



ARBITRATION AWARD

Panelist: Mashooda Patel _____
Case: GPBC 345/2019 _____
Date of Award: 20th January 2020 _____

In the ARBITRATION between:

PSA obo Mogoboya _____

(Union / Applicant)

And

GAUTENG DEPARTMENT OF AGRICULTURE AND RURAL DEVELOPMENT _____

(Respondent)

Union/Applicant's representative:

Ms. Yolande Ralawe _____

Union/Applicant's address:

Telephone:

Telefax:

Respondent's representative:

Mr. Sam Phaladi _____

Respondent's address:

Telephone:

Telefax:

PARTICULARS OF PROCEEDINGS AND REPRESENTATION

1. The Arbitration hearing was set down at the GPSSBC offices in Pretoria on the 2nd December 2019. The parties agreed to proceed with the matter on submissions, thus no oral evidence was led. Final submissions were to be received on or before the 7th January 2020.
2. The Applicant was present and represented by Ms. Yolande Ralawe, a trade union official from the PSA. The Respondent was represented by Mr. Sam Phaladi, the Deputy Director Labour Relations.
3. A Joint Bundle of Documents was submitted marked as Bundle "A" (216pages)

ISSUE IN DISPUTE

4. I must decide whether the Respondent has committed an unfair labour practice in the relocation of the Applicant?

BACKGROUND TO THE DISPUTE

5. The Applicant was employed as a Deputy Director: Labour Relations and was furnished with a letter from the Acting Head of Department with the intention to relocate him. The Applicant was granted 24 hours within which to indicate his decision not to relocate.

SUMMARY OF THE EVIDENCE AND ARGUMENT

6. In terms of section 138(7) (a) of the LRA, I am required to issue an award with "brief reasons". I do not propose to offer an exhaustive survey of all the evidence and argument led at the arbitration hearing. What follows is a summary of the evidence relevant to my findings only.

APPLICANT'S SUBMISSIONS:

7. The following submissions were made on behalf of the Applicant:
8. After the Applicant was furnished with a letter for his relocation, he responded as per page 18 of the Bundle that inadequate time had been given to him for a response, further to that there was no terminology for 'relocation in the disciplinary code or regulatory framework and the Applicant was further unaware as to the reason for the said relocation. The Respondent in reply indicated that the relocation is to be done pending the investigations into an alleged misconduct.
9. The Collective Agreement only deals with suspensions and transfers and not synonyms of each of these words. Thus the use of the terminology not used in the code is arbitrary.
10. It was further submitted that the letter issued on page 18 was issued by Ms. G Petersen who did not have the authority, responsibility and accountability to issue such a notice as the acting Head of Department was Mr. Mkwana.

11. It was further submitted that the conduct of the Respondent is arbitrary as the Head of Department is required as per the SMS handbook, chapter 6 paragraph 4.3 to ensure that decisions are made impartially.
12. The Applicant stated that there was no substantive reason for his relocation as the investigation was conducted and concluded on the 1st June 2018 and the notice for relocation was sent on the 17th January 2019, seven months after the conclusion of the investigation. The relocation was malicious and intended to embarrass the Applicant which constitutes an arbitrary action.
13. It was submitted that the Respondent had dealt with Applicant maliciously as he had voiced opinions on certain matters particularly in making adverse findings against the management of the Chief Directorate and advising against the Respondent's conduct to dismiss an employee.
14. It was submitted that the conduct of the Respondent was to humiliate him while abusing power and disregarding the applicable prescripts.

RESPONDENT'S SUBMISSIONS:

15. The following submissions were made on behalf of the Respondent:
16. The Applicant was placed on precautionary transfer with effect from 21 December 2018 in line with the provisions of the disciplinary code and procedure (Resolution 1 of 2003). The provisions guiding precautionary transfers in the public service are contained in clause 7.2 of the disciplinary code and procedure which provides that –
 - (a) *“the employer may suspend an employee on full pay or transfer the employee if: -*
 - *if the employee is alleged to have committed a serious offence; and*
 - *the employer believes that the presence of an employee at the workplace might jeopardise any investigation into the alleged misconduct, or endanger the well-being or safety of any person or state property.*
 - (b). *A suspension of this kind is a precautionary measure that does not constitute a judgement, and must be on full pay*
17. It was submitted that in terms of clause 7.2 of the code, it does not provide time frame/s that the respondent had to comply with when giving the employee an opportunity to make representation as long as the time provided to the employee is reasonable and that the employee is able to respond to the allegations. The respondent issued the applicant with an intention to relocate on 11 December 2019 as reflected on page 19. The letter contained all allegations that the applicant was to answer to should he decide to exercise his right to be heard.

