaining all inmates in safe custody. [29] The taxpayers and society rely on all officials who work for respondent to protect society against inmates who are being detained in correctional centres.

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[25] CCMA Guidelines par 94
[26] *Mutual Construction Co Tvl (Pty) Ltd v Ntombela NO & others* 2010 31 *ILJ* 901 (LAC)
[27] *Sidumo* at par 64 to 66 quoting with approval dicta in its judgment in *National Education Health and Allied Workers Union v University of Cape Town and others* 2003 (3) SA 1 (CC);
[28] Item 2.1 of the Disciplinary Code
[29] Section 2 of the Correctional Services Act No 111 of 1998

[83] When prisoners escape, the trust of the public in respondent's ability to carry out its statutory functions for which the taxpayers are paying, is breached. Communities often live in fear when they hear that inmates have escaped from correctional centres in their area. In this case local newspapers kept on enquiring about the escape and questions were even asked about it in parliament – and rightly so. The embarrassment that this escape caused for respondent was therefore significant.

[84] Any conduct of a correctional services official that results in the escape of a prisoner, is as a rule sufficiently serious to impose a sanction of dismissal even in the case of a long serving employee with a clean disciplinary record. In one case where the Labour Court confirmed that dismissal is appropriate for this form of misconduct, it held that one of the reasons why misconduct of this nature is so serious and why dismissal is appropriate, is because the taxpayer expects that the Department of Correctional Services ensures that prisoners do not escape.[30] This however does not mean that irrespective of the circumstances, dismissal is always appropriate for this form of misconduct. It will depend on the facts of the case.

[30] Mbiza v General Public Service Sectoral Bargaining Council and Others (P 532/10) [2012] ZALCPE 12 (10 October 2012) para 9

*Mitigating factors and personal circumstances*

[85] As mitigating factors I take into account that applicant has been employed by respondent since 1987 and has a clean disciplinary record. I also take into account that he did not actively assist the prisoner to escape and never had the direct intention to allow a prisoner to escape. He breach security measures, and unfortunately for him the result was that a prisoner escaped.

[86] As further mitigating factors I take into account the fact that applicant had good intentions in that he breached the security rules in order to facilitate the flow of work. Furthermore he was no longer on duty when the escape took place and after he went off duty nobody removed the obstacles that he had placed in the doors. I also take into account that there were other contributing factors that led to the escape. Furthermore I take into account the fact that what applicant did, had also been done by his colleagues in the past, although unfortunately for applicant their conduct did not result in an escape whereas his conduct did.

*Consistency*

[87] On behalf of applicant it was submitted that the sanction was unfair because of inconsistency. The fact that Ms Msweli who was stationed at the main exit gate only received a final written warning was raised in this regard.

[88] Our Courts distinguish between historical consistency and contemporaneous consistency. Historical consistency occurs when an employer has in the past as a matter of practice not dismissed employees or imposed a specific sanction for contravention of a specific workplace rule. [31] Contemporaneous consistency in employment law requires that like cases should in fairness be treated alike.[32] It means that where two or more employees are guilty of the same misconduct at roughly the same time, but only one or some of them is disciplined, or where different penalties are imposed, this could be seen as unfair.[33] However, inconsistency is not *per se* unfair.[34] The circumstances in which it is perpetrated must also point to the fact that the inconsistency was induced by capaciousness or bad faith on the part of the employer.[35]

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[31] Grogan *Dismissal* (2010, 1st ed) 150
[32] Grogan *Dismissal* (2010, 1st ed) 152
[33]Grogan *Dismissal* (2010, 1st ed) 151
[34] Grogan *Dismissal* (2010, 1st ed) 151; *SACCAWU v Irvin & Johnson (Pty) Ltd* (1999) 20 ILJ 3202 (LAC) at 2313
[35] Grogan *Dismissal, Discrimination and Unfair Labour Practices* (2nd ed) at 274; *SACCAWU v Irvin & Johnson (Pty) Ltd* (1999) 20 ILJ 3202 (LAC) at 2313

[89] Even if employees have committed serious misconduct, and one of them is, for improper motives, not dismissed, this would still not mean that the other miscreants should escape.[36] An employer cannot be expected to continue repeating a wrong decision in obeisance to a principle of consistency. [37] Consistency in employment law is simply an element of disciplinary fairness.[38] When it comes to serious misconduct in the public service, then two wrongs can never make a right when an arbitrator is assessing the effect of inconsistency on an appropriate sanction.

