



ARBITRATION AWARD

Panellist/s: Joyleaf Boase
Case No: GPBC1054/23
Date of Award: 05 April 2024

In the ARBITRATION between:

PSA obo Gaobuse, Abel
(Union / Applicant)

And

Department of Public Works, and Roads - Mmabatho
(Respondent)

Union/Applicant's representative: Mr Albert Ramahoshi

Respondent's representative: Mr Lesego Disipi

ARBITRATION AWARD

DETAILS OF HEARING AND REPRESENTATION

1) The arbitration hearing took place on the 12 and 13 February 2024 at the Respondent premises in Mmabatho, the Department of Public Works, and Roads. The proceedings were electronically recorded. The Applicant, Mr. Abel Gaobuse was represented by union official from PSA union, Mr. Albert Ramahoshi. The Respondent was represented by Mr. Lesego Disipi from Labour Relations.

2) Both parties agreed to submit their closing arguments on the 21 February 2024 at midnight.

ISSUE TO BE DECIDED

3) I must decide whether the dismissal of the Applicant was both procedurally and substantively unfair after he retracted his notice intending to go on retirement.

NARROWING OF ISSUES

4) It was common cause that the applicant before his termination was employed by the Respondent as Assistant Director: Information and Planning directorate since 2006.

5) Issues in dispute is that the Applicant is the one who terminated the service, while he insisted it was well within the policy to retract as the Respondent never responded or not followed procedures to his notice intending to go on retirement.

6) Parties submitted documents, the Applicant had bundle A and the Respondent bundle B.

7) The Applicant was the only witness who testified while the Respondent called in 3 witnesses, Ms. MMphoentle Choche, Ms. Agnes Mere and Ms. Buyiswa Nkopo.

BACKGROUND TO THE MATTER

8) The Applicant was employed as Assistant Director by the Respondent since January 2006 before confirmation on termination due to retirement he was on salary notch of R30425.20. On the 03 May 2023 the Applicant wrote a letter to the Human Resources Management (HRM) with a subject, notice to retirement with effect from the 31 July 2023.

9) However due to time and with no response acknowledging or taken to process in preparing his departure on the 02 June 2023 he once more wrote another letter subjected, a retraction of notice of retirement indicating he's currently deciding to continue with the services whereby on the 06 June 2023 the Respondent did sent in an email thanking him for his 20 years services and further that the department did not consent to this retraction letter. He then referred the matter to the GPSSBC (the Council) in terms of section 191(1) [191(5)(a)], Unfair dismissal - the Labour Relations Act of 1995 (the Act) as amended on the 14/08/2023. The matter was conciliated but remained unresolved and was referred for arbitration that was scheduled for a set down on the 12 and 13 February 2024.

SURVEY OF EVIDENCE AND ARGUMENT

Applicant Evidence and Arguments

1st Witness: Mr. Abel Gaobuse testified as follows under oath: -

10) that on the 03 May 2023 he did send a notice of retirement to the Respondent but after a while within 30 days and further that there was no response back acknowledging his notice, he felt to change his mind by retracting the notice. Immediately after sending in the second letter of retraction on the 02 June 2023, he now received a response letter on the 06 June 2023 that said there is no way he can do that instead he needs to have some discussions with the Respondent, but he must know that as he mentioned in his notice he must leave on the 31 July 2023. Then this came to him as a dismissal because the first part is that an employee must put in 3 months' notice whereby within that the Respondent must take an employee through the process of exit interview, to understand why an employee wants to go for retirement before the age of 65 which wasn't done. Instead after receiving the response from the Respondent that he's will no longer be in services of department he remembered that there was a letter circulating advising all Heads of the Department (HOD) to do these exit interviews which amazes him why this wasn't considered on his part where he even went to Human Resources unit (HR) to enquire if it is possible for him to be forced to retire before the age of 65.

11) He further mentioned whilst in his frequent visit to the HR office worried about the 31 July 2023 getting closer he received another letter stating that his retirement has been approved by HOD which showed that after they received his notice was quickly taken to HOD without supporting documents, never signed or arrangements with Government Employees Pension Funds (GEPF) which is unfair, urgency on shortcuts because what they wanted was just to fill the post he was on and with his retraction letter he is only disturbing their intentions. He lastly explained that his main understanding with these exit interviews is when sometimes the Respondent still requires an employee's services and in the process some suggestions to change dates of retirement or resignation until Respondent finds a replacement or when asking an employee why he/she is leaving before the age of 65 it was found out that it was a fed-up retirement or resignation in the main an employee is advised on the implications of such decision as well on finances, and all this as examples of what needed to be done before his notice of retirement was taken to the HOD.

