



GENERAL PUBLIC SERVICE
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ARBITRATION AWARD

Panellist/s: Mr Martin Sambo _____
Case No.: GPBC1277/2023 _____
Date of Award: 12 March 2024 _____

In the ARBITRATION between:

PSA obo MERRIAM LETSOALO

(Union / Applicant)

AND

GAUTENG DEPARTMENT OF EDUCATION

(Respondent)

Union/Applicant's representative: Mr Ernest Masango _____

Union/Applicant's address: PSA _____

Telephone: _____

Telefax: _____

Respondent's representative: Ms Mercy Modise _____

Respondent's address: Gauteng Department of Education (5th Tshwane South District)

Telephone: _____
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ARBITRATION AWARD

DETAILS OF HEARING AND REPRESENTATION

This matter was scheduled for arbitration on 19 February 2024 at the premises of the Respondent, President Towers, 265 Pretorius Street In Pretoria Central.

The employee party, Ms Merriam Letsoalo (hereinafter referred to as the Applicant), was represented by her union official of PSA, Mr Ernest Masango. The employer party, Gauteng Department of Education (hereinafter referred to as the Respondent), was represented by its labour relations officer Ms Mercy Modise.

The proceedings were electronically recorded.

ISSUE TO BE DECIDED

I must decide whether, in the circumstances detailed hereunder, the Respondent committed an unfair labour practice by giving the Applicant sanction short of dismissal (Three months suspension without pay).

BACKGROUND TO THE ISSUES

The Applicant Ms Merriam Letsoalo was employed by the Respondent on 01 April 2009. The Applicant was employed in the position of Housekeeper: Senior Supervisor at the time of this case. The Respondent is a Gauteng Department of Education, 5th Tshwane South District.

The Respondent has on the 24 March 2023 issued the Applicant with a sanction of three months suspension without pay allegedly for taking pictures of learners while naked. The Applicant was dissatisfied and referred the matter to Council for conciliation. The matter could not be resolved at conciliation stage and the Applicant referred it for this arbitration.

The parties submitted bundle A (for Applicant) and B (for Respondent) of documents to Council. The Applicant seeks that her 3 months suspension be reversed and she be reimbursed. The Applicant gave her own testimony and the Respondent called one witness for its case. The Applicant indicated that she is disputing both the process and substance of her disciplinary hearing. On the process she raised the following point: that the Presiding Officer did not announce the finding within 5 days as per clause 7.3 of resolution 1/2003; that the Appeals Authority did not pronounce appeal outcome within 30 days as per clause 8.8 of resolution 1/2003; the Presiding Officer did not allow the Applicant to fully cross-examine Respondent's witness. On the substance the Applicant raised the following two points: that the sanction was inappropriate; and that she was advised by her supervisor to take photos of learners in such situations so that she could have evidence. The parties indicated that there was no point *in limine* to raise.

SUMMARY OF THE APPLICANT'S EVIDENCE

The Applicant Ms Merriam Letsoalo testified that:

She is the Housekeeper: Senior Supervisor at Via Nova School. Her duties includes taking care of the children, cleaning their rooms, bathing them, taking them to meals and making their beds. She and other colleagues were informed by the principal that when there is an incident or trouble with the children they have to take photos of the children so that they have evidence of what occurred. An incident occurred where some of the kids refused to bath in the shower and used basins. She took photos of two of them so that she can

present it as evidence to her supervisor Ms Welhemina Vorster. It was during her second shift that starts from 12h00pm to 20h00pm. When she went to the supervisor the following day she found that the supervisor already knew and had escalated the matter to the principal without having talked to her first. The principal had also escalated the matter to the district without having talked to her. She is upset because there were other worse cases at the school that were never escalated to the district.

SUMMARY OF THE RESPONDENT'S EVIDENCE

Mr Joseph Munengwane testified that:

He was appointed by the HOD as the Presiding Officer (PO) in the disciplinary case of the Applicant. In the Applicant's referral form she indicated that she was brought to the disciplinary hearing and was found guilty without evidence presented. From pages 21 to 32 of bundle "B" is the disciplinary hearing report prepared and signed by him after hearing evidence of witnesses from both sides. In those pages it shows that witnesses testified and were cross-examined by the Applicant's representative of PSA Ms J Makhubela. So the Applicant was given an opportunity to cross-examine witnesses of the Respondent.

Page 35 bundle "B" is the minutes of the pre-arbitration conference held with the Applicant's team on 09 February 2024. The Applicant indicated on that page that the procedure was unfair in that PO communicated the decision beyond the stipulated 30 days timeframe stipulated in the collective agreement; the PO pronounced the outcome outside the stipulated timeframe of 5 days as per clause 7.3 of PSCBC resolution 1/2003; Appeals Authority did not deal with the appeal lodged, as prescribed in clause 8.8 of PSCBC resolution 1/2003.

The last date of the hearing was 01 March 2023 when he received aggravation and mitigation circumstances from the parties. The HOD signed off the sanction on 20 March 2023 and it was received by the 24 March 2023 by the Applicant. The decision was therefore not communicated outside the 30 days as indicated by the Applicant in the pre-arbitration minutes.

