

Council Name

# ARBITRATION AWARD

Panellist/s: Teresa Erasmus  
Case No.: GPBC673/2020  
Date of Award: 3 November 2020

## In the ARBITRATION between:

PSA obo H COETZEE

(Union / Applicant)

and

DEPARTMENT OF DEFENCE

(Respondent)

**Union/Applicant's representative:**

Ms Natalie Adams (PSA)

Union/Applicant's address:

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Telephone:

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Telefax:

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**Respondent's representative:**

Mr Zanele Ngwane

Respondent's address:

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Telephone:

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Telefax:

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## ARBITRATION AWARD

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### DETAILS OF HEARING AND REPRESENTATION:

1. This matter was set down for Arbitration at the General Public Service Sectoral Bargaining Council in terms of section 186(2)(b) of the Labour Relations Act and was heard virtually on 19 October 2020. The Applicant was represented by Ms N Adams from PSA, whilst the Respondent was represented by Mr Z Ngwane, a Labour Relations Officer at Respondent.

### ISSUE TO BE DECIDED:

2. I must decide whether the applicant was subjected to an unfair labour practice dispute, related to unfair suspension in terms of section 186(2)(a) of the LRA, 66 of 1995.

### BACKGROUND TO THE MATTER:

#### THE APPLICANT'S OPENING STATEMENT

3. The applicant received a special leave/suspension letter on 12 July 2018 applicable with immediate effect. The applicant was informed of an investigation which was underway with regards to alleged misconduct. The PSA addressed a letter to the respondent's Labour Relations department on 28 January 2019 requesting the upliftment of the suspension, due to the 30 to 60 day stipulation within which a hearing must be held, in accordance with Resolution 1 of 2003, as amended.
4. By the 6<sup>th</sup> of April 2020 the PSA did not receive a response from the respondent. The disciplinary hearing was finalized on the 13<sup>th</sup> of July 2019 and the final outcome received on the 6<sup>th</sup> of March 2020. The sanction was that of a final written warning and the applicant was found guilty on one of the charges, the applicant did not appeal against the outcome.
5. The applicant then awaited an instruction from the respondent to return to work. On 20 March 2020, the PSA addressed a letter to the respondent, requesting an instruction for the applicant to return to work, but no response was forthcoming. The PSA continued

sending e-mails to labour relations, even after correspondence with Ndhluli that the e-mail would be sent again.

6. To date, no response has been received from the respondent with an instruction for the applicant's return to work. The applicant is currently being paid. Despite Covid-19 and lockdown regulations, the respondent continued working, either on the frontline or where possible from home. There is no reasonable cause or explanation for the delay. The applicant has been on suspension for 2 years and 2 months. The fact that the applicant remains in suspension despite the fact that his disciplinary hearing has been finalized, amounts to an unfair labour practice.
7. The applicant seeks the upliftment of the suspension together with compensation due to the prejudice suffered by the applicant.
8. **HEINRICH COETZEE testified in support of his own case (hereinafter referred to as "the applicant")**
9. The respondent did not contest any of the dates advanced by the applicant in his opening. The applicant suffered prejudice due to the fact that his reputation in the department was gone. His colleagues all thought he had done something wrong and his colleagues avoid him in the shops. The applicant received a final written warning in respect of non-declaration.

#### **THE FOLLOWING ENSUED FROM CROSS-EXAMINATION:**

10. The applicant acknowledged that he was found guilty of the charge of wilfully contravening section 30 of the Public Service Act and earned remuneration outside of the workplace. He was a shareholder and conducted business and failed to declare his interest in this business.
11. The applicant conceded that he received a final written warning in respect of this charge, which warning letter he still has not received. He was only informed of the outcome. The applicant acknowledged that the charge was serious.

#### **THE RESPONDENT'S OPENING ARGUMENT**

12. The respondent stated that it will not call any witnesses but would address argument in closing.

13. The respondent acknowledges that the applicant is still on suspension, due to an ongoing investigation. The respondent is however prepared to uplift the applicant's suspension. There was no prejudice towards the applicant, as he was paid during his suspension from 26 October 2020. The letters for the upliftment of the suspension still have to be issues.

