



GENERAL PUBLIC SERVICE
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ARBITRATION AWARD

Panellist/s: Dorothy Khosa
Case No.: GPBC1479-2021
Date of Award: 22 February 2022

In the ARBITRATION between:

PSA OBO Jimmy E Swift

(Union / Applicant)

and

Department of Correctional Services

(Respondent)

Union/Applicant's representative: Mr A Sigudla
Union/Applicant's address:

Telephone:

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Respondent's representative: Mr L Moela
Respondent's address:

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ARBITRATION AWARD

DETAILS OF HEARING AND REPRESENTATION:

1. The matter was set down for virtual arbitration hearings on 23 November 2021 and 10 February 2022 in terms of section 191(1) of the Labour Relations Act 66 of 1995, as amended ('LRA'). The Applicant was represented by Mr Archie Sigudla ('Sigudla'), an official from the Public Servants Association of South Africa ('PSA'). The Respondent was represented by Mr Lawrence Moela ('Moela'), its official. He was accompanied by his colleague, Mr P L Mothapo. Mr Sizwe Skweyiya, of the Council was present. The proceedings were digitally and manually recorded.

ISSUE TO BE DECIDED:

2. I must decide whether or not the alleged suspension of the Applicant by the Respondent was unfair or fair and/or constituted an unfair labour practice, and whether the Applicant is entitled to compensation due to the allegation.

BACKGROUND TO THE MATTER:

3. The Applicant is an employee of the Respondent, the Department of Correctional Services (DCS). He occupies the position of Correctional Officer: Grade 1. It is common cause that the Applicant was placed on precautionary suspension on 20 May 2021, for alleged misconduct. He was subsequently charged, and his disciplinary enquiry commenced on 1 September 2021. It was not yet concluded at the time of the arbitration hearing at the Council. The Applicant's precautionary suspension was instituted in terms of clause 7.2 of the GPSSBC Resolution No 1 of 2006 ('Resolution'). The Resolution contains the disciplinary code and procedure for DCS.
4. The Applicant contends that the Respondent failed to adhere to the prescripts of the Resolution because it failed to adhere to the prescribed time frames. The protracted precautionary suspension had deprived him of benefits that he used to enjoy. This, according to the Applicant constitute unfair labour practice in terms of section 186(2)(b) of the LRA. As a relief, he prays for the precautionary suspension to be uplifted and he sought compensation.

5. During Arbitration, the parties were allowed to cross-examine and re-examine during the presentation of their evidence, as well as present closing arguments. For the sake of brevity, the details of this will not be repeated in the award but it should not be construed that it was not considered.
6. In addition, it is a requirement of the LRA, in section 138(7)(a), that the commissioner must issue an arbitration award with brief reasons, signed by the commissioner within 14 days of the conclusion of the arbitration.
7. For this reason, only the salient points will be mentioned in the award. It is to be noted further, that despite this the submissions have been considered in detail in the writing of the award.

SURVEY OF EVIDENCE AND ARGUMENT:

Evidence

The parties submitted three bundles which were marked A (Pre-arbitration minutes signed by both parties), B (Applicant's bundle) and C (Respondents' bundle).

Applicant's Evidence

Mr Jimmy E Swift ('Swift'), after being sworn in testified as follows:

8. He is the Applicant in this matter and an employee of the Respondent since 31 December 1990. He is based at the Bavianspoort management area. He occupies the position of a Correctional Officer: Grade 1. His supervisor is Mr R Olivier.
9. He was suspended on 20 May 2021. The investigation was concluded on 15 June 2021 and the disciplinary enquiry commenced on 1 September 2021. At the time of this arbitration, the disciplinary enquiry had not yet been finalised, but the last seating was on 27 January 2022. The parties were waiting for the outcome of the disciplinary enquiry. During the suspension period he received his basic salary and no allowances. These are weekend, danger, standby, visit and public holiday allowances. This has affected his finances because he was no longer receiving extra income. His wish was to go back to work and enjoy all the benefits that he was no longer receiving.
10. During cross-examination, the Applicant stated that it was alleged that he had used a derogative word, towards his colleagues. That was 'kaffir', commonly known as the 'K' word. He confirmed that the investigation was concluded on 15 June 2021, and he stated

that the Respondent failed to adhere to the 90-day period as per the Resolution. It was further confirmed that the verdict of the disciplinary hearing was to be issued on 15 February 2022.

