



ARBITRATION AWARD

Panelist/s: Kevin Perumal
Case No.: GPBC 460/2022
Date of Award: 20 December 2023

In the ARBITRATION between:

PSA obo R GOVENDER AND 1 OTHER

(Union / Applicant)

and

OFFICE OF THE PREMIER KZN

(Respondent)

DETAILS OF HEARING AND REPRESENTATION

1. The arbitration at all materially times were held at the Office of the Premier Kwa-Zulu Natal.
2. The arbitration commenced on the 5th July 2022 and continued on the 5th August 2022, 3rd and 4th November 2022, 6th December 2022, 20th and 21st April 2023 1st September 2023 and 2nd November 2023 and was completed on the 3rd November 2023.
3. The Applicants were represented by Mr. Charles Ngubane an official of the PSA and the Respondent was initially represented by Mr. JJ Nxumalo, Mr Dlomo and later on by Mr. T Makhathini.
4. At the conclusion of the arbitration proceedings, the parties agreed that closing arguments would be submitted to the GPSSBC on or before the 17 November 2023.

ISSUE TO BE DECIDED

5. I am called upon to determine whether the respondent party committed an unfair labour practice with regard to the precautionary transfers of the applicants and remunerating both applicants with 12 month's compensation.

BACKGROUND TO THE ISSUE

6. On the 7 April 2022, the applicants referred a dispute to the GPSSBC for conciliation alleging that the respondent had committed an unfair labour practice regarding their precautionary transfer in terms of section 186 (2) (b) of the LRA as amended.
7. The GPSSBC conciliated the dispute and the dispute remained unresolved and was thereafter referred to arbitration.
8. The first sitting of the arbitration took place on the 5 July 2022.
9. On both the 3rd and 4th November 2022, the arbitration had to be postponed due to the unavailability of the respondent's official representative and costs was reserved as costs in the cause.
10. The parties filed a joint bundle of documents marked as Bundle "A" and the pre-arbitration minute was marked as Bundle "E". Further bundles of documents were admitted marked respectively as "B", "C", "D" and "E".

11. Both parties substantially complied with the directive, albeit late, to file their respective closing arguments to the GPSSBC by the stipulated date.

POINTS IN LIMINE

12. On the 8 August 2022, the respondent raised a point in limine stating that the GPSSBC does not have jurisdiction to determine the dispute. The applicants objected to the point in limine raised. I thereafter made the following ruling and directed the parties as follows:

“The arbitration is hereby postponed to a provisional date being the 20 September 2022, to be confirmed or denied depending on the outcome of this jurisdictional point raised by the respondent in these proceedings.

- *The respondent had until the 11 August 2022 to bring the application, the applicants had the right to oppose the application if any, by the 18 August 2022 and thereafter the respondent had the right to reply on or before the 25 August 2022.*
- *The arbitrator was required to issue his ruling on or before the 8 September 2022”.*

13. The parties confirmed that the raising of the **point in limine** was not done in terms of Rule 32 For the Conduct of Proceedings before the GPSSBC but was raised as a legal point that requires determination by the Arbitrator at the earliest and preferable in writing.
14. The respondent failed to bring the application by the desired date of 11 August 2022. Despite the respondent calling the writer hereof indicating that they would be late with the application, to date no application was made by the applicant regarding the point in limine raised.
15. Upon clarifying the issue with the Case Management Offices of the GPSSBC, I received the applicants notice of opposition to the jurisdictional point raised.
16. Despite there being no formal application raised by the respondent I determined the point in limine based on the information provided at the arbitration which was verbally raised on the 5 August 2022.
17. On the 8 September 2022, I made the following Ruling:

17.1 Section 186(2) prohibits the unfair suspension of employees or unfair disciplinary action short of dismissal. To fall within the terms of this provision, disciplinary action short of dismissal must be disciplinary both in nature and intent. It is

important to note that for purposes of unfair suspension, precautionary and punitive suspension fall within the terms of section 186(2).

17.2 The GPSSBC has the requisite jurisdiction to determine the dispute referred by the respondents in these proceedings.

SURVEY OF EVIDENCE AND ARGUMENT

Summary of the Evidence of the Applicant's case.

