



Panellist/s: SITHEMBELE TSHWETE _____
Case No.: GPBC 758/2023 _____
Date of Award: 11 JANUARY 2024 _____

In the ARBITRATION between:

PSA obo LR Maputle & 4 Others _____
(Union / Applicant)

and

Department of Employment & Labour

(Respondent)

Union/Applicant's representative: Yolanda Ralawe _____
Union/Applicant's address: 28 Melle Street _____
Braamfontein _____
2017 _____
Telephone: _____
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Respondent's representative: Nkhensani Ramulisa _____
Respondent's address: 77 de Korte Street _____
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ARBITRATION AWARD

DETAILS OF HEARING AND REPRESENTATION:

- [1] The arbitration hearing was set down for 01 September 2023. It was subsequently held on 07 and 08 November 2023. The last day was 05 December 2023.
- [2] The Applicants in this matter were represented by Ms. Yolanda Ralawe of the Public Service Association (the Union).
- [3] The Respondent was represented by Nkhensani Ramulisa of the Department of Labour (the Department).

ISSUE TO BE DECIDED:

- [4] I am required to determine whether the Respondent committed an unfair labour practice by precautionary suspending the Applicants and if found in the affirmative to lift precautionary suspension and compensate the Applicants.

PRELIMINARY ISSUES:

- [5] The Respondents raised a point in limine regarding the lack of jurisdiction for the arbitration regarding late referral by the Applicants. A ruling in this regard was issued dismissing this point in limine

BACKGROUND TO THE MATTER:

- [1] On the 26 of September 2022 the Applicants were issued with letters intending to suspend them.
- [2] On the same day and in the same letter the Respondent asked the Applicants to submit written representations on why they should not be suspended as contemplated on or before 12: 00 midday.
- [3] It is common cause that these written representations were not submitted on the prescribed time by the Applicants.

- [4] On 27 September 2022 the Applicants were all precautionary suspended in terms of paragraph 7 (2) (c) of the Public Service Co-ordinating Bargaining Council (PSBC) Resolution No 1 of 2003 (Disciplinary Code and Procedures for the Public Service)
- [5] On 06 December 2022 a disciplinary hearing was held for the Applicants
- [6] On 26 June 2023 this precautionary suspension was lifted for all the Applicants
- [7] The lifting of this precautionary suspension contained a precautionary transfer of the Applicants from Benoni Labour Centre to Nigel, Boksburg and Springs Labour Centres.
- [8] On 27 June 2022 the Applicants referred an arbitration case of unfair suspension or disciplinary action in terms of Section 186 (2) (b) of the Labour Relations Act 66 of 1995 to the General Public Service Sector Bargaining Council (GPSSBC).
- [9] On 01 September 2023 the arbitration hearing was set down for the first time

SURVEY OF EVIDENCE AND ARGUMENT:

Employer (Respondent)

Evidence

- [10] It is common cause that the Applicants are Client Services Officers of the Department and all working at the Boksburg Labour Centre and are responsible for processing Unemployment Insurance Fund (UIF) claims
- [11] The Respondent submits that these employees (applicants) allegedly committed serious misconduct. This misconduct refers to allegations of fraud amounting of more than R6 million at the Benoni Labour Centre.
- [12] The Applicants were suspended in terms of paragraph 7 (2) (c) Resolution No 1 of 2003 of the PSCBC.
- [13] A disciplinary hearing was held within the required 60 days stipulated by Resolution No 1 of 2003 of the PSCBC (herein referred to as Resolution 1 of 2003).
- [14] The precautionary suspension was lifted and employees were precautionary transferred to various Labour Centres within close proximity to Benoni Labour Centres