12) During **cross examination** he stated that in his 20 years' service working for the Respondent it was his discretion not forced to write a notice of retirement indicating he will be leaving in 3 months, but the procedure wasn't followed. He explained that page 17, letter signed on the 29/08/23 before his retraction letter with subject an employee request to retire after attaining the age of 60 years in terms of Chapter V, section 16 (4) of Public Service Act number 103, he agreed was intended to be submitted to the HOD but nothing was communicated to him as far as the process has to be done internally including by his direct supervisor that they are acknowledging his retirement notice that was supposed to have some attachments. His conclusion was that on how his case was handled its first of its kind, an abuse or been targeted as it has never been done to others who retracted their notice previously but he could not remember other employees he is mentioning but said the Respondent has those names in its records, later on said he remembers 1 lady in the unit which he cannot recall her name. He further mentioned that this retirement was a personal decision which he didn't discuss with the HOD and again not aware that when he wrote the retraction letter the HOD has already approved his retirement which he insists he wasn't the first to have done. It will be difficult for him to go on other employees' files while he agrees the HOD is the only one having powers to approve a retirement and he cannot be forced because he is showing he made a mistake or changed his mind about leaving and, it cannot be seen as preferential treatment. He read on page 15, showing that the signature is of Ms. Delange who is his director not his direct supervisor who also didn't communicate anything further it was HR who was supposed to call him they

sit for all necessary process because his intension wasn't that he is retiring from the date of notice it must be known the is grace period of 3 months to address all the attachments.

13) He agreed that Ms. Delange was telling HR to proceed with his notice, but things must be done and to check if his decision is not out of mistakes, emotional, anger, frustration, or family matters further the notice circulating after receiving the approval letter from HOD warning of exit interviews which remain his consent. A version was putted to him that HR didn't conduct his exit interview instantly on his retraction letter which made HR to get confused, in the response he said it's a no, he never wrote his leaving immediately if the interview was conducted it could've assisted but nothing was conducted to give out on the same discussion, but they only wanted to remove him. The reason that he is below 65 years it was correct for the HR to check if the decision is not wrong not that he is shifting the blame but personal circumstances during the time he wrote the notice which was to be considered when they receive the notice, but they had lack of consent.

Respondent Evidence and Arguments

1st Witness: Ms. Mphoentle Choche testified as follows under oath: -

14) that she is employed by the Respondent as Chief Director (CD) responsible for Custodian and Immovable Assets Management in the Directorate for Planning and Information, doing reports, accounting for land, and buildings in province, HR, risk management and development, directors reports, payments, MEC's and legislatures houses, offices, cleanings, prestige portfolio and gardening. She confirmed she knows the Applicant who was Assistant Director at immovable register and that he was reporting to the Deputy Director who reports to Sylesta but for her to come in the proceedings was that its alleged she is the one who dismissed him. On bundle B, page 11 is the letter she saw written by the Applicant to the Director indicating the intension to retire and after that receival of the letter on page 15, is letter to Director HRM informing her that the Applicant and Ms. Nthutang will be going on retirement as per their request which was approved by the HOD on the 29 May 2023. She further indicated that on page 12, is the Applicant retraction letter of retirement with a follow up letter she wrote dated 02 June 2023 on page 13 responding simple and clear to his notice that any retraction must be on mutual agreement meaning not a decision an employee can just take alone the employer needs to consent to it, and she thanked him for his services with the Respondent lastly confirming to him that his last day at work will be the 31 July 2023 as indicated by him in the notice.

15) She mentioned that this retraction letter on page 12 and the letter to the HOD on page 19 the dates shows that the accounting officer has already accepted his retirement which was voluntarily made or a unilateral decision which he doesn't have powers to do except employers presence or consent which is not there and she is battling to find any correlation on the exit interview process because when one says he is going whether interview is conducted or not it doesn't change the facts with an example with her previous employer with a contract of 5 years that she left without this exit interview and could say she was not leaving, no material in this, never heard of such situation, it baffles her, if HR failed to conduct one she never heard off maybe is her who is failing to understand the correlation about exit interview. She stated that for him to suggest that he was unfairly dismissed that allegation has no basis as is his choice and he was never forced to say go on retirement: cannot understand how she dismisses a person who has an intension of going, and maybe she be clarified as to this alleged dismissal, what it entails, its baseless and, no way, she is running the government, people cannot just be left to come and do as they please.