Witness 1: Mrs S Du Preez

18. The witness confirmed that she was employed by the Office of the Premier KNZ. She commenced work in the public service in 1988 and due to various promotions she currently is the Deputy Director Financial Accounting. She has more than 18 years' experience as Deputy Director. Her key responsibilities were to manage about 17 people, manage the administration and Bass payments for subsistence and travel claims, Persal, payroll, the human and financial matters of the sub-directorate and policy management.
19. On the 29 November 2021, she received a letter from the Director General informing her of her precautionary transfer to Directorate Internal Control with effect from 1 December 2021. The letter further informed her that it was not a punitive measure but a precautionary one and that she will receive full benefits. Furthermore, the letter advised her that the action taken of her precautionary transfer was merely to ensure that the investigation is conducted objectively and as expeditiously as possible with the minimum interference which is in the best interests of all parties¹.
20. The Director General informed her to report to Internal Control and she continued to support the acting Financial Director. 12 months later she was not performing any of her substantial duties as she was carrying out instructions of the Financial Director. She was not allowed to speak to her staff that she previously managed.
21. The witness testified that the prolonged precautionary transfer violated her rights to dignity, she feels humiliated, and has been extremely stressed by the decision of the respondent.
22. She was never subjected to any disciplinary proceedings to date and the allegations made against her by management refers to poor work performance of her subordinates. She has an exemplary public service record. She was not aware of any grievances that were lodged against her as the supervisor of the section by the

¹ Bundle A page 9

employees that she supervised. The DPSA Guidelines on Precautionary Suspensions and Transfers are being violated by the respondent.

23. The investigation into the alleged misconduct commenced after she was precautionary transferred. She co-operated with the investigators sometime in March 2022, however the investigators asked vague questions which she replied to. During the time of the investigation she did not threaten any of the staff that gave evidence during the investigation and to date she was not advised of the outcome thereof and remained on precautionary transfer.
24. The decision of the respondent is unlawful, arbitrary and has violated her right to human dignity and constituted an unfair labour practice. There are no reasons provided by the respondent for her continued precautionary transfer as the investigation was concluded and the respondent has failed to act on the recommendations of the investigation report. The actions of the respondent are pure victimization.
25. At the time of the extension of the precautionary transfer, she was not provided with an opportunity to provide her side of the story, as required by the audi ulteram partem rule.
26. She believed that her right to work in the job that she was appointed to was violated and demanded that her precautionary transfer be uplifted and the arbitrator should rule that the respondent committed an unfair labour practice and she should be compensated 12 months' remuneration.

Cross examination of the witness

27. The witness confirmed that although the DPSA Guidelines is silent on the right to be heard before a precautionary transfer can take place, she believed that such right existed at common law.
28. She reaffirmed that she has been precautionary transferred to Internal Control and reports to the Acting Director Financial Accounting Ms. Ngcobo
29. The investigators called her to a meeting, she answered their questions and cooperated with them. The issues raised, related to staff unhappiness but were rather vague as she heard for the first time such unhappiness. She denied that the respondent's precautionary transferred her for such staff unhappiness.
30. No benefits have been forfeited and remuneration has been paid by the respondent.
31. She has not committed any serious offence to justify the continued precautionary transfer. Although the respondent has the right to suspend or precautionary transfer an employee such must happen within reasonable time frames.

32. She was advised by the Acting Director not to communicate with her staff that she previously supervised.

Re-examination of witness

33. Although she had managed some of her duties now under instruction from the Acting Director Financial Accounting, she was not undertaking all her responsibilities, and not managing her staff.
34. The witness reaffirmed clauses 7,8,9,10, and 11 of the pre-arbitration minute agreed to between the parties.²
35. The demand for compensation is due to the humiliation that she faced by the respondent, by the unfairness of the lengthy precautionary transfer and for pain and suffering as she was physically, mentally and psychologically affected by the decision of the respondent to continue with her precautionary transfer even after the investigation was completed and for such a lengthy period.

