



GENERAL PUBLIC SERVICE
SECTOR BARGAINING COUNCIL

AWARD

Panellist: E Maree
Case No.: GPBC1647/2018
Date of Award: 2 July 2019

In the MATTER between:

PSA obo T A Mahlanya
(Union / Applicant)

and

Department of Trade and Industry

(Respondent)

Union/Applicant's representative: Mr. J. Ntwampe
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DETAILS OF HEARING AND REPRESENTATION

1 The matter was set down for arbitration on the 17th of May 2019 and it was agreed that it could be dealt with by way of written arguments in terms of the following time line -

- 1.1 applicant to serve on respondent on or before the 30th of May 2019;
- 1.2 respondent to serve on applicant on or before the 17th of June 2019;
- 1.3 applicant to serve on respondent on or before the 25th of June 2019
- 1.4 Parties to file simultaneously with the Council and myself [personal fax and e-mail provided].

2. Both parties have complied as agreed.

ISSUES TO BE DECIDED

3. Whether the precautionary suspension of the applicant constitutes an unfair labour practise and to determine appropriate relief if found that it amounts to an unfair labour practise.

SURVEY OF ARGUMENTS

The evidence/arguments/submissions on behalf of the parties are summarised and not a verbatim record thereof. Only the evidence/arguments/submissions deemed necessary for purposes of this award are reflected. All evidence/arguments/submissions were considered.

APPLICANT'S ARGUMENTS

4. It was argued on behalf of the applicant by Mr. Ntwampe the applicant, who is employed as Assistant Director: EMIA [IDAD] was served with a notice of intention to suspend on the 12th of April 2018 and was given the opportunity to explain why he should not be subjected to precautionary suspension.

5. It was alleged in the suspension letter that the applicant behaved in an improper, disgraceful and unacceptable manner when he allegedly compiled a fraudulent claim that was submitted for payment to the CFO Helpdesk. Payment was for the amount of R2922 000, 00 to Anchor Archeitector [Pty] Ltd. It was contended that the banking details of the supplier was changed when submitted for payment.

6. The applicant submitted his response to the allegation and disputed it. It was stated that he prepared and submitted the correct claim documents. It was stated that documents submitted after his own submission did not have his signature or that of his Director. The applicant noticed the irregular payment to African Skies [that was cancelled] and reported this to the Director of Finance.

7. Despite this explanation the applicant was suspended on the 18th of April 2018 which suspension was uplifted on the 18th of November 2018.

8. It was argued that it is clear from the explanation given by the applicant that he was placed on precautionary suspension for reporting fraudulent claims on which his signature was forged. The respondent did not appreciate the fact that the applicant saves them from losing millions of Rands but instead humiliated him by escorting him from the premises in front of his colleagues. The employees were then informed at a meeting that the applicant was suspended for submitting a fraudulent claim.

9. The suspension of the applicant was for invalid reasons and due to ulterior motives in an attempt to protect those involved in submitting fraudulent claims.
10. It was found in Premier of the Northwest Province that employers need to refrain from hastily suspending employees when there are no valid reasons to do so.
11. The suspension had a detrimental impact on the applicant and prejudiced his reputation, advancement, job security and fulfilment.
12. PSCBC Resolution 1 of 2003 provides in clause 7.2[c] for precautionary suspension and states that a disciplinary hearing must be held within a month or 60-days depending on the complexity of the matter and the length of the investigation. Postponements would be considered by the chairperson of the hearing.
13. The applicant's period of suspension exceeded the period of 60-days as he was suspended for 236 days.
14. It needs to be determined if the respondent held a disciplinary hearing within the 60-day period and if not if it constitutes an unfair labour practise. In *Ngwenya v Premier of KwaZulu Natal* it was held that a suspension become unfair if imposed for an unreasonable period, particularly if the period of suspension is limited by disciplinary hearing.
15. No disciplinary hearing was held during the period of precautionary suspension nor after the upliftment of the suspension. In *Sajid v Mohammed* it was found that the suspension of an employee was unfair because the employer later decided not to convene a hearing.
16. The applicant was suspended with full pay but must be compensated for the prolonged suspension for his injured feelings and for the impairment of his dignity. In *IMATU obo Senkhane v Emfuleni local Municipality* the Court awarded 3-months compensation to an employee who was suspended on full pay. The applicant seeks maximum compensation of 12 months.
17. In response to the arguments raised on behalf of the respondent, it was argued that the Collective Agreement does not allow for a period of suspension exceeding 60-days and if it occurs is "automatically unfair".
18. It was further argued that notice is taken of the Constitutional Court case of *Long v SAB* but that the merits differs from the case of the applicant which is regulated by collective agreement and as such the respondent must comply with the terms thereof.
19. The applicant as the person who discovered and reported the fraud should not have been suspended but should have been treated as whistle-blower.