## **THE APPLICANT'S CLOSING ARGUMENT**

14. In response to the respondent's claim of being ambushed: The dispute was referred as an Unfair Labour Practice, outlining the applicant's arguments are not a requirement. However, the applicant tried in vain to set a pre-arb meeting, as per pages 14 to 17 of the bundle where this could have been addressed. The respondent was unprepared by its own negligence and failure to communicate with the applicant or the union.
15. In response to the respondent using the applicant's testimony and saying that he did not provide names of the people who confronted him in the mall or what his response was to these people: The respondent had an opportunity to cross-examine the applicant in order to establish these factors but opted not to. The applicant's evidence is thus considered true evidence.
16. In response to the respondent arguing that the applicant was found guilty on a dismissible charge: The applicant contests strongly as it is indicated in the chairperson's finding found on page 9, that the applicant was found guilty on not declaring his remunerative work outside the department in the proper format and on a yearly basis. This is not a dismissal misconduct.
17. In respondent's arguing conflict of interest in the respondent: The applicant was not found guilty on any fraud or conflict of interest charges and therefor this argument is irrelevant to the unfair suspension in this matter. These proceedings are not to deal with perceived guilty of other charges or any charges.
18. The argument on the respondent sourcing a forensic specialist after the disciplinary hearing or even that the respondent wants to take the chairperson's findings on review is not relevant to the unfair suspension.
19. The respondent's argument for non-compensation is based on allegations that the applicant was already found not guilty of and does not address the Unfair Labour Practice this dispute relates to.

## THE RESPONDENT'S CLOSING ARGUMENT

20. The respondent objected to the fact that the applicant now required not only upliftment of his suspension, but also compensation. The respondent also objects against the applicant's evidence that he was avoided by colleagues in the mall due to the stigma attached to the allegations against him, although the names of these colleagues were not mentioned.
21. The applicant's averment that his colleagues told him that he had stolen and that he was going to be dismissed, was also not corroborated by any witnesses. The applicant conceded that he was found guilty of charges of serious misconduct and that he is awaiting the final written warning to be issued to him by the head of the department.
22. The applicant conceded that the charges against him was serious. It is common cause that charges of this nature can lead to dismissal. It is public records as stated by the public service commission that numerous government employees are performing illegal work and doing business with their employer. These practices lead to employees abandoning their daily duties and focusing on their private business with the employer. This is a direct conflict of interest. Employees who conduct businesses with the employer deprive unemployed South Africans to be appointed in those positions. The applicant therefore benefited twice from the same employer.
23. The applicant was appointed in a position of trust as budget manager, which amongst others deals with the costing of tenders, which makes him privy to information before the tenders are advertised to the public. The applicant dishonestly misused his position. He used information obtained in during his employment to his advantage.
24. The applicant did not suffer any prejudice as he was fully remunerated during his suspension. The respondent is currently reviewing the sanction and his intention to apply to the Labour Court for amendment of the chairperson's outcome.
25. The respondent secured the services of a forensic company to proceed with the investigation with regards to serious evidence of fraud, corruption and maladministration involving huge sums of money established and the applicant was implicated and the continued suspension of the applicant was directly linked to the investigation and was done to serve and protect the integrity of the ongoing process.
26. In spite of every endeavour by the respondent to finalize the investigation, the Covid-19 pandemic played a huge role in the delay of the process and there was no malicious intention by the respondent to place the applicant in suspension.

27. Therefore, the respondent argues that the applicant is not entitled to any compensation.

**ANALYSIS OF EVIDENCE AND ARGUMENT:**

28. It is common cause from the evidence before me that the applicant remained on suspension in spite of the fact that the disciplinary process had been finalized. The outcome sought by the applicant was the upliftment of the suspension and return to his workplace. Although the respondent avers that the applicant's suspension was extended due to the fact that an ongoing investigation regarding alleged corruption was underway, this was not put to the applicant or his representative in response to a request for the applicant to return to work. This evidence was only tendered in closing arguments during the Arbitration proceedings and not advanced as a reason for the prolonged suspension. The respondent failed to inform the applicant of the reason for his ongoing suspension, after the disciplinary hearing was finalized.
29. I take cognizance of the respondent's tender to uplift the suspension with immediate effect and that the applicant can return to the workplace.
30. The respondent did not deny the applicant's representative's statement that a request had been sent to the respondent as is evidenced on page 17 of the applicant's bundle, being an e-mail dated the 8<sup>th</sup> of May 2020. The applicant's representative requested an update of the status of the matter with regards to the upliftment of the applicant's suspension and return to the workplace. The respondent's averment at the time that it had the intention to take the matter on review is noted, however no such steps have been taken since the date of the letter dated 8 May 2020 and no explanation has been given for failure to do so either.
31. It is clear from the applicant's bundle that the applicant's representative made several attempts to obtain confirmation from the respondent as to when the applicant could return to work, without any success. The respondent made much of uncontested evidence by the applicant, of colleagues who mistrusted and/or avoided him, in order to counter the applicant's evidence that he has suffered severe prejudice.
32. I find that the extension of the applicant's suspension, after finalization of his disciplinary hearing, amounts to an unfair labour practice, especially in the absence of any notification to applicant or his representative of an investigation of alleged further charges of misconduct in the form of corruption and/or fraud against the applicant.
33. I take cognizance of the respondent's undertaking to attend to the immediate upliftment of the applicant's suspension, only at the Arbitration hearing. No explanation has been tendered for this sudden turnaround of event.