Witness 2: R Govender

36. The witness stated that she was a public servant for more than 34 years and was appointed Director Financial Accounting at the Office of the Premier on the 1 March 2014. Her key responsibilities were that of credit management, financial statements and management of resources and management of the sub-directorate. She was precautionary transferred on the 1 December 2021 as per the letter from the DG dated 29 November 2021³. To end April 2023, she would have been precautionary transferred for a period of 17 months.
37. The Sub-directorate had a vacancy rate of 43 % and despite this, the unit's outputs were met. She recalled working early hours of the morning to meet her work standards and targets.
38. The pre-arbitration minute agreed to between the parties confirmed that her performance of the duties exceeded the standards and in her previous assessment done on the 30 September 2021, she was rated 4. She believes that poor performance cannot be a reason for a precautionary transfer only issues related to misconduct can be used to precautionary transfer an employee.
39. During her employment as Director Financial Accounting she cannot recall anytime where staff had raised complaints against her of the Deputy Director, had this been done as manager in charge she would have responded and addressed the issues.

² Bundle Pre-Arbitration Minute E page 2

³ Bundle A page 11

40. She regarded her precautionary transfer as unlawful, unfair and amounted to victimization, as well as violated her right to human dignity.
41. The respondent failed to hold a disciplinary hearing within the time frames as per the collective agreement and the policy of the respondent. She was never given an opportunity to provide reasons why she not be precautionary transferred. The department had breached their own Batho Pele principles of openness and transparency.
42. On the 5 July 2022, she issued a minute to the department requesting the upliftment of her precautionary suspension, the respondent did not have the courtesy of replying.
43. She also lodged a grievance but the respondent failed to address the same.
44. After being precautionary transferred to room 406 outside of her department, the office was small for two people to sit in, she would see her subordinates in the lift or passages which is in conflict with the allegation by the employer that she would jeopardise the investigation.
45. Despite having spoken to and answered questions from the investigators, to date no feedback was given to her and she still remains precautionary transferred.
46. The precautionary transfer affected her in many ways, long time relationships were soured, the people she liaised with saw her in a different light, her honesty, integrity and trustworthiness was brought into question, and she felt humiliated and disrespected and victimized. Her careers advancement within the department has been halted by the precautionary transfer.
47. The witness believed that the precautionary transfer was punitive in nature and it had a direct impact on her physical, mental and psychology. Some people even accused her of stealing money, such was detrimental to her.
48. She demanded that the arbitrator should find in favour of the upliftment of the precautionary transfer as it constituted an unfair labour practice, and that she be compensated 12 months' remuneration for the pain and suffering she endured and for the violation of her dignity and other rights.

Cross examination of the witness

49. The witness confirmed her employment with the respondent as Director Financial Accounting and she was an effective director performing her duties to the best of her abilities. She had a good relationship with her staff.

50. With regard to the investigation she was aware as she testified before the investigators and came to know for the first time that the staff had grievances with her. She never received any complaints or grievances from her staff before the investigation had started. Furthermore, the investigation was vague and she advised the investigators that she did not commit any acts of misconduct.
51. The witness reaffirmed that she required the precautionary transfer to be lifted and that she be paid compensation as per the LRA as to date she was not charged for any acts of misconduct nor was she subjected to any disciplinary action by the respondent.
52. She agreed that the respondent had the right to precautionary transfer her but that such right was limited by resolution 2 of 1999 and the Guideline document of the Public Service Commission, 2022.
53. The witness denied acceptance of the respondent's decision taken to precautionary transfer as a result of management and leadership capabilities, but suggested that had she been investigated for acts of misconduct she would have accepted the precautionary transfer for a limited period.

Re-examination of the witness

54. She had been precautionary transferred for over 17 months. She regarded the period as being grossly unreasonable.
55. During this investigation, it was the first time since she was appointed Director that her management and leadership capabilities was brought into question. These are performance issues not issues of misconduct. Although the DG had the right to investigate complaints against her such investigation was completed and the findings were never implemented, however she still remains on precautionary transfer.
56. The Commissioner had the power to determine compensation for the unfair conduct of the respondent.

Summary of the evidence of the respondent's case.

Witness 1: SV Mtungwa

57. The witness testified that she was employed by the Office of the Premier KZN since August 2002. She knew both applicants.

58. Sometime in November 2021 there was a sit in by the entire section, staff were complaining of the treatment that they were receiving from the applicants.
59. After two officials were sent to calm the employees down a meeting was convened by the DG to address the concerns of the employees.
60. Subsequently, the DG made a decision to appoint a psychologist to assist all the employees. She visited the psychologist twice but have not seen the outcome of the reports by the psychologist.
61. The investigation into the complaints took place and to date she has not seen the report as it was sent to the DG.