RESPONDENT'S ARGUMENTS

20. It was argued on behalf of the respondent by Adv. Ramaano that the suspension of the applicant was fair and that no prejudice was suffered as it was precautionary and with full pay.
21. If there was prejudice it was ameliorated by the payment of remuneration.

22. In the Constitutional Case of Long v SAB the decision of the Labour Court was upheld and it was found that prejudice that might have been suffered by the employee was mitigated by the fact that remuneration was paid during the period of suspension, thus rendering the suspension fair.

23. Allegations were made that the applicant processed two fraudulent claims involving African Skies awarding them a grant to the amount of R7315 000. The approved grant had been withdrawn by the respondent but it was later found that two claims to the amounts of R3008 500 and R2970 000 were submitted.

24. Claims were prepared and submitted despite cancellation of the project. The signature of the applicant appeared on both claims. The respondent at this stage was not in a position of confirm or reject the applicant's version and the only tool to ascertain the truth was by way of an investigation.

25. Allegations were also made of the applicant's involvement in recommending payments to Zwile Ka Langa a project that was also cancelled due to fraudulent financial statements submitted to the respondent.

26. Due to the seriousness of the allegations the respondent had to launch an investigation to establish facts and gather evidence in order to determine if misconduct was committed or not.

27. The applicant was then precautionary suspended after he was given an opportunity to submit a representation as to why he should not be suspended.

28. The period of the precautionary suspension was from the 18th of April 2018 until the 18th of November 2018.

29. The allegations levelled against the applicant were serious and very complex involving a large amount of government funds bordering on fraud and corruption.

30. The respondent sourced a hand writing expert Mr. Viljoen who examined the signatures on the supplier's maintenance form and all claims documents on which the applicant claimed his signature was forged.

31. On the 5th of June 2018 Mr. Viljoen submitted a first report but it contained no conclusion.

32. Two supplementary analysis were conducted and two reports dated the 4th of June and the 13th of July concluded fundamental handwriting differences were identified. The reports cannot be submitted due to fear that an ongoing investigation might be compromised.

33. The respondent also had to engage the National Treasury safety net to establish who captured the fraudulent bank account purported to be that of the director of Anchor Architecture whose company was hijacked and account changed on the respondent's system.

34. On the 24th of August 2018 it was established that the applicant was not responsible and the person behind the fraudulent account was identified. Details about this cannot be provided due to the sensitivity of the ongoing investigation.

35. The investigation extended beyond the borders of South African and the complexity of the matter required an intensive investigation.

36. The respondent has prima facie reason to believe that the applicant was involved in serious misconduct and that there were objectively justifiable reasons to deny him access to the workplace pending the investigation.

37. It is trite law [Mashego v Mpumalanga Provincial Legislature] that an employer has the discretion to suspend if the presence of an employee is likely to undermine an investigation and that each case must be determined on its own merits [Mogothle v Premier of the North West where it was also held that the employer must have a justifiable prima facie reason to believe that an employee has engaged in serious misconduct and that there is an objectively justifiable reason to deny such employee access to the workplace.

38. Furthermore, the requirements for a fair suspension as stated in MEC for Education, North West Government v Gradwell were met. It was also stated in this matter that if suspension is on full pay, prejudice is curtailed. Damage to the reputation of an employee is not a consideration as this would render almost every precautionary suspension unfair.

39. In the matter of SAPU obo Matthys v SAPS the court held that the delay in finalising the disciplinary process was due to the employer waiting for the completion of the investigation by the Independent Police Investigating Directorate and found this to be a substantively fair reason. In this matter the respondent engages hand writing experts.

40. The applicant did not suffer prejudice and if there was any it was ameliorated by the payment of his salary as per Long v SAB.

ANALYSIS OF ARGUMENTS

41. Section 186[2] [b] of the Labour Relations Act 66 of 1995 defines an unfair labour practice as follows:

[2] Unfair labour practice means any unfair act or omission that arises between an employer and an employee involving –

[b] the unfair suspension of an employee or any other unfair disciplinary action short of dismissal in respect of an employee’.

42. It was common cause that the applicant was placed on precautionary suspension from the 18th of April 2018 until the 18th of November 2018.

43. The reasons why he was suspended was also not disputed and was based on allegations of misconduct involving allegations that the applicant processed two fraudulent claims involving African Skies awarding them a grant to the amount of R7315 000. The approved grant had been withdrawn by the respondent but it was later found that two claims to the amounts of R3008 500 and R2970 000 were submitted.