16) During **cross examination** she stated that when she received this notice, she discussed with the Director mainly that it had 2 people retiring they took the letter to HR on page 15 and insisted it is not a

legal requirement to write a letter back in acknowledging the contents but agreed that they didn't write anything back that time. In the main what prompted her to respond on the retraction letter was that the first time to her the employment relationship was already terminated now with him thinking that he can withdraw unilaterally she was clarifying him on his position to say he is going. She stated that on 03 May 2023 when they received the letter he was terminated by HOD signature on the 29th and whether communicated or not it is just academic, and she is responsible for HR but not its full functions: she never acknowledge his retirement as there was nothing to acknowledge he was leaving and on exit interview HR is there to can respond because is for the first time she being told she didn't conduct exit interview for Ms. Nthutang who left in June and him, Applicant left in July and, the HR can give a list even other who left around December and she never get involved after sending to HR who also sent to HOD.

2nd Witness: Ms. Agnes Mere testified under oath as follows: -

17) that she is employed by the Respondent as an Assistant Director in the Human Resources Administration with duties to appoint new employees with conditions of services, pensions units report to her, housing, leaves, employees' records and dealing with notices of retirements. She clarified that she knows the Applicant as working at property management as well as a colleague who would come to her for greetings further who asks questions in her office. On page 11, the notice letter she received from the Applicant via his workstation at property directorate as it was written to Human Resources Manager (HRM) with page 15, covering letter attached to page 16, the memorandum approved by the HOD on 29 May 2023. She explained the process the memorandum went from HRM till to the stage of HOD with an approval where she comes in after to make an improvement from the Director then prepares letter to inform the Applicant about the HOD having approved his notice by further asking some of her subordinates to bring in some forms the Applicant should fill, and sign before sending them to GEPP offices for payouts. She explained that this page 12, the retraction letter of notice to retire she saw it from one of her colleagues including also the Applicant showing it to her informing her that he did send his notice to the Director, but the approval was done on the 29 May 2023 before the retraction letter on the 02 June 2023 was received. The exit interviews are for employees leaving the department and it's done by the Human Resources Planning (HRP) unit: further remembering that in 2014 there was a Circular confirming all employees are aware about it but it remains the responsibilities of the supervisor and the employee.

18) During **cross examination** she stated that when the Applicant sent in his retraction letter, he wasn't aware that the initial notice to retire was approved further that before it is approved the notice must go with other attachments, they must use on page 15, 11 and the identity document (ID). She stated that this incident of the Applicant since she started working in the HRA it was the first of its kind, not working with interviews interviews but to get clarity she did went to HRP to ask about this after her supervisor at pensions and the Circular said something about exit interviews then HRP said to her Eggy when somebody exit the department must go for the exit interview, in the response asked what is the impact and was told it has no impact it is just something, the is problem even one is not taken for it, it is just to hear employees feelings just use the questionnaire forms, her and colleagues at pensions don't have problem when employees don't go for exit interviews as long as pensions and other gratuities are going to be paid after the approval as always.

3rd Witness: Ms. Buyiswa Nkopo testified under oath as follows: -

19) that she is employed by the Respondent as an Assistant Director in the HRP unit with her responsibilities being to make sure that HR plan is in place with reports done annually for the office of the Premier which reports this to the Department of Public Services and Administrations (DPSA) and Employment Equity which she must make a point that the Respondent complies with as per the Act. She

indicated that she knows the Applicant as she understands hearing from the grapevine that he is no longer with the department. When an employee tenders a retirement the unit that deals with that is the HRA that administer the exit where later the HRP she heads follow with administering the exit interviews but for 2023 the were no exit interviews conducted and explained the process to say upon receiving an employee's notice of retiring or resigning the direct supervisor must know first, they make the request to the HRA unit to administer all what is received on retirements, capped leaves and again they both as it is their responsibilities inform HRP about an employee leaving so that exit interview must be scheduled that's why she didn't receive any request for the Applicant. The exit interviews the is no regulation or a directive that pin an employee not to go on retirement or resign if the is no one conducted, no penalty. She later stated that the DPSA gave directive to say retiring or resigning employees must do exit interviews and for them to be conducted one is the questionnaire or templates provided for an employee to fill in the forms where employee is telling them the reason for leaving , what has the department done to them for them to leave, they check if reasons are valid or not, some will be what can the department can do for them, what can be done to retain him/her: furthermore explained that the reason behind to do exit interview is to retain employees or in the main a retention strategy in those 3 questions. She stated that the directive isn't explicitly compulsory because they have so many employees even this year leaving without it being conducted and it cannot be said that the is inconsistency in this matter.