Cross examination of witness

62 Nil

Re-examination of the witness

62. Nil

Witness 2: DR NO Mkhize (via Zoom)

63. The witness confirmed that she was employed by the Office of the Premier as the Director General with effect from 1 August 2017 for a period of 5 years and such contract was extended for another five years. The witness thereafter explained in detail her duties and responsibilities.
64. The applicants were precautionary transferred as a result of the staff under their supervision having stopped work and raised various issues against them, such issues required an investigation which she ordered.
65. On the 25 November 2021 she called a meeting with the applicants and all staff but the applicants did not attend. At this meeting she observed that staff were emotional, were volatile but she gave them an opportunity to express themselves. The staff raised issue of being humiliated, victimization tools of trade and being degraded by the applicants. She concluded that the trust relationship between the applicants and their staff had been eroded.
66. On the 29 November 2021, after discussing the matter with DD Ngubane she signed off both precautionary letters and requested Mr. Ngubane to issue them to the applicants.
67. In January 2022, she appointed external investigators to investigate the complains received. Her decision to appoint external persons to conduct the investigation was so that they would be impartial, not be influenced and not be bias.

68. She had sessions with both applicants, and Ms. Govender stated that she was very unhappy with the decision and could not understand the move. She advised Ms. Govender that she had a duty to stabilize the section as the situation was not conducive to peaceful operations. She further advised that the precautionary transfer would enable the investigation to be conducted on the staff allegations against them. Ms. Du Preez was very emotional and stated that the decision affected her personally, she was not guilty of any offences and also made allegations against the staff.
69. The investigation commenced in January 2022 and a preliminary report was received in July 2022. After conducting a meeting with DDG Mr. Ngubane it was decided to invoke the Corporate Health Awareness program. She also met with a representative from PSA and explained the situation who understood what was going on although the representative indicated that the decision was one sided but she advised the representative that she wanted to obtain facts about what's was happening in the department.
70. The investigation report was an interim report and that she was still going through it. She did not share it with her colleagues. The findings and conclusions are contained in the report.⁴
71. She subsequently briefed the Executive Authority, the issue had more to do with the risk within the department should she uplift the precautionary transfer. She has a responsibility to ensure stability and safety and security of all employees.
72. The precautionary transfer of the applicants should remain until the entire process reaches finality as this matter is very complex. Various meetings were held with the staff in March and May 2023 to address the factual issues contained in the investigation report. Furthermore, the psychologist report was needed staff needed psycho social support. Therefore, the process is ongoing. The applicants were also included in the process however they declined.
73. The witness confirmed that applicant Du Preez reports to Ms. Ngcobo who is the Acting Director Financial Accounting.
74. The situation in financial accounting is stable now and employees are meeting their targets.
75. The witness could not understand the request by the applicants to be financially compensated as they are receiving all benefits and salaries as previously paid.
76. Given the fact that the trust relationship had broken down the applicants had to be transferred to another section to defuse the tensions in the section. At present the environment is not conducive for the applicants to return to the section.

⁴ Bundle C

Cross examination of the witness

77. The witness stated that the circular inviting all employees to attend the meeting on the 25 November 2021 included the applicants no special invite was sent to the applicants.
78. The precautionary transfer letters confirmed the reasons for the transfer was due to the management and leadership capabilities of the applicants which were raised by their employees.
79. The witness disagreed that employees can only be precautionary transferred for issues related to misconduct. And she regarded this as serious.
80. The witness confirmed that the respondent did not hold the disciplinary hearing within 60 days, as they were not there yet as the process is still not completed.
81. The respondent requires an extension to finalise the recommendations of the investigation and psychologist reports.
82. The witness disagreed with the respondent's representative Mr. Dlomo when he signed the pre-arbitration minute that the matter was not serious, the matter is serious as it concerns the safety and security of all employees within financial accounting. As the head of the organisation she deems the matter to be serious.
83. The witness disagrees with the applicants' representative that although the applicants were still in the same building there were no risks to the respondent. Employee do not talk to the applicants although they are in the same offices.
84. She disagreed with having met Mr. Vilakazi, the PSA representative on the grievances.
85. Psycho social support was offered to all employees including the applicants.
86. The witness disagreed that the applicants be paid compensation for the unlawful non procedural and unfair labour practice of keeping the applicants on precautionary suspension for such a length of time.