Argument

- [15] The Respondent put an emphasis on complexity of the fraud investigation and the complexity of the case as the main reason for the postponement of the disciplinary hearing on 26 December 2022 pending fraud investigations.
- [16] The other reason is that the investigations were not concluded at the time of the sitting of the disciplinary hearing on the 06 December 2022
- [17] Lastly, the holding of the disciplinary hearing on the 26 December was as to seek postponement as the 60 days prescribed by item 7 (2) (c) of Resolution 1 of 2003 was about to lapse.
- [18] The chairperson of the disciplinary hearing of the 26 December 2022 granted the department postponement pending finalisation of the investigations into allegations of fraud by the Applicants.
- [19] An argument was also placed by the Respondent that the Applicants are not prejudiced by the postponement pending investigations as this is ameliorated by the fact that Applicants were fully remunerated during this period.
- [20] Furthermore, the Respondent submits that the lifting of the precautionary suspension and the subsequent precautionary transfer of the Applicants on 26 June 2023 is done to comply with the directive by the Minister of Public Service and Administration which ordered all departments to bring precautionary suspended employees back to work as they were remunerated without them doing work
- [21] The Respondent submitted that the precautionary transfer of Applicant to other labour centres around Benoni was done so as not to give the Applicants an opportunity to commit the same misconduct. Furthermore the Applicants were placed in other offices so that they do not temper with evidence at Benoni Labour Centre.
- [22] The Respondent also submitted that fraud investigations were still ongoing by the end of October 2023 an indication of the amount of work that goes into these investigations.
- [23] Regarding the investigation, the Respondent further submitted that the department received a report in December 2022. Just after that report was tabled to management at the department, new allegations against the Applicants were emerged in May 2023.
- [24] This is another factor that has cause the protraction of the fraud investigations against the Applicants.

ApplicantEvidence

[25] The Applicants submit that the notices of suspension given to the employees on the 26 September 2022 did not give them adequate time to respond and submit written representations through their trade union

[26] Submission is made by the Applicants that after the disciplinary hearing on the 26 December 2022 the respondent failed to update neither them nor advance charges of the misconduct.

[27] The Applicants also submit that the precautionary transfer of the employees is a continuation of the unfair labour practice

[28] The Applicants submit the guidelines on management of suspensions on public service to which the respondent failed to comply with. It is common cause that these guidelines refer to: *Guidelines on the Management of Suspensions* issues in 2002 by the Department of Public Service and Administration. Specific reference is made by Applicants to paragraph 2 of these guidelines: *Guiding Principles*

2.1 The employer must have a valid and fair reason for suspending an employee, based on fair labour relations principles.

2.2 The period of suspension should be reasonable and justifiable

2.3 Suspensions must be reviewed on a regular basis

2.4 There must be a clear balance between the interests of the employee in continuing his or her daily work, and disciplinary and operational requirements of the employer.

2.5 Employees must, without delay, and throughout the process be informed of the various steps that the employer is initiating/undertaking

2.6 If suspended, the employee is entitled to a speedy and effective finalisation of the disciplinary process.

[29] The Applicants further pointed out to paragraph 7.2 (c) of Resolution No 1 of 2003 of the PSCBC. The emphasis of the Applicants is on the failure of the chairperson of the disciplinary hearing in deciding on further postponements.

Arguments by the Applicants

- [30] The Applicants argue that the duration of the investigation and the disciplinary process is unreasonably long and unjustifiable and prejudices them as they are now seen as fraudsters by their fellow employees and families.
- [31] The precautionary suspension went beyond the 60 days without any information availed to them about neither the steps of the disciplinary process nor any review of their suspension.
- [32] The Applicants submit that they were only contacted when the precautionary suspension was lifted on the 26 June 2023.
- [33] On the 03 July 2023 the Applicants were further precautionary transferred to other labour centres that are far away from their normal workplace, Benoni.
- [34] This precautionary transfer inconvenienced them in terms of transport costs which were more than the usual fares as they were far off from their original workplaces.
- [35] The Applicants argue that the reassignment of duties as a result of this precautionary transfer is not the same or at a similar level. The Applicants argue that they are assigned to a mere capturing of curriculum vitae for work seekers meanwhile their normal jobs involved more than just capturing work seekers.
- [36] The Applicants argue that the Respondent is failing to prove the allegations of fraud against them. The Applicants submit that the failure to review their suspension and the back and forth of reports as well as the lack of update on the disciplinary process on those that are suspended is proof that the department does not have a case against them. The claim by the Respondent that these investigations are complex, and require a substantially long period, is not justified by any plausible reasons.

ANALYSIS OF EVIDENCE AND ARGUMENT:

Procedural Issues:

- [37] The first issue to deal with is the submission by the Applicant regarding representations before suspension. It is trite law that in a precautionary suspension pending investigation, the employer is not required to afford employees representation before they suspend them. In the case: *Long v SAB (Pty) Ltd and Others (2019) 40 ILJ 965 (CC); 2019 (5) BCLR 609 (CC); [2019] 6 BLLR 515 (CC)*

[24] ...Where the suspension is precautionary and not punitive, there is no requirement to afford the employee an opportunity to make representations.