20) During **cross examination** she stated she couldn't remember where an employee went to this interview after the proceedings has identified that employees' reasons for leaving where wrong was advised to stay, she was given 2 employees Ms. Tawana and Mr. Setlhare which she remembered the one of Mr. Setlhare but not the exacts contents of the questionnaire and didn't know that Ms. Tawana is still in the employment of department. She maintained that is dual responsibility of supervisor and the employee meaning the notice of employee by supervisor must be taken to HRA where within the 30 days the exit interview must be conducted before an employee exit and when no date is given for the interview he or she must make the supervisor aware of such to say interview me as he is leaving she has experience of such issues because she files records as this information is confidential and this records of exits do help the department to correct especially on reasons given for leaving example others leave because department don't give out tools to complete work, others not in good terms with their supervisors and this assist the department to rectify mistakes it is doing or happening: because at the end of the day the department must be seen as employer of choice. She narrated that the DPSA and the Circular on the heading under the background gave a directive that employer must conduct exit interview on resigning and retiring employees which she knows.

ANALYSIS OF EVIDENCE AND ARGUMENT

21) It was common cause that the applicant was employed by the Department of Public Works, and Roads in Mmabatho before he could write a notice of retirement which he later intended to retract but was approved confirming his wish to leave on the 31 July 2023. The Applicant is required to proof that there was unfair dismissal.

22) **In terms of Labour Relation Act 66 of 1995 "the Act", Section 213**, definitions 'dismissal' means dismissal as defined in section 186 (1)(a) an employer has terminated employment with or without notice;

23) **In terms of the Act - Schedule 8, Code of Good Practice: Dismissal, item 4 on fair procedure:**
(1) Normally, the employer should conduct an investigation to determine whether there are grounds for dismissal. This does not need to be a formal enquiry. The employer should notify the employee of the allegations using a form and language that the employee can reasonably understand. The employee should be allowed the opportunity to state a case in response to the allegations. The employee should be entitled to a reasonable time to prepare the response and to the assistance of a trade union

representative or fellow employee. After the enquiry, the employer should communicate the decision taken, and preferably furnish the employee with written notification of that decision.

(3) If the employee is dismissed, the employee should be given the reason for dismissal and reminded of any rights to refer the matter to a council with jurisdiction or to the commission or to any dispute resolution procedures established in terms of a collective agreement.

24) In terms of the Act - Section 213, Collective agreement means a written agreement concerning terms and conditions of employment or any other matter of mutual interest concluded by one or more registered trade unions, on the one hand and, on the other hand -

(a) one or more employers;

(b) one or more registered employers' organisations; or

(c) one or more employers and one or more registered employers' organisations.

25) In terms of the Act - Section 192:

(1) In any proceedings concerning any dismissal, the employer must establish the existence of the dismissal,

(2) If the existence of the dismissal is established, the employer must prove that the dismissal is fair.

26) In terms of Public Service Act, 1994 issued the directive on exit interviews must be conducted with all employees whose services are terminated on or after 1 January 2008 on account of incapacity due to ill-health or injury, retirement, or resignation.

27) The Applicant was challenging both procedure and substance followed by the Respondent where he did send a notice to retire on the 03 May 2023 indicating that he will be in service until on the 31 July 2023 but due to no response or any acknowledgement of his notice he started having change of heart where on the 02 June 2023 he wrote again to inform the Respondent that he is no longer leaving. The Respondent on the 06 June 2023 responded for the first time to him informing him that his notice was approved on the 29/08/2023 by the HOD, his retraction must be a mutual agreement with the employer consenting to it and thanked him for his services. The applicant explained that was he at the age of 65 as stated by the policy and not been taken for an exit interview he wouldn't worry about it but due to personal circumstances or being fed up he wanted to bring that to the attention of management were they will be having discussions as per policy further that there are some employees who are still in the employment with the Respondent after retracting their intended notice to retire.

28) I took an observation in all what Ms. Choche said after they became aware of the notice to retire of the Applicant which is correct, she discussed with the director in how to process his application in far worse to defend the wrong that happened that they didn't acknowledge the receipt of the notice which was the first part to assist the approval to be made by the Director. Ms. Agnes spoke about what was to be attached that includes the identity document of the Applicant which wasn't in the documents and I cannot understand when speaking of their relationship was that she had a good one with the Applicant, they greeted even can sit in for some discussions but she couldn't bother when she see the notice from one the colleague wanting to know what is going on main point she at the HR unit if her believe when doing her work that the only is when employees have received their payouts that's enough for is not correct. Ms. Buyiswa also from HRP she heads she only heard from grapevine that the Applicant is no longer with the department also didn't assist or her explanations to assist the frustrated employee. The most common issue about these 3 witnesses is that they were found wanting on the exit interview that was to be conducted before an Applicant application to retire can be approved because had this interview been made all this could've not arise. Ms. Choche firstly must be at ease in a level of how she responds to any questions facing her and she was of opinion that there was nothing for her to acknowledge when the notice was brought to her attention, she further said in her previous employment of 5 years she left with

