



ARBITRATION AWARD

Panellist/s: SB Balkaran
Case No.: GPBC984/2017
Date of Award: 15 July 2019

In the ARBITRATION between:

PSA obo PM Khumalo
(Union / Applicant)

And

Department of Correctional Services
(Respondent)

Union/Applicant's representative:

Union/Applicant's address:

Telephone:

Telefax:

Respondent's representative:

Respondent's address:

Telephone:

Telefax:

DETAILS OF THE HEARING

1. The Arbitration was held at the Department of Correctional Services (DCS), Community Correction Centre, Deputasie Street, Vryheid (Kwazulu Natal). The Applicant was represented by Mr MP Zulu (LRO) of the Public Servants Association (PSA). The Respondent was represented by Messrs MI Setlhodi and Mr MCL Dladla of Employee Relations - Department of Correctional Services (Kwazulu Natal).

ISSUES IN DISPUTE

2. The matter dealt with unfair suspension (without contemplation) and excessive suspension in contravention [Annexure B16] of the DCS Suspension Policy as ratified by GPSSBC Resolution 1 of 2006. The suspension was substantively unfair. It is common cause that the Respondent accepts that it did not follow procedure as contemplated in GPSSBC Resolution 1 of 2006.

BACKGROUND TO THE DISPUTE

3. The Applicant Mr PM Khumalo ("Khumalo") was employed at DCS as Deputy Director and Head of Ncome Correctional Centre. After an offender escaped on 8 February 2017 from Ncome Correctional Centre, he alerted Ms. Z Mbhele ("Mbhele"), the Acting Area Commissioner (AAC), but could not provide full information as they were searching the field. Mbhele testified that Khumalo "gave her trouble to get the information on the escaped offender" and displayed "attitude and disrespectful utterances" until she was assisted by Mr Erwee and Mr Smith. Mbhele, as per protocol reported the escape to the Regional Commissioner (RC) without additional details and shared her frustration with the RC who summoned Khumalo together with four other Ncome Managers to the Regional Commissioner's office in Pietermaritzburg on 9 February 2017, where he was accused of insubordination towards Mbhele and ordered by Mr. M Nxele ("Nxele") the Regional Commissioner to apologise in writing. Khumalo was not informed for what behaviour he was expected to apologise and repeatedly requested to state his version of events to Nxele. Khumalo was denied and ordered to leave the Regional Commissioner's meeting. He refused and protested the *audi alterem partem* principle. A "heated argument and confrontation" ensued between Nxele and Khumalo where it is alleged that Khumalo was "tired of Nxele harassing him" and challenged him to "suspend or dismiss him" and Nxele ordered Khumalo to leave the office which he did stating that "he could not be ordered like a dog". Mbhele testified that Khumalo had disrespected the Regional Commissioner in her presence.
4. On 10 February 2017, Khumalo received a precautionary suspension letter [Annexure A41], paragraph 2, from the AAC. Mbhele suspended Khumalo in the presence of the Executive Management of the Ncome Management Area as she was afraid and terrified of the Applicant for the aggression he displayed towards the Regional Commissioner on 9 February 2017. Further that she was aware Khumalo's history of aggression; however this was refuted as outright lies by the Applicant. The Respondent brought Somaru to testify in this regard.
5. The Applicant argued that the suspension was without any contemplation letter for possible intended suspension as stated in the Departmental policy pertaining to suspension [Annexure B1].