[90] In the recent case of *Government Printing Works v Mathala*[39] the Labour Court made the following important observations about consistency:

> **"even in cases that are similar, it must be expected that there will *(i)* <u>always be some inherent variances</u> that *(ii)* are random, *(iii)* affecting different employees, and (iv) will determine <u>different assessment and outcomes</u>. It is certain though, that <u>the gravity of the offence is the grandest factor causing the variances</u>, and must always be scrutinised with greater care"**

[91] The remarks made by the court in that case also find application in this case. The gravity of applicant's misconduct cannot be compared to the gravity of the misconduct of Ms Msweli.

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[36] Grogan *Dismissal* (2010, 1st ed) 151; *SACCAWU v Irvin & Johnson (Pty) Ltd* (1999) 20 ILJ 3202 (LAC) at 2313

[37] *SACCAWU and Others v Irvin & Johnson* and *Cape Town City Council v Masitho and Others* (2000) 21 ILJ 1957(LAC) par 14.

[38] Grogan *Dismissal* (2010, 1st ed) 151; *SACCAWU v Irvin & Johnson (Pty) Ltd* (1999) 20 ILJ 3202 (LAC) at 2313

[39] Government Printing Works v Mathala N.O. and Others (JR583/14) [2016] ZALCJHB 358 (31 August 2016) at par 41

[92] The evidence of Mr Le Roux and Mr Stemmet which I have accepted, is that the job of Ms Msweli was not to exercise any control over prisoners. Officials at the exit gate do not control inmates that move through the gates in vehicles. They only control the access and exit of vehicles. I agree with Mr Stemmet and Mr Le Roux that nothing that Ms Msweli could have done, could have prevented the inmate from escaping. Applicant's actions on the other was a direct cause of the escape, and I might add, in my view the most significant factor that resulted in the escape.

[93] The difference in sanctions of applicant and Ms Msweli does therefore not amount to inconsistency. It is simply the result of the rule that the unique circumstances of each offence and each offender must be taken into account when imposing a sanction.

[94] The fact that the SAPS also had a role to play in the escape is a mitigating factor, but whether or not they were disciplined is not something over which respondent has any control and can accordingly not be taken into account for purposes of consistency.

[95] While it is so that fingers could also be pointed at other employees of respondent, whose actions have contributed to the escape, Mr Le Roux has testified that disciplinary action was also taken against certain other officials, although he is not aware of the outcome since he was not involved in those matters. Since I have no further information about the disciplinary proceedings against them, and since applicant bears the onus, I cannot conclude that there was inconsistency in respect of those officials.

[96] The one official against whom no disciplinary action was apparently taken, is Mr Radi who has a higher rank than applicant and who was a supervisor in the reception area. He walked through the open doors on the morning of the escape. On the other hand he never instructed applicant to place obstructions in the doors, he never gave applicant permission to do so and neither is he the person who unlocked the doors and placed the obstructions there; it was applicant who did so. Had applicant been dismissed, the fact that Mr Radi has not been disciplined at all, might perhaps have played a more significant role in determining an appropriate sanction, but given the seriousness of applicant's conduct and the nature of the sanction that was imposed, this issue in my view does not have bearing on the appropriateness of the sanction.

[97] Due to the mitigating circumstances, I agree with the chairperson Mr Stemmet that dismissal was not an appropriate sanction in this case. The misconduct was however so serious, that a mere final written warning would not have been an appropriate sanction. That would have been far too lenient. If any criticism could be levelled against the sanction of one month's suspension without pay that was imposed, it is that it was probably too lenient. Applicant should count himself lucky that the sanction which was imposed on appeal was not a more severe sanction, because despite the mitigating circumstances, the misconduct certainly justified a more severe sanction than one month's suspension without pay, but short of dismissal. Under these circumstances my finding is that the sanction of one month suspension without pay was not too harsh and was not unfair. This means that the conduct of the employer was also substantively fair.

## AWARD

In the premises I make and publish the following order and award:

1. Applicant's guilt on the charge against him is confirmed

2. The sanction of one month's suspension without pay was a fair sanction

3 The respondent did not commit an unfair labour practice as intended in section 186(2) of the LRA

4. Applicant's claim is dismissed.

5. No order as to costs is made.

**Adv D P Van Tonder**
GPSSBC Arbitrator
Western Cape