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ARBITRATION AWARD

Case No: GPBC999/2018

Date : 14 November 2019

Panellist: Vuyiso Ngcengeni

In the matter between

PSA obo Gasa GP

Employee

And

Department of Education, Pietermaritzburg, KZN

Employer

Employee representative: Perfect Zulu

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Facsimile : 087 234 7718

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Employer representative: Dexter Thwala

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DETAILS OF HEARING AND REPRESENTATION

1. This is the award in which I briefly record the presentations made to me by the parties and the reasons for the determination that I have made.
2. The arbitration was held under the auspices of the General Public Service Sector Bargaining Council ("the Council") on 08 October 2019 in terms of section 186 (2)(c) of the Labour Relations Act, No 66 of 1995 as amended ("the Act").
3. The Employee was present and he was represented by Mr Mlungisi Vilakazi from PSA. The Employer was represented by Mr Dexter Thwala.
4. After setting out matters of common cause and the matters in dispute, I ordered the parties to submit arguments on the matters in dispute as follows:-
 - 4.1 Employer's founding arguments by no later than 18 October 2019.
 - 4.2 Employee's responding arguments by no later than 25 October 2019.
 - 4.3 Employer's final reply by no later than 30 October 2019.
5. On 14 November 2019, I had not received the reply from the Employer and I therefore continued with the award.
6. The Employee submitted one bundle (electronically).

ISSUE TO BE DECIDED

7. I have to determine whether the Employer has failed to reinstate the Employee in terms of any agreement, following his reinstatement by the Employer on 12 December 2016.
8. I firstly have to determine whether the Council has jurisdiction to hear the matter, as such it being challenged by the Employer.
9. The Employee wants the Employer to remunerate him for the period starting from November 2009 to March 2016.

BACKGROUND TO THE ISSUE

10. The Employee was employed by the Employer on 19 April 2004.
11. He currently occupies a position of Senior Personnel Officer, on salary level 5. His monthly basic salary is R 14 900.00.
12. The Employee was dismissed by the Employer on 09 November 2009 for abscondment and his dismissal was in terms of section 17 of the Public Service Act which the Employer describes as a dismissal by operation of law.
13. At the time of his dismissal, he was based at Umlazi Commercial High School and earned R 6 132.00 per month. He was paid until October in 2009, and then from November 2009, he was not paid as he was on dismissal.
14. On 25 February 2010 the Principal of Umlazi Commercial School recommended that the Employee should be reinstated to his position (p 1 of the bundle).
15. He was reinstated on 12 December 2016 with effect from April 2016 (p 4 of the bundle).
16. The Employee was not satisfied as he sought reinstatement from November 2009, the date on which his services were terminated.
17. He filed a grievance against the Employer on 08 January 2018, seeking to be reinstated with effect from November 2009.
18. Following his dissatisfaction with the Employer's response, he declared a dispute on 15 March 2018.
19. He then referred the dispute to the Council for conciliation on 10 May 2018.
20. The matter was then referred for arbitration on 06 July 2018.

SURVEY OF ARGUMENTS

EMPLOYER'S CASE

21. Any person who is determining whether or not an act or omission by the Employer constitutes an unfair labour practice has to bear in mind that there is a widespread misconception that everything "unfair" an employer does will constitute unfair labour practice and that the employee will automatically have a remedy. Accordingly, everything the Employer does that does not meet the approval of an Employee (or a group of employees) is called an "unfair labour practice", which is not the case.
22. Section 186(2) of the LRA defines unfair labour practice as:
 - (a) *unfair conduct by the employer relating to the promotion, demotion, probation or training of an employee or relating to the provision of benefits to an employee;*
 - (b) *unfair suspension of employee or any other unfair disciplinary action short of dismissal in respect of an employee;*
 - (c) *a failure or refusal by an employer to reinstate or reemploy a former employee in terms of any agreement; and*
 - (d) *an occupational detriment, other than dismissal, in contravention of the Protected Disclosures Act, 2000 (Act 26 of 2000), on account of the employee having made a protected disclosure defined in that Act.*
23. The only disputes that are arbitrable are those that fall within the scope of the unfair labour practice definition. If a certain action does not fall within the scope of the definition it will not be unfair labour practice in terms of the LRA. This has jurisdictional implications.
24. In **South African Post Office v CCMA and Others, the Labour Court held that the CCMA** does not have a general unfairness jurisdiction and that the employee referring an unfair labour practice dispute in terms of section 186 must demonstrate that it falls within that section.
25. The question that has to be asked is whether the parties involved in the matter have locus standi in the forum in which they find themselves. This is important because the Council must have authority to hear the matter and it can only arbitrate a dispute if that dispute falls within the scope of the unfair labour practice definition.
26. In this matter the Employee has declared a dispute in terms of section 186(2) (c) of the LRA. It is the Employer's submission that this clause applies to employees who had previously been retrenched or dismissed (not as a result of dismissal by operation of law as provided in section 17(3) (a) of the Act), and there is a failure or refusal by an employer to reinstate or reemploy the employees in terms of an agreement. An agreement between the employer and employees in that case would usually require the employer to rehire dismissed workers, if and when suitable vacancies arise.
27. Section 186(2) (c) suggests that affected employees have to prove the mere breach of an agreement. The clause covers any agreement and would include agreements entered into with individual employees, unregistered unions or employee groupings. Employees alleging this form of unfair labour practice must prove the existence of an agreement that imposes an obligation on the employer to reinstate or re-employ them.
28. In **OCGAWU & Others and First Pro Engineering** an agreement provided that the employer should give preference to retrenched employees "as far as is practicable". The arbitrator held that it could not be considered practicable to rehire employees who were not suitably trained for new vacancies.
29. It has to be noted in this case that there is no agreement between the Employee and the Employer. In abscondment cases, normally there is no agreement that the employer and the employee enter into, an agreement that would determine reinstatement and the conditions attached to it.
30. It also has to be noted that in this case the Employee is challenging the conditions attached to his reinstatement, as the Employee was reinstated by the Employer after his services were terminated by