6. Notwithstanding, the Respondent maintains that its action was justifiable in terms of the Suspension Policy.

SURVEY OF SUBMISSIONS AND ARGUMENTS

7. The Respondent called three witnesses (Ms. Z Mbele; Mr. Somaru and Mr. VJ Ndlovu) to testify.
8. Ms. Mbele was the Acting Area Commissioner (AAC) of Ncome Management Area from 8 June 2016 to March 2017 and continued in her Acting duties beyond her period of appointment as the AAC on the basis that the work had to be done as she was the last person appointed to act so she had to take that responsibility. Ms. Mbele was the AAC when Khumalo was suspended and had signed the precautionary suspension letter for the alleged insubordinate behaviour at the Regional Commissioner's Office on 9 February 2017 as well as the escape of the offender on 8 February 2017.
 - 8.1. Mbele confirmed that she never contemplated the Applicant in order to hear from him why he should not be suspended before effecting precautionary suspension in terms of the provisions of the policy.
 - 8.2. Mbhele accepted that Khumalo had been suspended for more than the prescribed period of 4 months and he had not been informed of the reasons for extending the prescribed period.
 - 8.3. Mbele confirmed that she had followed the prescribed procedure as she was the AAC at that time and was not required to contemplate Khumalo before she suspended him as Khumalo was insubordinate to her and the RC, and both of Khumalo's actions occurred in her presence and not communicated by a third person or through hearsay and therefore that was sufficient justification from deviating from the Suspension Policy.
 - 8.4. Mbhele acceded that the policy does not provide for any deviation against any transgressor against any employee who is accused of alleged misconduct.
9. Mr RK Somaru ("Somaru") is a Deputy Director and Human Resource Coordinator (Corporate Services), in the Office of the DCS Regional Commissioner (Pietermaritzburg). Somaru was not present when the incidents are alleged to have occurred, neither at DCS Ncome nor at Regional Office. He confirmed that he did not have any role in the suspension of Khumalo. As Resource Coordinator (Corporate Services), he confirmed that he was unaware of any provisions that allowed for deviation in terms of Suspension Policy as it was not the Respondent/Employer procedure to deviate from its "own" stated policy and it would have been unprecedented for any Employer Representative to discretionary deviate from policy.
10. Mr. VJ Ndlovu ("Ndlovu") confirmed he was Acting Regional Coordinator (Corrections) as Ms. N Mkhize was on leave when Khumalo was suspended. Ndlovu confirmed the argument occurred in his presence between Nxele and Khumalo on 9 February 2017 at the Regional office which eventuated in Khumalo's suspension. He was not aware of Resolution 1 of 2006 (Disciplinary Code) as he had not gone through it. He was not aware of any policy that allowed for the suspension of any employee without first applying the "*audi alteram partem*" principle and that "there was nothing wrong to hear his (Khumalo's) side of the story". Ndlovu testified that he was not aware of any deviation from the suspension policy.

11. The Applicant argued that there was no need to state its case as the Respondent had not proven any justification to deviate from its "own policy". However, the Respondent counters that the Applicant was accorded the opportunity to present its case but Mr P Zulu (PSA) opted not to lead oral evidence and chose to submit Heads of Arguments on the basis that the *matter requires only interpretation of the suspension policy* and further submitted that the *Respondent did not make up a case to answer to*. However, the Respondent argued that this matter was is not about interpretation but an unfair labour practice relating to suspension short of dismissal. (See referral form on Bundle A page 41 @ paragraph 2 Nature of Dispute

ANALYSIS OF SUBMISSIONS AND ARGUMENTS

12. It is common cause that the Respondent suspended Khumalo on 10 February 2019 as per Khumalo's signed acknowledgement [Annexure B1-2]. It has been argued by the Respondent that Khumalo was insubordinate to the Acting Area Commissioner (AAC) on 8 February 2017 and to the Regional Commissioner (RC) on 9 February 2019 and for the escape of an offender at the Correctional Centre he headed.
13. The Applicant argued that Khumalo was never contemplated for suspension in line with both the Suspension Policy and Resolution 1 of 2006 which is the Disciplinary Code and Procedure for the Department of Correctional Services. The purpose of Khumalo's precautionary suspension according to the suspension letter was to allow the investigation to proceed to finality without hindrance or interference [Annexure B1].
 - 13.1. The investigation was finalised on 18 April 2017 yet Khumalo's suspension was not uplifted.
 - 13.2. If the reason for suspension was based on the finalisation of the investigation, the respondent did never uplift the suspension as per the terms of the suspension.
 - 13.3. It is averred that the suspension was meant to be punitive rather than precautionary.
 - 13.4. During the entire arbitration the Respondent did not provide any justification or reason(s) for not uplifting the suspension at the conclusion of the investigation.
14. The purpose of suspension of an employee in service jurisprudence is twofold. The traditional and dominant purpose of suspension is to aid and assist a disciplinary enquiry against an employee. Suspension in such cases is not a punishment. The second known purpose of suspension is to impose it as a punishment.
15. The Respondent submits that the allegations against Khumalo were investigated and the matter was brought before the Disciplinary Hearing with a charge sheet dated 8 June 2017 [Annexure C1-2] for the charges levelled against the Applicant which resulted in his dismissal [Annexure C3] - notification of dismissal, [Annexure C4] for the notice of appeal and [Annexure C5] for the withdrawal of his appeal and [Annexure 6-8] bearing the suspension reviews of Khumalo's

suspension^{1/2/3/4} which he acknowledged as proof that throughout his suspension period he had conceded to the continued suspension based on the reasons advanced by the employer.