Re-examination of witness

87. Nil

Witness 3: Ms. Maureen Mbense

88. The witness stated that she was employed as a Clinical Psychologist for over 30 years. She possessed a Master Degree in Clinical Psychology.
89. She was invited by the Wellness section within the Office of the Premier to assist the employees in the financial accounting section. After holding a team meeting with

the employees, she became aware that there was much concerns, intense emotions and a breakdown of staff.

90. Thereafter she consulted individually with staff on a one on one basis between 2 December 2021 and the 8 December 2021. Her findings were that 80% of the staff were diagnosed with clinical depression and anxiety as there was other underlying trauma from past stress. The staff raised promotional issues, breakdown of the trust relationship between themselves and their managers, impaired human dignity, undermining of staff which affected them and their families. Some even had suicidal thoughts.
91. She submitted her report with recommendations to the DG around the 27 January 2022. She was of the view that none of her recommendations were implemented, and should the applicants return to their substantive posts, she would be concerned for both staff and the applicants.
92. She confirmed that the applicants were not assessed by herself.

Cross examination of the witness

93. She had seen about 18 employees and the applicants were not part of those employees that she had not consulted.
94. She could not comment on the situation in financial accounting at present and was not aware of where the applicants had been moved to and whether the applicants came into contact with their subordinates.
95. She further could not comment on why the recommendations were not implemented.

Re-examination of the witness.

96. Nil

Witness 4: B Gabela

97. The witness stated that she joined the respondent in June 2020 as Assistant Director in the Finance Creditors section. Her supervisor was Sandy Du Preez but after the incident in 2021 she is being supervised by Nonto Ngcobo.
98. The situation at current is much better than before. When she first joined the department the situation was very bad.

99. He relationship with the applicants was good but there were tensions between the staff that she supervised and the management of the section. She recalled that management would instruct her how to deal with her subordinates and on one occasion she recalled being chased out of a meeting that she was invited to attend.
100. She felt stuck between the lower grade staff and management. The situation at present was beautiful, calm and there is a peaceful atmosphere within the section of financial accounting. At present she was not on talking terms with the applicants.

Cross examination of the witness.

101. She was not in speaking terms with the applicants because of the incident that occurred in November 2021 where she was part of the team that reported their unhappiness to the DG.
102. The reasons for the precautionary transfer of the applicants was based on the complaints raised by the staff with the DG and the DG had requested that an investigation be undertaken.
103. The witness confirmed that when she first stated with the respondent she was supervised by Sandy Du Preez but after the incident in 2021 she is currently being supervised by Ms. Ngcobo.
104. She affirmed that she was chased away from a meeting. She received an invite to attend the meeting from the PA of the Director and when she arrived at the meeting she was chased away by the Director Ms. Govender. Ms. Du Preez, Zandile and Sbonelo was present.
105. She was not aware of the contents of the letter of transfer given to the applicants and therefore could not comment thereto. When the witness was advised of the reasons and conditions of the transfer which included not communicating with staff, she could not comment.
106. She was advised by Ms. Ngcobo not to talk to the applicants until the investigation was completed.
107. With regard to the incident of her being shouted at and told to leave the meeting, she did not raise it with Ms. Ngcobo nor did she lodge a grievance with the respondent.

Re-examination of the witness

108. She was interviewed by the investigators and told them all that happened since she joined the department.

109. She was not speaking to the applicants because she was advised not to do so by Ms. Ngcobo.

Witness 5: Sbonelo Mcane

110. The witness stated that he joined the department in May 2020 as Assistant Director accounting services. When he joined he reported to Nisha. He was part of junior management.

111. The relationship between staff and management was bad, there was no professionalism or respect within the department. The spirit of Ubuntu was not prevalent within the department. He had a serious struggle with management. After his director had left he reported to Tiny Gabela.

112. His observations of the applicant's management style, was that he was told how to manage his staff, told not to talk to staff, issued with rules on how to manage his staff, which he found odd.

113. At present the situation had changed from acrimonious to stable and peaceful. productivity had improved, team work was prevalent and they obtained a clean audit.

114. He reported to the investigators and was assessed by the clinical psychologist.

115. If the applicants were to return back to financial accounting this would be a serious problem, people will not be valued.

Cross examination of the witness.