- the latter in terms of Section 17(3) (a) of the Act. The reinstatement of the Employee was in terms of section 17(3) (b) of the Act. This is not the reinstatement that is referred to in section 186(2) (c).
31. This is the reinstatement that arises from the application of the deeming clause by the employer i.e. that arises from dismissal by operation of law. An employee challenging such a dismissal and the conditions attached to his/her reinstatement cannot seek a relief in the bargaining councils and CCMA. An employee can seek an appropriate relief in the Labour Court.
 32. It is based on the above that the Employer submits that the dispute does not fall under the unfair labour practice definition in section 186(2) (c) of the LRA.
 33. It is therefore the Employer's submission that the GPSSBC has no jurisdiction to enquire into the procedural and substantial fairness of the deemed dismissal and the subsequent reinstatement conditions attached to it.
 34. The Employer prays that the Commissioner finds that the Employee's dispute does not fall within the ambit of unfair labour practice as provided in Section 186(2) (c) of the LRA.

EMPLOYEE'S CASE

Mr Perfect Zulu submitted the arguments below on behalf of the Employee: -

35. In 2009, the Employee fell sick and in November 2009, he was discharged from service in terms of Section 17 (3) of the Public Service Act on allegations of abscondment.
36. On 20 February 2015 the Employee wrote a submission to the Employer explaining his case. He attached all the proof that he was sick. The Principal of the school where the Employee worked, also wrote a letter supporting the reinstatement of the Employee and explained that he only failed to submit the sick leave application forms on time and that this was the Employee's first act of misconduct (see page 1 of the bundle).
37. The Employer acknowledged receipt of the submission and declined the request for reinstatement (see 2 of the Bundle).
38. On 22 October 2015, the Employee submitted his response to the letter declining his application for reinstatement. On this submission he reattached proof that of his first submission; medical certificates and the recommendation letter from the principal (see page 3 of Employee's bundle).
39. On 06 December the Employer wrote a letter to the Employee, reinstating him as a Senior Clerk at Phumelela Circuit Office with immediate effect. The Employee acknowledged receipt of this letter on 12 December 2016 (see attached page 4 of the Employee's bundle).
40. The Employee however resumed his duties as per an agreement on 01 April 2017. The Employer however has reemployed the Employee instead of reinstating him.
41. Attempts to resolve the matter between the two parties failed. On 08 January 2018, the Employee lodged a formal grievance seeking the Employer to rectify the date of employment by reinstating him instead of reemploying him (see page 5 – 6 of the Employee's bundle).
42. The Employee was dismissed by the Employer in terms Section 17(3) of the Public Service Act, the abscondment.
43. The Employer reinstated the Employee after a submission to the HOD was approved. Since the reinstatement was approved, the Employer was supposed to reinstate the Employee as per the agreement between the Employer and the Employee. The Employee was reemployed instead.

ANALYSIS OF EVIDENCE AND ARGUMENTS

44. The Employer's submission is very clear in that it dismisses an existence of any agreement between itself and the Employee.
45. The Employer asserted that due to the non-existence of any agreement as per the referral made by the Employee, the Council therefore has no jurisdiction on this matter, as s186 (2)(c) can only come to bear when there is an agreement.
46. The Employee has stated the background which is nonetheless captured in the issues of common cause.
47. The Employee failed to either submit an agreement or dispute that there is no such an agreement.
48. The Employee submitted that since his reinstatement was approved, the Employer was supposed to reinstate him as per the agreement between the Employer and the Employee. The Employer failed to do that and reemployed the Employee instead.
49. The Employee, being aware of the Employer's rebuttal of the existence of any agreement, was at the very least supposed to submit such an agreement and he failed to do so.
50. Further to the above, the Employee chose through his representative not to respond to the profound jurisdictional challenge submitted by the Employer, on the basis of non-existence of an agreement and the fact that the Employer stated that the Employee was reinstated in terms of section 17 of the Public Service Act.
51. That being the case, seeing that there is no agreement to reinstate the Employee, the Employer's submission on the Council lacking jurisdiction on the matter has to succeed.
52. In the circumstances, it is my finding that the Council lacks jurisdiction to hear this matter.

AWARD

53. The Council has no jurisdiction to hear the matter.
54. The dispute is dismissed.



Commissioner: Vuyiso Ngcengeni