Further, although he does not have proof, he has submitted his decision within 5 days of the hearing to the HOD who then signed it off on the 20th March and it was received by the Applicant on the 24th March 2023. He has therefore met the required 5 days time frame to communicate the sanction.

Further, he cannot testify as to the process of the Appeal as the Appeals Authority sits with the MEC and not the Respondent.

He has found the Applicant guilty based on the plausible evidence of the Respondent's witnesses. The Applicant could not rebut the said evidence. He had assisted in securing two witnesses for the Applicant but she opted not to call them on the stand. Further, witness 5 of the Respondent confirmed that the Applicant threatened to take their photos to social media and she was not disputed.

ANALYSIS OF THE SUBMISSIONS, EVIDENCE AND ARGUMENTS

I have to decide whether, in the circumstances detailed hereunder, the Respondent committed an unfair labour practice by giving the Applicant sanction short of dismissal (Three months suspension without pay).

In this case, the Applicant indicated that she is disputing both the process and substance of her disciplinary hearing. On the process she raised the following point: that the Presiding Officer did not announce the finding within 5 days as per clause 7.3 of resolution 1/2003; that the Appeals Authority did not pronounce appeal outcome within 30 days as per clause 8.8 of resolution 1/2003; the Presiding Officer did not allow the Applicant to fully cross-examine Respondent's witness.

It is important to note that despite having raised she disputes this procedural points, the Applicant did not lead any evidence on this points when she testified in this arbitration. The Respondent witness who was the PO opted to clarify this points as they were also raised in the pre-arbitration minutes.

Process

Presiding Officer did not announce the finding within 5 days as per clause 7.3 of resolution 1/2003

The PO testified that although he does not have proof, he has submitted his decision within 5 days of the hearing to the HOD who then signed it off on the 20th March and it was received by the Applicant on the 24th March 2023. He has therefore met the required 5 days time frame to communicate the sanction. Clause 7.3 (o) states that *"the chair must communicate the final outcome of the hearing to the employee within five working days after the conclusion of the disciplinary enquiry,..."*.

Appeals Authority did not pronounce appeal outcome within 30 days as per clause 8.8 of resolution 1/2003

The PO indicated that he could not answer or speak to the questions of appeals as he was not privy to the issues and that it is fall with by another body.

Presiding Officer did not allow the Applicant to fully cross-examine Respondent's witness.

The PO testified that from pages 21 to 32 of bundle "B" is the disciplinary hearing report prepared and signed by him after hearing evidence of witnesses from both sides. In those pages it shows that witnesses testified and were cross-examined by the Applicant's representative of PSA Ms J Makhubela. So the Applicant was given an opportunity to cross-examine witnesses of the Respondent.

I am satisfied with the explanation by the PO and evidence on this last point that the Applicant was given an opportunity to cross-examine witnesses. I, however, find the explanation by the PO in the first two points not satisfactory to prove that the Respondent complied with clauses 7.3 and 8.8 of resolution 1/2003. However, i do not find the two points to be so material to render the hearing procedurally unfair.

In the case of **Elizabeth Avril Home for the Mentally Handicapped V CCMA & Others** it was held that procedural fairness refers to an opportunity that must be given by the employer to the employee to state a case in response to any allegations made against that employee, which need not be a formal enquiry, it means no more than that there should be dialogue and an opportunity for reflection before any decision is taken to dismiss. I consider this to be the minimum procedural points required in law. The above case law separates trivial procedural points from those required by law. From the circumstances outlined above I therefore find nothing wrong with the procedure followed to come to the sanction of suspension for three months without pay.

Substance

In unfair labour practice disputes the onus to prove rests on the Applicant. On the substance the Applicant raised the following two points: (a) that she was advised by her supervisor to take photos of learners in such situations so that she could have evidence; and (b) that the sanction was inappropriate or too harsh;

In this case the Applicant claims that she was unfairly treated by the Respondent in that (a) she was advised by her supervisor to take photos of learners in such situations so that she could have evidence and (b)the sanction was inappropriate or too harsh.

(a) she was advised by her supervisor to take photos of learners in such situations so that she could have evidence

The Applicant testified that she was advised by her supervisor to take photos as evidence. She testified that now that she is in trouble the supervisor who told her about Sylvia taking videos decided to retract and claim she did not tell her so. She also said the principal was aware of this practice. The Applicant seem to claim that this is regular practice with other colleagues to take photos when there is a crisis with the kids; that the kids were not naked as alleged but wrapped with towels. The Respondent does not in cross-examination disputes this and neither does its witness talks to the issue nor does it call a witness to rebut this assertion by the Applicant.

(b) the sanction was inappropriate or too harsh.

The Applicant did not take this point further, other than what was said above.

From the circumstances outlined above, I find on a balance of probabilities that in coming to a sanction of suspension for 3 months without pay, the hearing was procedurally fair but the sanction was too harsh. The Respondent does not rebut the Applicant's testimony that there was a practice of staff taking photos to prove an incident.

AWARD

1. The Respondent is ordered to reduce the sanction 3 months without pay to 2 months without pay.
2. The Respondent is ordered to repay the Applicant one month's salary of R16 381.13. into her bank account.
3. The Respondent is ordered to effect payment in clause 2 above on or before 15 April 2024.
4. I make no order as to costs.



PANELLIST: MARTIN SAMBO

Date: 12 March 2024