Respondent's Evidence

The Respondent called one witness who testified after having been duly sworn in.

Mr Lawrence Moela ('Moela') testified as follows:

11. He was an employee of the Respondent and occupied the position of Labour Relations Officer. He was appointed to represent the Respondent at this arbitration hearing. The Applicant was issued with contemplation to suspend letter on 11 May 2021, and he responded the following day. He was subsequently suspended on 20 May 2021 for reasons to investigate the allegations that he used the 'K' word to address some colleagues. He confirmed that the investigation was concluded on 15 June 2021 and that was the date in which the Respondent started counting days as per the Resolution. Therefore, the Respondent was still within the 90-day period. That was within 81 days. The Respondent relied on a statement under clause 7.1.3.4 of the Resolution. It reads as follows:

"NNB: Finalization of investigation shall be the date on which the delegated authority takes the decision whether to charge or not to charge the employee."

12. The Applicant's precautionary suspension was with full pay, medical and housing benefits. The following allowances were excluded, overtime, danger, and special danger. The Applicant was also not entitled to visit allowances because these visits are per incident. This is supported by clause 7.2 of the Resolution. It reads as follows:

"...A suspension of this kind is a precautionary measure that does not constitute a judgment. An employee shall not be suspended without salary or normal benefits. Benefits shall not include overtime payment or danger and/or special danger allowances."

If an employee is suspended or transferred as a precautionary measure, the employer must hold a disciplinary hearing within 60 calendar days, depending on the complexity of the matter and the length of the investigation. If after 60 days of suspension the disciplinary hearing has not been instituted the suspended employee may return to work. Depending on the seriousness of the alleged misconduct, the Employer may extend the suspension with a further 30 days. If after such period the Disciplinary hearing has not been instituted the

employer must return to work. If the disciplinary hearing has been instituted the employer shall determine when the employee can return to work.”

13. The Respondent complied with the Resolution and did not commit any unfair labour practice, as per section 186(2)(b) of the LRA.
14. During cross-examination, Moela stated that he was familiar with the Resolution. He stated that the Applicant was suspended to avoid him interrupting the investigation that was conducted against the allegations made by the Applicant. This was also for the Applicant’s safety because even the offenders were aware of the allegations. When asked that the Applicant was to be investigated for colleagues outside his management area, he stated that he was basing his arguments on the investigation report that he had received. He stated that the incident happened whilst the complainants were attending training, but he was not sure of when the training ended.

ANALYSIS OF EVIDENCE AND ARGUMENT:

15. Section 185 of the LRA, stipulates that every employee has the right not to be unfairly dismissed or to be subjected to an unfair labour practice.
16. Section 186(2) of the LRA, stipulates that *“unfair labour practice’ means any unfair act or omission that arises between an employer and an employee involving-*
 - (a) ...
 - (b) *the unfair suspension of an employee or any other disciplinary action short of dismissal in respect of an employee;*
 - (c) ...
 - (d) ...”
17. It should be stated at the outset that although the LRA is silent on the onus of proof in disputes relating to unfair labour practice, it is trite that he or she who alleges must prove. Therefore, in the present instance, the Applicant bears the onus to prove on a balance of probabilities that the Respondent’s conduct constituted an unfair labour practice when it prolonged the suspension period pending an investigation of an alleged misconduct.
18. It is common cause that the Applicant was suspended by the Respondent on 20 May 2021, for allegedly using the ‘K’ word towards his colleagues who came to attend training at his management area. An investigation was conducted, and it was finalised on 15 June 2021. The outcome of the investigation necessitated a disciplinary enquiry. The Respondent issued

a notice of the hearing on 21 August 2021, to take place on 2 to 3 September 2021. Without repeating the content of the Resolution as outlined in paragraph 16 of this award, the Respondent had compelling reasons to suspend the Applicant and be allowed to be heard at a disciplinary enquiry. The use of the 'K' word is not acceptable, and it is regarded as a form of racism. It was management's responsibility to investigate and allow the necessary process to prove the allegations. This is without judging the Applicant before the outcome of the disciplinary enquiry could be issued.