116. When asked who he reported to the witness was unsure, he said he reported to Nisha but when confronted about his supervisor being Ms. Govender he remained unsure.

117. His reply that his EPMDS documents was signed by Nisha, but since Nisha had left it was signed by Ms. Ragani Govender, however he denied that Ms. Du Preez signed his EPMDS documents. The witness thereafter confessed that Ms. Du Preez was his supervisor.

118. Although he was employed as a supervisor he was not given the opportunity to supervise his staff. He raised the issue of smelling water which was not taken seriously by management.

119. The witness denied that Ms. Govender had personally helped him with his girlfriend's baby shower and stated that it was done as a collective by the staff. Despite her using her money to buy him gifts, her character did not change.
120. The witness stated that he was present when Gabela was chased out of the meeting, but later said that Ms. Gabela was told to leave the meeting in a loud voice as the room was big and she was at the entrance of the door when told to leave the meeting.
121. He could not comment on the role of the two applicants when it came to the clean audit.
122. He could not jeopardise the investigation however greeting someone is not talking.

Re-examination of the Witness.

123. After the investigation he gave up trying to greet the applicants. He was not advised not to talk to the applicants.
124. His EPMDS was signed off by Ms. Govender and not Ms. Du Preez.

ANALYSIS OF EVIDENCE AND ARGUMENT

125. In terms of section 186 (2) of the LRA every employee has the right not to be subjected to unfair labour practices. The current definition of "unfair labour practice" reads as follows:

Section 186 (2)(a) and (b) "Unfair labour practice" means any unfair act or omission that arises between an employer and an *employee* involving

- (a) unfair conduct by the employer relating to the promotion, demotion, probation (excluding *disputes* about dismissals for a reason relating to probation) or training of an *employee* or relating to the provision of benefits to an *employee* and
- (b) the unfair suspension of an employee or any other unfair disciplinary action short of dismissal in respect of the employee.

126. Chapter 7 of the SMS Handbook provide for precautionary suspension or transfer as follows:

(2) (a) The employer may suspend or transfer a member on full pay if-

- The member is alleged to have committed a serious offence; and

- The employer believes that the presence of a member at the work place might jeopardise any investigation into the alleged misconduct, or endanger the wellbeing or safety of any person or state property.

(b) A suspension or transfer of this kind is a precautionary measure that does not constitute a judgement, and must be on full pay.

(c) If a member is suspended or transferred as a precautionary measure, the employer must hold a disciplinary hearing within 60 days. The chair of the hearing must then decide on any further postponement⁵.

127. It is undisputed, that the right to precautionary transfer of a member of the SMS, is the right of the respondent pending the investigation into allegations of serious misconduct. However, such right is not absolute, it requires that the respondent exercise's such right when there are serious acts of misconduct that have been alleged committed by the applicants.

128. Clause 5.3 of the Guidelines on the management of suspensions issued by the Public Service Commission, 2022, state that "departmental policies on the management of suspensions should contain a list of serious transgressions that would result in a precautionary suspension or transfer being considered by the employer⁶. No such list of transgression was provided for by the respondent to these proceedings.

129. It is common cause that the parties to these proceeding signed and confirmed the pre-arbitration minute wherein the parties agreed that the reasons offered by the respondent did not warrant a serious offence for the precautionary transfer to be enacted.⁷

130. In this case the employer has not shown that serious acts of misconduct have been committed by the applicants. Furthermore, the investigation report was concluded by the investigators on the 20 July 2022 and to date of having heard all the evidence of the respondent, the respondent failed to act on the recommendations contained therein. And the respondent did not lead any evidence that the applicants had in fact jeopardized the investigation. In fact, the evidence of the applicants was that they corporated with the investigators and such was never dispute.

In *Mogothle v Premier of the North West Province & another* [2009] 4 BLLR 331 (LC) the Labour Court noted that the suspension of an employee pending an inquiry into alleged misconduct is equivalent to an arrest, and should therefore be used only when there is a reasonable apprehension that the employee will interfere with investigations or pose some other threat.