18. The applicant replied through his union as per page 16 and did not ask to be afforded an opportunity to prepare his response. Had he so requested more time would have been considered and been granted. After having considered his response to the letter of relocation, the respondent decided that it was fair to transfer him pending investigation into allegations of misconduct against him.
19. The respondent conceded that the usage of the word "relocate" instead of transfer in the precautionary transfer letter was incorrect however it does not render the transfer unfair.
20. The respondent intended to transfer the applicant on a precautionary basis pending finalization of an investigation of allegations of misconduct against him. This intention is reflected in the letter as per pages 19-20 wherein the reasons for the intended transfer are outlined. Considering the Applicant's position, the applicant could not have difficulties in understanding that he is precautionary transferred for purposes of investigations.
21. It was submitted that the Applicant was not prejudiced by use of the incorrect word
22. It was submitted that the Acting HOD was Ms. Pietersen as of the 21 October 2018 as is reflected on pages 214-216.
23. It was further submitted that on arrival of Ms. Gasela as the HOD on 20 December 2018, Ms. Gasela had requested vacation leave which was coinciding with her date of appointment. The HOD (Ms. Gasela) noted that Ms. Pietersen was appointed for a period of three months ending on 26 January 2019 as per paragraph 1 of her acting letter (page 214). The HOD (Ms. Gasela) decided that since Ms. Pietersen was still within her acting period, she should continue acting until her (Ms. Gasela)'s return from vacation leave.
24. The applicant challenges the fairness of the transfer and alleges that the transfer was neither justifiable nor necessary as the allegations he is facing are frivolous and preposterous and therefore rendering the suspension unfair. The suspension of the Applicant was based on reasonable reasons which are set out below.
25. The respondent became aware of possible fraud relating to an appointment letter from the Department of Communications submitted by the applicant to solicit a counter offer. The said allegation was made in April 2018 and the Director: HR enquired from the Department of Communication if they were aware of the letter as reflected on pages 69 and 70. The officials at the Department of Communication stated that they were not aware of the appointment of the applicant.
26. The enquiries by the Director: HRM was not a formal investigation as alleged by the applicant. This was not an investigation by the respondent as at this stage the respondent had no information to substantiate the allegation. The respondent then waited for further information which was not forthcoming until advised to conduct formal investigation and possibly subpoena information from the Department of Communication. An investigation was conducted and thereafter the applicant

was charged with misconduct .At all material times, the respondent had a strong belief that the applicant is or might interfere with the investigation or tamper with evidence. This belief was based on amongst others the fact that the applicant is the Head of Labour Relations which is a unit responsible for dealing with investigations of misconduct. Moreover, the applicant was the only official in place within the Unit and therefore would directly or indirectly manage his own case.

27. The respondent did not with malice and after having being furnished with new information by the Department of Communication, the respondent did not see a need to proceed with the hearing. The new information proved that the applicant was not involved in a fraudulent offer and as such cannot be held responsible for poor administration by the Department of Communication. Although the offer to the applicant did not follow the relevant prescripts such as Public Service Regulations, such an omission was not the responsibility of the applicant.

ANALYSIS OF THE SUBMISSIONS BY PARTIES

28. Section 186(2) (b) of the Labour Relations Act defines **“Unfair labour practice”** as any unfair act or omission that arises between an employer and an *employee* involving—

(b) unfair suspension of an ‘employee’ or any other disciplinary action short of dismissal.

29. The Applicant disputed the following issues:

- That he was not afforded sufficient time to respond to the intention to transfer/relocate before the decision to do so was taken by the respondent;
- That the respondent’s usage of the word relocate in the precautionary transfer letter was vague and unfair to him;
- That that the precautionary transfer was unlawful in that the person who signed the letter (Ms. Pietersen) had no authority to discipline him as of 21 December 2018; and
- The respondent did not have valid reasons to precautionary transfer the Applicant

30. I will deal with each disputed point separately. In terms of the first issue in dispute did the Applicant have sufficient time to respond to the transfer/relocation?

31. The Applicant was furnished with a letter of relocation on the 11th December 2018 as per page 19 of the Bundle and was granted an opportunity to make representations within 24 hours of being furnished with the letter. The Applicant responded through his union as per page 18 of the Bundle indicating that inadequate time had been given to him.

32. The Respondent contended that clause 7.2 of the Disciplinary code, does not provide time frame/s that the Respondent had to comply with when giving the employee an opportunity to make representation. On perusal of such Disciplinary code I concur with the Respondent, however one must note that should the code be silent on same it would be taken that a reasonable period of time should be afforded.