The argument by the Applicants therefore cannot stand.

[38] The second issue to deal with is the substantial amounts of time consumed by the Respondents on the investigation into allegations of fraud.

[39] After the granting of the postponement by the chairperson of the disciplinary hearing on 26 December 2022 there has been no movement from the department as required by the *guidelines on management on of suspensions*.

[40] These guidelines advocate for a period of suspension that is fair and justifiable. The Applicants in this case have been on suspension for more than a year. Inclusive in this is the precautionary transfer which is clearly defined by the same guidelines as another form of suspension.

[41] These guidelines provide for the following in managing suspensions :

[2.5] *Employees must, without delay and throughout the process be informed of the various steps that the employer is initiating/undertaking.*

[2.6] *If suspended, the employee is entitled to a speedy and effective finalisation of the disciplinary process.*

[42] On several occasions at the arbitration a version was put to the Respondents by the Applicants that the employees were not contacted and informed about the steps the employer is undertaking or progress in their suspension. This version went unanswered and uncontested by the respondent. In essence no evidence was provided that suspended employees were informed of the various steps that the department was initiating or undertaking regarding the disciplinary process nor was there regular review of the precautionary transfer as required by the guidelines.

[43] These omissions in this process of the precautionary suspension of the Applicants were not justified and render the process as being unfair.

Substantive Issues

[44] The Respondent repeatedly cites the seriousness and complexity of the allegations of fraud as the reason for the investigations to take more than a year and still ongoing.

- [45] The internal risk unit, responsible for investigations, submitted that the first preliminary investigation report was submitted to management of the department in December 2022. This was turned back by management of the department for the risk unit to conduct more investigations. The second report was submitted on April 2023 and was also turned back for the same reasons.
- [46] The internal risk unit attributes the fraud incidents in the department, especially in UIF claims, to backlog and lack of controls within the claims system. This was detected by the department during the Covid 19 period in the year 2020. These controls have been tightened since April 2021 through introduction of a consolidation of the claims chain and provision of a one day service for clients
- [47] There is now a one day service that minimises or mitigates fraud incidents. It puts everyone in the claims chain from the claims chain including the Applicants (Client Services Officers) Declarers, Assessors and Paymasters in one work area.
- [48] Furthermore the risk unit submitted that investigations into one fraud case are an arduous task that involve a lot of role players that the investigator has to interview and investigate in order to uncover fraud. There are a lot of cases allocated to one investigator at a time. In conclusion the Respondent submitted that it is difficult to allocate time frames for a conclusion of a fraud case.
- [49] The risk unit witness also conceded that the suspended employees could not be linked to any fraud incident at this stage (as at 05 December 2023) as the investigations are ongoing. The only progress in these investigations is the charges the near finality of one other similar fraud case in another group of employees except the Applicants.
- [50] The reasons advanced by the risk unit investigations team are fraught with contradictions with no sight to the conclusion of this investigation. It is not clear whether the Applicants will be charged anytime soon. This is buttressed by the cropping up of new information at intermittent steps in the investigation
- [51] To make matters worse the investigating team is citing additional issues relating to backlog and lack of controls in claims processes of the department. These latter issues require the attention of management of the department. It is unfair to expect the Applicants to bear the consequences of lack of controls and backlogs. Nor is it fair for the disciplinary process to be dragged for more than a year because of management glitches.
- [52] The reasons advanced by the Respondent on this long suspension due to the complexity of this investigation cannot stand. Even complex investigations properly

planned and executed will have to come to an end and the employees charged. It cannot be fair to the employees to be placed on a perpetual precautionary suspension.

[53] Even after these employees have been brought back and precautionary transferred there has been no evidence pointing out the periodic review required in terms of the *guide on managing suspensions* in the public service by the Respondent.

[54] I therefore find the suspension of the Applicants procedurally and substantively unfair.

AWARD:

[55] The Respondent is directed to uplift the suspension of the Applicants and to allow the Applicants to resume their duties with immediate effect from the date of the receipt of this award

spt

Name: SITHEMBELE TSHWETE

(GPSSBC) Arbitrator