⁵ Bundle A page 16

⁶ Bundle B page 8

⁷ Bundle E page 2

131. The Guidelines on the Management of Suspensions, further provide at 6.4 (d) for a meeting with the affected employee/s to take place so that the employee can make representations as to why he/she should not be suspended.
132. In casu the respondent did meet with the applicants and advised them of the decision taken to have them precautionary transferred to another section.
133. Clause 7 under Review of Suspension, the respondent failed miserably to advise the applicants of their continued precautionary transfer⁸, even after the investigation was completed as well as the initial report was received from the Clinical Psychologist. It is noted at this stage that the respondent in the submission of their closing arguments presented two letters addressed to the applicants dated 23 October 2023 and 27 October 2023, These letters were never presented at arbitration and the applicants could not accept nor dispute them and for that reason it is omitted from the analysis of the evidence presented at arbitration.
134. It is not within my purview to comment on the investigation report nor the initial report by the Clinical Psychologist as the respondent failed to inform the applicants of the outcome thereof. Furthermore, the respondent failed to act on the recommendations to date. The reasons advanced at arbitration is that this is a complex matter, despite agreeing that this is a complex matter, the respondent should have actioned the recommendations. The Clinical Psychologist conformed that she has not been advised since 2022, on how the respondent intends proceeding with her recommendations. In short no action was taken by the respondent despite them being in possession of the initial clinical report from the 28 January 2022, and the investigation report from the 20 July 2022.
135. It must be noted that a precautionary transfer must be done within a reasonable time frame. On the 27 January 2022, the initial clinical report by the psychologists was completed and submitted to the respondent, post the receipt of such report, the applicants still remained on precautionary transfer.⁹ On the 20 July 2022, the investigation report was signed off and submitted to the respondent with specific recommendations on the applicants, no action was taken by the respondent, however the applicants still remained on precautionary transfer.
136. The applicants were precautionary transferred on the 1 December 2021. To date the applicants have been on precautionary transfer for a period exceeding two years. The question is, is this fair in light of the fact that the investigation has been completed and there are no serious acts of misconduct that have been levelled against the applicants.
137. It is noted that much of the evidence presented by the respondent's witnesses, relates to evidence that should be presented at a disciplinary hearing and given the

⁸ Bundle B page 10

⁹ Bundle D page 12

fact that I am not called upon to determine whether the applicants are guilty or not of any alleged misconduct, such evidence has been specifically excluded in my analysis of the evidence. Such evidence is not relevant to the proceedings at arbitration.

CONCLUSION

138. If one reads the suspension provisions of the SMS Handbook in context, one notices that they are integral to the holding of a disciplinary enquiry. Thus, the decision to suspend or precautionary transfer an employee ahead of an inquiry or to extend a suspension or precautionary transfer during an inquiry is linked to some or other serious allegation an employee faces. Put differently, suspension or precautionary transfer is a precaution in relation to harm that may be caused before the allegations are adjudicated. It is meant to address an employer's bona fide apprehension that the employee's presence at work may hamper the holding of a hearing, or the gathering of evidence ahead of a hearing.
- 139 A precautionary suspension may also be that the presence of an employee endangers the well-being or safety of any person or state property. This too, however, is in relation to an up-coming disciplinary hearing. But there is no such disciplinary hearing in casu. The applicants seek the precautionary transfer to be lifted.
- 140 In *Lekabe v Minister: Department of Justice & Constitutional Development* (2009) 30 ILJ 2444 (LC) upon which Applicant's counsel placed reliance. I am satisfied that the provision in the SMS Handbook regarding a 60-day time limit for a suspension, within which a disciplinary enquiry must be convened, was intended to be peremptory. The discretion to extend the period of suspension beyond that date rests with the chairperson. It seems to be reasonably incidental to the exercise of that discretion that a chairperson must consider the extension of the precautionary suspension, since the purpose of the provision is to prevent lengthy suspensions without disciplinary steps being brought to a conclusion. The chairperson will need to consider, after 60 days, whether the reasons for the suspension remains valid depending on the progress of the enquiry.
- 141 It is common cause in these arbitrations proceedings that no disciplinary action has been instituted by the respondent against the applicant and therefore in the circumstance it would be unfair for the applicants to remain on a precautionary transfer.
- 142 The Public Service Precautionary Suspensions Policy Guideline provide a guideline on the management of precautionary suspensions is necessary to ensure that such transfers/suspensions are managed in accordance with the principles of administrative justice, natural justice and fairness. The maintenance of a good labour relations atmosphere in the workplace requires that acceptable and fair procedure is in place and observed.¹⁰