19. I now turn to whether the Respondent failed to adhere to the stipulated time frames as per the Resolution. In *casu*, the Applicant was suspended on 20 May 2021. The investigation of the alleged misconduct was finalised on 15 June 2021. The disciplinary enquiry commenced on 1 September 2021 (both parties stated this), but according to the notice of the hearing, the dates were 2 and 3 September 2021. Counting from 21 May to 31 August 2021, that is 103 days. One could argue that the 90-day period was off by about 13 days. Clause 7.2 of the Resolution refers to 60 days which can be extended by 30 days. This means that the Respondent is given up to 90 days to institute a disciplinary hearing of an employee on precautionary suspension. If that has not happened, the employee **must** return to work. In *casu*, the Applicant had not returned to work. Instead, the disciplinary enquiry was to be concluded when the unfair suspension was heard by the Council. The verdict was to be issued on 15 February 2022. That was after this award could have been issued. The Respondent's argument that the disciplinary enquiry was instituted within the 90-day period is not convincing. The notice might have been issued within 90-days but when the actual disciplinary enquiry commenced it was outside the 90-day period. It is not clear what caused the delay after the investigation was finalised on 15 June 2021.
20. The Applicant's pray is for suspension to be uplifted and be compensated in terms of section 193(4) of the LRA. At the time of writing this award it was not easy to decide on the upliftment of the suspension because the outcome of the disciplinary enquiry might have been issued and ruled on this.
21. In terms of section 193(4) of the LRA, "*an arbitrator appointed in term of this Act may determine any unfair labour practice dispute referred to the arbitrator, on terms that the arbitrator deems reasonable, which may include ordering reinstatement, re-employment or compensation.*" In *casu*, I take into cognisance that the Applicant received his full salary and normal benefits from the day he was suspended until the arbitration was held at the Council. Therefore, the Respondent complied with part of clause 7.2 of the Resolution. The Applicant was not entitled to allowances as overtime payment or danger and/or special danger allowances, as per the Resolution.

22. In awarding compensation to the Applicant, I must weigh the alleged unfair labour practice by the Respondent against the loss suffered by him. In **SA Post Office Ltd v Jansen van Vuuren NO & Others [2008] JOL 21839 (LC)**, the court considered that the suspended employee suffered no actual financial loss.
23. In **Fourie v Capitec Bank [2005] 1 BALR 29 (CCMA)**, it was held that “*the determination of appropriate relief, therefore, calls for the balancing of the various interest that might be affected by the remedy. The balancing process must at least be guided by the objective, first, to address the wrong occasioned by the infringement of the constitutional right; second, to deter future violations; third, to make an order that can be complied with, and fourth, of fairness to all those who might be affected by the relief.*” The court further argued that employers should refrain from instituting such suspensions for no apparent reason. This could also include protracted suspensions.
24. In *casu*, I have considered that the Applicant did not suffer no actual loss because of the precautionary suspension. He received his basic salary in full. I have also considered that the suspension may have prejudiced his reputation, advancement, job security and fulfilment.
25. Having considered the parties’ evidence and arguments in totality as well as the aforesaid legal principles, the decision at which I have arrived is that the Applicant has managed to discharge the onus of proving on a balance of probabilities that the Respondent’s conduct constituted an unfair labour practice, but his arguments for compensation are not compelling. That is to be awarded eight months’ salary.

AWARD:

26. In light of the above analysis of material evidence and arguments in totality, I make the following award:
- a) The Respondent committed an unfair labour practice in terms of section 186 (2)(b) of the LRA, when it suspended the Applicant outside the prescripts of clause 7.2 of the Resolution.
 - b) The Respondent should compensate the Applicant in the amount of R31 715, 15 of one month’s salary.
 - c) There is no order as to costs.



Name: Advocate Dorothy Khosa
(GPSSBC) Arbitrator