no exit interview but in the ease I am noting is that we talking about an employee whose been with the department for almost 20 years this was the first grey area that needed the attention of management. She stated that she doesn't get involved after sending the notice to the HR unit, but she was involved all the time writing and thanking the Applicant for his services with the department. I must reiterate to the witness that her narration that when they received this notice of the Applicant to her the employment relationship was terminated this is not correct and will never be. The Applicant has no power to change his mind, but had she done what was to be done as per the policy the answer is that all employees has a right to change their minds that why the is a directive from DPSA about the subject. Maybe the ones on long service may not understand the ones with less services but let's be at ease and work together by directing each other in the right path not just to say we must be consent only on running government but having patience with our employees.

29) Ms. Agnes said for completion on approval of the application one of the document is identity document which was not there, when the Applicant sent the second letter to retract the application it was already approved this very contradicting, she mentioned that after one colleague spoke something about exit interview she went to HRP to ask where she was told is nothing to worry about but to just get employees feelings and this can never be right from someone from the office who is expected to know what to do. I cannot accept that as long as employees payouts are made nothing doesn't bother, in my emphasises if this approach will remain this will the same employees who needs to go and sit with their last money after working so hard but what will be the point this employees go home not having information or got induction they will go back to be the burden to the state having waisted the payouts she mentioned.

30) The Applicant main version is why is he expected to know all employees who retracted their notices forgetting he is the one who alleges inconsistency or he is treated differently from others but what he must know in any workplace as I understand the is grievance procedures which he should advance in getting managements attention to avoid when they ignore his crying also urge the Applicant to ease or to come down because all people involved here are in the high positions the Chief Director, HRP, HRA and AD of the department learn to work together we wouldn't be in the arbitration, ubuntu not only to communities but also in the workplace.

31) The Respondent main argument is that it never dismissed the Applicant but instead is the one who dismissed himself but here is Ms. Buyiswa she stated in the whole of 2023 period the unit never conducted any exit interview which isn't of a consent, her HRP unit must be informed by the HRA of any employee whose retiring so her unit must schedule an exit interview, but she heard from grapevine that the Applicant is gone, out of the inconsistency mentioned of others who retracted their notices she only remembers only one of Mr. Sethlare but not of Ms. Tawane but agreeing Ms. Tawane after retracting she still in the employment. She on witness who was honest in the proceedings when she said the notices of employees leaving are filed in her unit to help the department to correct as some employees exit due to them not given tools to do their work some exit because their not in good terms with their supervisors, for the department to rectify mistakes and further that at the end of the day the department must be seen as an employer of choice. She contradicted herself further to say it is the responsibilities of employees and supervisors in requesting for exit interview but later agreed to say after HRA informed her unit, she must prepare for the interview within 30 days and 2023 they were not held. In all this I accept 2 wrongs don't make right but the Applicant within 30 days he retracted when the was no response... The main intension is to retain she said.

32) When applying my mind in all what transpired in the proceeding the Applicant was in no way can force coming to work which indeed clarifies that the was stoppage to him coming to work, were he agreed he made mistake wanting the attention of management. Ms. Buyiswa went to quote the Circular and the DPSA directive that says employer must conduct exit interviews to all retiring and resigning employees,

which is what know. The Respondent must follow its own policy framework to the latter as errors or failure to implement exonerates out the wrong parties.

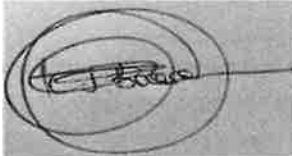
'Relief'

33) In conclusion the Respondent, the Department of Public Works, and Roads in Mmabatho must reinstate the Applicant, Mr. Abel Gaobuse with immediate effect.

AWARD

34) The dismissal of the Applicant, Mr. Abel Gaobuse was both procedurally and substantively unfair.

34) The Respondent, the Department of Public Works, and Roads in Mmabatho must retrospectively reinstate the Applicant, Mr. Abel Gaobuse with immediate effect within the 2 days of receiving this award.

A handwritten signature in black ink, appearing to read "Joyleaf Boase", is written over a circular stamp or seal. The signature is somewhat stylized and overlaps the circular boundary.

Name: Joyleaf Boase

GPSSBC PANELIST