44. Allegations were made that claims were prepared and submitted despite cancellation of the project and that the signature of the applicant appeared on both claims. It was also alleged that the applicant was involved in recommending payments to Zwile Ka Langa a project that was also cancelled due to fraudulent financial statements submitted to the respondent.

45. It was argued on behalf of the applicant that he pointed out the irregularities and should have been treated as a whistle blower and not suspended. It was stated on his behalf that his signature was forged.

46. Arguments on behalf of the respondent was they were not in a position to confirm or reject the applicant's version and the only tool to ascertain the truth was by way of an investigation.

47. The investigation entailed sourcing a hand writing expert Mr. Viljoen who examined the signatures on the supplier's maintenance form and all claims documents on which the applicant claimed his signature was forged. On the 5th of June 2018 Mr. Viljoen submitted a first report but it contained no conclusion.

48. Thereafter two supplementary analysis were conducted and two reports dated the 4th of June and the 13th of July 2018 concluded fundamental handwriting differences were identified. It was argued that the respondent also had to engage the National Treasury safety net to establish who captured the fraudulent bank account purported to be that of the director of Anchor Architecture whose company was hijacked and account changed on the respondent's system.

49. According to the respondent it was established on the 24th of August 2018 that the applicant was not responsible and the person behind the fraudulent account was identified. It was also argued that the investigation extended beyond the borders of South African and that the complexity of the matter required an intensive investigation.

50. Based on numerous cases quoted it was argued that the respondent had prima facie reason to believe that the applicant was involved in serious misconduct and that there were objectively justifiable reasons to deny him access to the workplace pending the investigation.

51. It was argued that the applicant suffered no prejudice and if any was suffered was softened by the fact that the suspension was on full pay. It was also argued with reference to case law that the fairness of precautionary suspension is not determined by damage to reputation. The applicant argued that the prolonged suspension injured his feelings and impaired his dignity.

52. The explanations given on behalf of the respondent for the precautionary suspension of the applicant shows that there was a justifiable reason to prima facie believe that he was involved in serious misconduct and that objectively speaking there was justification of barring access to the workplace in order to conduct the investigation.

53. The applicant's contended that he detected the fraud and reported it and that this should have led to him being treated as whistle-blower and not have led to his suspension. It seems from this that he is of the view that his "say so" that he was innocent and that his signature was forged was enough to avoid suspension.

54. Given the seriousness of the allegations and the contentions of forged signatures it could not have been expected of the respondent to just accept this without investigation. The subsequent investigation then indeed found that the applicant was not involved and his suspension was uplifted.

55. What was not explained is why the suspension was only uplifted on the 18th of November 2018 when it was already clear on the 24th of August 2018 that the applicant was not involved.

56. The period thus from the 24th of August 2018 until the 18th of November 2018 was no longer based on prima facie believe of the applicant's involvement. It was also not explained that his suspension during this period was to protect the ongoing investigation.

57. It was held in SAPO Ltd v Jansen Van Vuuren NO and others [2008] 8 BLLR 798 [LC] that a suspension even while investigations are underway amounts to an unfair labour practise if the period of suspension exceeds the period stipulated in a contract of employment, regulation or collective agreement.

58. In this matter precautionary suspensions are governed by PSCBC Resolution 1 of 2003 and clause 7.2[c] states that a disciplinary hearing must be held within a month or 60-days depending on the complexity of the matter and the length of the investigation.

59. Although accepted that an investigation was conducted into a serious and complex matter across borders and involving hand writing experts, it still exceeds the period of 60-days and as stated there is no explanation why the suspension was extended beyond the finding that the applicant was not involved.

60. Both parties argued the issue of damage to the reputation of the applicant from different angles.

61. In *Dladla v Council of Mbombela local Municipality and another* [2008] 29 ILJ 1902 [LC] it was held that damage to the reputation of an employee's image and reputation was not a ground for finding a suspension unlawful.

62. Having considered the arguments presented it is my view that the applicant is entitled to minimum compensation as solatium for not timeously uplifting the suspension.

AWARD

63. I therefore make the following award:

"The respondent, DEPARTMENT OF TRADE AND INDUSTRY must pay the applicant, T A MAHLANYA, compensation equivalent to one [1] months remuneration.

64. This amount to be paid within seven [7] days from the date this award is served on the respondent"

DATED AT PRETORIA ON THIS 2nd DAY OF JULY 2019

A handwritten signature in black ink, appearing to read 'E Maree', written diagonally across the page.

**GPSSBC Panellist
E Maree**