34. I now turn to the applicant's claim for compensation, over and above his claim for upliftment of his suspension. The respondent argued that the applicant is not entitled to compensation if he did not stipulate compensation as a desired outcome. I however have a discretion in awarding compensation, especially in the light of the long and unexplained suspension. I disagree with the respondent that the applicant did not suffer prejudice, because he was on paid suspension. I take cognizance of the applicant's evidence that his professional reputation was severely damaged by his prolonged suspension.
35. In terms of common law principles the suspension of an employee with pay will usually not constitute a breach of contract. In most cases the employer has no obligation to provide an employee with work to do. Provided the employee is paid his or her agreed salary, and absent a provision in the contract of employment to the contrary, there will be no breach of contract. Usually this type of suspension is resorted to as a 'holding measure' in the sense that the employee is removed from the workplace whilst an investigation into allegations of misconduct committed by the employee are investigated. It is often referred to as a 'precautionary suspension'.
36. There is a statutory obligation of an employer to act fairly when suspending an employee. The duty to act fairly has a substantive as well as a procedural element. There has to be a fair reason to suspend an employee and a fair procedure has to be followed prior to the suspension being imposed.
37. Section 186(2)(b) of the LRA specifically records that any unfair act or omission in relation to an unfair suspension constitutes an unfair labour practice.
38. **Member of the Executive Council for Education, North West Provincial Government v Gradwell (2012) 33 ILJ 2033 (LAC).** The LAC noted that, in the majority of cases decided by the Labour Court, the audi-rule prevailed. Accordingly, employees should be afforded an opportunity to make representations prior to suspension.
39. Whilst accepting that the audi rule applied to precautionary suspensions, the LAC adopted a fairly minimalist approach to what constitutes procedural fairness. The LAC noted that, in the case of precautionary suspensions, the right to a hearing or to make representations may be 'attenuated' for three principle reasons. These were that: the prejudice to an employee will be minimised by suspending with full pay; the period of suspension is for a limited duration; and, the purpose of the suspension (to investigate the misconduct) risks being undermined by an in-depth preliminary investigation. It should be noted that the LAC did not indicate that the right to a hearing prior to suspension can be 'disregarded' or 'dispensed with'. It still required some form of compliance with the audi rule.

40. **In South African Breweries (Pty) Limited v Long and others [2019] JOL 41188 (LC) Snyman AJ** reasoned that, the fairness of a precautionary suspension depended on three criteria. The Labour Court held that – • the reason for the precautionary suspension must be directly linked to a pending investigation or process and it must serve to protect the integrity of that investigation or process; • the precautionary suspension must be on full pay in order to curtail any prejudice to the employee. In this regard, the court noted that considerations of prejudice relating to reputational harm cannot detract from the prerogative of the employer to institute disciplinary suspension; and • the duration of the suspension should not be unduly long. This, however, must be considered within the context of the nature or scope of the pending investigations and proceedings.
41. In the matter before me the prejudice may have been minimized initially due to the fact that the applicant was suspended on full pay. The applicant was however never informed of the purpose of the suspension after his disciplinary hearing was finalized, nor was he afforded an opportunity to make representations prior to his suspension. Therefore the respondent failed to adhere to the audi-rule.
42. The applicant was not informed of the purpose for his further suspension after his disciplinary hearing was finalized. I find that the duration of the suspension was unduly long, thus justifying a penalty to be imposed on the respondent for its unacceptable manner in which the applicant was treated.
43. I therefore find that it is only fair and just to award compensation to the applicant over and above the upliftment of his suspension.


## **AWARD**

44. I find that the applicant was subjected to an unfair labour practice.
45. The respondent is ordered to uplift the applicant's suspension with immediate effect and to pay the applicant compensation equal to three (3) months' salary, calculated as follows:

$$R18\ 699.51 \times 3 = R56\ 098.53$$

payable within fourteen (14) days from the date of this award.

Signed and dated at Stellenbosch on the 3<sup>rd</sup> of November 2020



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**Name: T ERASMUS**

**GENERAL PUBLIC SERVICE SECTORAL BARGAINING COUNCIL ARBITRATOR**