33. In *MEC for Education, North West Provincial Government v Gradwell* (2012) 33 ILJ 2033 (LAC), it must be noted that the Labour Court (on urgent application in terms of s158(1)(a) of the Labour Relations Act, No 66 of 1995 (LRA) held that the suspension was unlawful, relying on the absence of a objectively justifiable reason to deny the employee access to the workplace, and the **lack of sufficient time to be heard** prior to his suspension.
34. In *Lebu v Maquassi Hills Local Municipality (2)* (2012) 33 ILJ 653 (LC)), it was held that the employer did not comply with a statutory provision or internal policy governing suspension. The municipality had failed to justify the employee's suspension and to afford him seven days in which to make his representations on the reasons for the proposed suspension, as required by the Local Government: Disciplinary Regulations for Senior Managers 2010.
35. Is 24 hours reasonable in the circumstances?
36. Can one fully respond to any allegations within a 24hour period? Yes it is possible to do so if one is under pressure to provide a response and that is in itself the optimum word to use, “under pressure”. The Applicant in this instance had to provide a response ‘under pressure’ which in the circumstances would not be reasonable. This was brought to the attention of the Applicant and it was not headed by the Respondent, I thus find that inadequate /insufficient time had been granted to the Applicant.
37. Was the usage of the term ‘relocate’ unfair or vague?
38. The Respondent conceded that the usage of the word “relocate” instead of transfer in the precautionary transfer letter was incorrect however it did not render the transfer unfair. The Applicant contended at length that the terminology used was incorrect and is not provided for in the code. The usage of the term was not prejudicial to the Applicant as he was aware and able to respond to such usage of the term. The use of relocate as opposed to transfer is rather semantics and was understood by the Applicant. I thus don’t find that the incorrect terminology was arbitrary and prejudicial to the Applicant.
39. Was the precautionary transfer unlawful in that the person who signed the letter (Ms. Pietersen) had no authority to discipline him as of 21 December 2018?
40. It was contended by the Applicant that Ms. G Petersen who did not have the authority, responsibility and accountability to issue the letter of relocation. It was contended by the Respondent that that the Acting HOD was Ms. Pietersen as of the 21 October 2018 as is reflected on pages 214-216. It was further contended that on arrival of Ms. Gasela as the HOD on 20 December 2018, Ms. Gasela had requested vacation leave which was coinciding with her date of appointment. The HOD (Ms. Gasela) noted that Ms. Pietersen was appointed for a period of three months ending on 26 January 2019 as per paragraph 1 of her acting letter (page 214). The HOD

(Ms. Gasela) decided that since Ms. Pietersen was still within her acting period, she should continue acting until her (Ms. Gasela)'s return from vacation leave.

41. On perusal of the Acting letter of Appointment of Ms. Pietersen it is noted that she was appointed on the 26th October 2018 which term ended on the 26th January 2019. I thus find that it was within her right and responsibility to issue the letter of relocation to the Applicant.
42. Did the Respondent have valid reasons to precautionary transfer the Applicant?
43. The Applicant contended that there was no substantive reason for his relocation as the investigation was conducted and concluded on the 1st June 2018 and the notice for relocation was sent seven months after the conclusion of the investigation. The Respondent contended that an allegation was made in April 2018 against the Applicant and a formal investigation was only conducted after further information was received in respect of the allegation. The Respondent further contended that respondent the Applicant is the Head of Labour Relations and there was a strong belief that the applicant might interfere with the investigation or tamper with evidence.
44. The *Gradwell* judgment above "In the context of a precautionary suspension (as opposed to a suspension as a disciplinary sanction) *"the standard of procedural fairness, may legitimately be attenuated for three principal reasons: First, precautionary suspensions tend to be on full pay with the consequence that the prejudice flowing from the action is significantly contained and minimized. Secondly, the period of suspension is often of limited duration. Thirdly, the purpose of the suspension - the protection of the integrity of the investigation into the alleged misconduct - risks being undermined by a requirement of an in-depth preliminary investigation. Provided the safeguards of no loss of remuneration and a limited period of operation are in place, the balance of convenience in most instances will favour the employer"*. Murphy AJA further held that it is sufficient if *"any (current or future) investigation"* may be compromised by the employee's presence at the workplace. The suspension may therefore be justified as long as an investigation is within contemplation, it need not have actually commenced. He further noted that *"the nature, likelihood and the seriousness of the alleged misconduct will always be relevant considerations in deciding whether the denial of access to the workplace was justifiable"*.
45. If one has to view the reasons for the intention to relocate the Applicant, they are well founded. There was a reasonable belief that the Applicant may hinder the investigation and thus the relocation of the Applicant. I have considered and perused the documents referred to by the parties to determine when did the investigation arise and it is clear that the allegation against the Applicant commenced in April 2018 but the investigation only commenced after the Applicant's relocation. I thus find that the Respondent did have valid reason for the Applicant's relocation/transfer.
46. Did the Respondent commit an unfair labour practice?

47. The only flaw by the Respondent relates to the insufficient time given to the Applicant to prepare a response prior to his transfer. This points to the procedure followed by the Respondent. I thus find that the Respondent had committed an unfair labour practice in respect of the procedure followed.

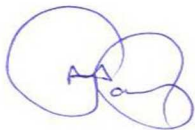
REMEDY:

48. The Applicant has resumed his previous position and based on the fact that the procedure had not been complied, I find that 2month's compensation would be appropriate. The compensation/salary of the Applicant was not provided during the Arbitration.

AWARD:

49. The Respondent is ordered to pay the Applicant 2months' compensation equivalent to two months' of the Applicant's salary which is calculated as follows $R64830.85 \times 2 = R129\ 661.70$ less any statutory deductions the Respondent is obliged to make.

50. The amount must be paid to the Applicant on or before the 24th February 2020.



GPSSBC Panelist
Mashooda Patel
North West