- 15.1. When suspension is made in contemplation of a disciplinary enquiry, certain prerequisites have to be satisfied. An enquiry should be contemplated or underway into charges of misconduct. The charges of misconduct, if proved, should be serious enough to warrant a major penalty.
16. Khumalo was investigated for both the insubordination (8 and 9 February 2019) as well as for the escape (8 February 2017) [Annexure B1]. The Applicant argues that on 8 February 2017, Khumalo was Head of the Ncome Correctional Centre and not directly involved in the guarding of the offenders and further contends that no evidence of fact was provided as to why he was a subject of investigation in the offender's escape; yet the officials who were directly responsible for the offender escape were never suspended.
17. The Departmental Suspension Policy is outlined [Annexure A19]:
- 5.1. *"... Inform the employee in writing of the allegations/complaints against him and that suspension is considered. The grounds for considering suspension must be provided.*
- 5.2. *"...afford the employee the opportunity to make written representation/furnish reasons within 24 hours why he or she should not be suspended (i.e. to apply audi alteram partem rule). The employee is entitled to be represented by a fellow employee/shop-steward/union official.*
18. Khumalo was never given an opportunity to state his case before being suspended. Further the Respondent (Employer) did not adhere to its "own" policy.
19. The Applicant was aggrieved when the respondent was not uplifting his precautionary suspension as stipulated in the Suspension Policy and Resolution 1 of 2006. A grievance was lodged with the Respondent on 24 February 2017 [Annexure A23] and proof of transmission [Annexure 28]. The Respondent failed to reply, resulting in the referral to GPSSBC for dispute resolution on 9 May 2017 [Annexure B3].
20. Paragraph 4.6 of the Suspension Policy states that the employee may not be suspended for a long period, and as a guideline, for no longer than 30 days; unless extraordinary circumstances are present and can be motivated as such [Annexure A19].
21. GPSSBC Resolution 1 of 2006, paragraph 7.2.3 states as follows: *"if an employee is suspended or transferred as a precautionary measure, the employer must hold disciplinary hearing within 60 calendar days, depending on the complexity of the matter and the length of the investigation. If 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 employee must return to work. If the*

¹ Koka v Director General: Provincial Administration North West Government [1997] 7 BLLR 874 (LC) BLLR 874 (LC)

² Sappi Forests (Pty) Ltd v CCMA & others [2009] 3 BLLR 254 (LC)

³ POPCRU obo Masemola & others v Minister of Correctional Services (2010) 31 ILJ 412 (LC)

⁴ Mogothle v Premier of the Northwest Province & another (2009) ILJ 605 (LC)

disciplinary action has been instituted the employer shall determine when the employee can return to work."

22. The Respondent did not adhere to the prescripts of its own policy nor to Resolution 1 of 2006, nor was there any justification offered. The fact that Khumalo opposed Nxele's (RC) point of view (RC) did not invite any unprocedural punitive suspension.
23. This was a clear indication of the abuse of power by both the AAC and RC as the instruction to compel Khumalo to apologise without due process is an affront and infringement on Khumalo's dignity and basic human and constitutional right.
24. Neither did this confer on the AAC or the RC the right to discretionarily deviate from a binding Policy/Collective Agreements as neither the Suspension Policy nor Resolution 1 of 2006 allow for any discretionary or arbitrary deviation.
25. Mr Khumalo (Applicant) was unfairly treated as an employee by the Respondent, resulting in a dispute referral in terms of Section 186 of the Labour Relations Act (66 of 1995). The Respondent's actions were both substantively unfair and unjustifiable as it further went beyond the prescribed period of 4 months in terms of GPSSBC Resolution 1 of 2006.
26. **Desired solution** – The Applicant prays that the Commissioner:
 - 26.1. Rule in his favour as the Respondent's actions were unjustified,
 - 26.2. Find the Respondent's actions unfair and unjustifiable,
27. The Respondent to pay compensation to Khumalo the number of days he was unfairly suspended for the period exceeding the prescribed period of four month until the date he resigned from the Department on 31 January 2019. Khumalo resigned whilst on suspension.
 - 27.1. The appropriate relief of compensation for the entire period of suspension is herewith prayed for, should the Commissioner find that the suspension of the Applicant was unfair.
28. Particular considerations arise where a dismissal is found to be only procedurally unfair. In such cases compensation takes the form of a solatium for the loss of the right to a fair pre-dismissal procedure. It is punitive to the employer to the extent that the employer who has breached the right must pay a penalty for doing so⁵.

RULING

29. The Respondent had acted purely arbitrarily in disregarding the provisions of Resolution 1 of 2006 – Disciplinary Code and Procedure for the Department of Correctional Services as such an agreement presupposes the existence and validity of these rights at the workplace, as well as a compliance with the procedural requirement. Therefore the Respondent's actions were procedurally unfair.
30. The Respondent had failed to contemplate the Applicant (Mr PM Khumalo) in terms of the provision of its own policy (Resolution 1 of 2006) prior to suspension.
31. The Respondent suspended the Applicant (Mr PM Khumalo) beyond the minimum prescribed period of 4 months and had not informed him of the reasons for extending the prescribed period.

⁵ Johnson & Johnson (Pty) Ltd v Chemical Workers Industrial Union (1999) 20 ILJ 89 (LAC)

32. The Applicant is awarded six (6) months compensation to be calculated on his salary on the date of his dismissal.

Signed and dated in Durban on this 15 July 2019.

A handwritten signature in black ink, consisting of a large, stylized letter 'S' with a horizontal line crossing it, and a vertical line extending upwards from the top of the 'S'.

Sanjay Balkaran
Panellist