¹⁰https://www.dpsa.gov.za/dpsa2g/documents/nlr/2015/21_1_r_4_12_2015%20Annexure%20B.pdf
accessed 5 December 2023

- 143 These principles have not been adhered to and renders the precautionary transfer of the applicants as being unfair, and therefore constitutes an unfair labour practice against the applicants.
- 144 In *POPCRU obo Masemola and Others V Minister of Correctional Services* (J1229/09) [2009] ZALC 65; (2010) 31 ILJ 412 (LC) [2010] 4 BLLR 450 (LC) (30 June 2009) the court stated that fairness requires the following before suspending or precautionary transfer the employees: first that the employer has a justifiable reason to believe, prima facie at least that the employee has engaged in serious misconduct. As concluded earlier, the respondent did not identify the serious misconduct conducted by the applicants and therefore to keep them on precautionary transfer for such a long period of time is unfair.
- 145 I therefore find that the respondent committed an unfair labour practice in terms of section 186 (2) (b) of the LRA, as amended, when the respondent allowed the precautionary transfer to remain subsequent to receiving the investigation report. I therefore conclude that the continued precautionary transfer of the applicants to be unfair and such should be lifted with immediate effect to allow the employees to return to their substantive posts of employment.
- 146 In terms of section 193 (1) (c) of the LRA, as amended, the arbitrator has the power to determine any unfair labour practice dispute referred to him or her on terms of which the arbitrator deems reasonable by means of the payment of compensation. Section 194 (4) of the LRA determines that compensation must be just and equitable in all circumstances but not more than the equivalent of 12 month's remuneration.
- 147 In *Tungwana / Robben Island Museum* (2009) 18 CCMA 6.4.2, reported in *Butterworths* [2009] 11 BALR 1178 (CCMA), Mr Tungwana was suspended pending a disciplinary enquiry into allegations that he failed to disclose outside interests and other acts of negligence. Tungwana referred his suspension as an unfair labour practice to the CCMA which was incorporated in a pre-dismissal arbitration. The commissioner found that the charges against Mr. Tungwana were unfounded. Turning to the suspension of the employee the commissioner found that there were no *prima facie* (on the face of it) grounds to believe that the applicant had committed serious misconduct and the employer therefore had no reason to exclude Tungwana from the workplace. Six months of the employee's salary was awarded as compensation for his unfair suspension.
- 148 In *SA Post Office Ltd v Jansen van Vuuren NO & others* (2008) 29 ILJ 2793 (LC) also reported at [2008] 8 BLLR 798 (LC), Regarding the suspension of the employee, the commissioner found this to constitute a separate unfair labour practice on the grounds that the employee was unaware of the nature of the offence he was alleged to have committed and was not given an opportunity to make representations concerning his suspension. The commissioner, having reasoned that suspension prejudices an employee psychologically, socially and in terms of future job prospects, awarded him six months' compensation.

- 149 Although both the aforementioned cases dealt with the issue of suspensions on full pay, it is likening to precautionary transfers on full pay and therefore the applicants are entitled to receive six months' compensation which in my mind is fair and equitable in the circumstances, due to the fact that the precautionary transfer prejudiced the applicants psychologically, socially and in terms of future job prospects.
- 150 The respondent is further required to pay the wasted costs of the arbitration hearings that did not convene on the 3 and 4 November 2022. In this regard payment should be made to the GPSSBC for the arbitrator's costs.

AWARD

- 151 The respondent committed an unfair labour practice when it continued with the precautionary transfer of the applicants post receipt of the investigation report.
- 152 The respondent is ordered to uplift the precautionary transfer of the applicants with immediate effect and by not later than the 1 February 2024.
- 153 The respondent is therefore ordered to pay the applicants 6 month's compensation within 30 days of receipt of this award, as follows:
- a. Ms. Du Preez: 6 x R 68 059,66= R 408 357,96, less any statutory deductions.
 - b. Ms. R Govender: 6 x R 90 709,51= R 544 257,06, less any statutory deductions.
- 154 The respondent is further ordered to pay the GPSSBC the amount of six thousand rand (R 6000,00) being wasted costs for the 3 and 4 November 2022, within 30 days of receipt of this award.



KEVIN PERUMAL
ARBITRATOR

SIGNED ELECTRONICALLY

ADVOCATE KEVIN PERUMAL
ARBITRATOR

20 December 2023