



GENERAL PUBLIC SERVICE
SECTOR BARGAINING COUNCIL

ARBITRATION AWARD

Panellist: MAHASHA THOMAS

Case No: GPBC 354/2021

Date of award: 26 April 2022.

In the ARBITRATION between:

PSA OBO D MOKGOKOLO

(Union / Applicant)

and

DEPARTMENT OF HIGHER EDUCATION

(Respondent)

Union/Applicant's representative: PHILLIP MAPONYA

Union/Applicant's address.

Telephone:

Telefax:

Respondent's representative: Thangeni Tshifhiwa

Respondent's address:

Telephone:

Telefax:

DETAILS OF HEARING AND REPRESENTATION.

1. The employee, Dithoriso Mokgokolo, attended the hearing represented by Phillip Maponya of PSA.
2. Thangeni Tshifhiwa appeared on behalf of the employer.

BACKGROUND TO THE MATTER.

3. The employee was appointed as a Provisioning Admin clerk stationed at Capricorn TVET campus earning a monthly gross salary of R 16 306-25.
4. In 2010, she was transferred to Central office to work at Supply Chain because of shortage of personnel.
5. Following allegations of misuse of her position, gross dishonesty and maladministration by not submitting Nashua's quotation for evaluation and adjudication, she was transferred to Polokwane Campus as a precautionary measure on 25 October 2018.
6. She was informed of the allegations levelled against her on 01 July 2019.
7. On 01 July 2019 she was served with a notice to appear at the disciplinary hearing. The disciplinary hearing was held on 10 July 2019 and finalized on 09 October 2019. She was found guilty and suspended for two months without salary.
8. She was also issued with a final written warning. She appealed the sanction on 17 October 2019. The appeal was dismissed on 04 December 2020.
9. Following a request by the employee, there was a delay in implementing the sanction. The sanction was consequently implemented during March and April 2021.
10. The employee was not happy about the disciplinary process and a sanction. She referred an unfair Labour Practice dispute with the GPSSBC in terms of section 186(2) (b) of the Labour Relations Act 66 of 1995 ("the LRA") as amended on 04 March 2021, challenging both the suspension and the disciplinary hearing.
11. The matter was set down as an arbitration process on 14 October 2021 at the offices of Capricorn TVET College, Department of Higher Education, Polokwane, but could not be finalized due to time constraints.
12. It was scheduled for arbitration on 11 and 12 April 2022 at the offices of Capricorn TVET College, Department of Higher Education, Polokwane.

ISSUE TO BE DECIDED.

13. I have to decide whether the Council has jurisdiction to arbitrate the alleged unfair suspension as a precautionary measure.
14. I am also required to determine whether the disciplinary hearing held by the employer amounted to unfair labour practice as envisaged by section 186(2) (b) of the LRA, and if so to order the appropriate relief.

PRELIMINARY ISSUES.

Ex tempore ruling

15. The employer submitted that the employee referred an unfair suspension dispute out of time and that a condonation application had to be made by the employee. The employee maintained that the referral was made within the prescribed time.
16. The appeal outcome was issued on 04 December 2020. The employee referred a dispute on 4 March 2021. The referral was accordingly made on the 60th day from the date on which the employee was suspended without pay.
17. The employee was however, suspended as a precautionary measure on 25 October 2018. The delay in referring an unfair suspension dispute as a precautionary measure was too excessive in that it was made after a period of over two hundred days. The employee should have applied for condonation. GPSSBC had no jurisdiction to entertain a dispute out of time where no condonation application was made.

SURVEY OF EVIDENCE AND ARGUMENT

EMPLOYEE'S EVIDENCE.

18. The employees' testimony was that she was working at Supply Chain Section at the time of her precautionary suspension and disciplinary hearing. She was charged for misconduct because it was alleged by the employer that she had omitted a quotation of one of the service providers, Nashua. She denied that there was an omission. She maintained that she never saw nor received Nashua's quotation.
19. She was requested by Van Der Merwe, the CEO, to send specifications to service providers. She was surprised why such an instruction could not be given to Mthombeni and Ravhuandzwa who were her supervisors and present at work. She was surprised by Van der Merwe's decision to be interested with Nashua and not the other service providers. It was not Van der Merwe's duty to seek quotations. If there was an error, she should have been consulted to correct it.
20. Before she could send out requisition to service providers, she was given specifications which the service providers had to comply with. After receiving the specifications, she immediately sent them to the service providers, who in turn furnished her with the quotations. The closing date for submission of quotations was 05 March 2021. She sent specifications to Nashua on 28 February 2018.
21. To her surprise Nashua's quotation was dated 26 February 2018 which was two days earlier than the date she had sent the specifications.
22. She only considered quotations for the first three service providers. The quotations which she considered and submitted for evaluation purposes were from Star Sign, Morgan's Copy Shop and Mr Bean.
23. She did not receive a quotation from Nashua. Even if she had received the quotation on time, she could not have recommended it because it was not market related. She wondered why Nashua already had a quotation on 26 February 2018.
24. In October 2018, she was called to the boardroom and informed that she was suspended. She was escorted out of the office by security guards and instructed to leave the building. The guards were present when she packed her belongings in her office and when the Campus Manager, Mamabolo issued her with a suspension letter.
25. During the time of her suspension, she did not know and understand why she was pushed out of the office by the security guards.
26. Because of the suspension without pay her medical aid was suspended and could therefore not manage to pay for the dentist. One of her daughters left employment because she was unable to pay for accommodation.
27. When cross examined she testified that she did not remember sending specifications to Nashua because she was not instructed to do so. If instructed, she would have sent it. Considering that there are a lot of printing companies in Polokwane

28. She did not understand what was so special about Nashua.
She did not send an email to Nashua. If the email was sent by her, there would be a trail of emails bearing her email address. She denied that she deleted an email sent by her to Nashua. An IT Officer conducted an investigation, but could not find any wrong doing on her part.
29. Her disciplinary hearing was held after 60 days.
30. **Ravhuandzo Rudzani Gladstone** testified that he was the employee's supervisor. The employee was a Provisioning Clerk responsible for inviting quotations. The employee was tasked to invite quotations from service providers by Mthombeni. Thereafter, the employee submitted to him two sets of three quotations each, with the exception of Nashau.
31. The three quotations for supply of stationery were Red Pencil Group, Lebedi Business and Saada. Those for design and printing works were Star Signs and Print, Morgan's Copy Shop and Mr Beans. The quotations submitted were complying in terms of the salary range. He recommended the quotations to Van Der Merwe who was not happy that Nashua's quotation was not amongst those submitted.
32. He was asked by Van Der Merwe to write a submission to deviate from the prescribed supply chain procedures to cater for Nashua. He could not understand why Van Der Merwe was concerned that Nashua was not one of the bidders recommended. He was suspicious of Nashau's quotation because it was far less than all the other bidders. He was also concerned that Nashua's quotation was dated 27 February 2018 which was a day before invitations for quotations was sent by the employee to service providers. He never saw Nashau's quotation.

EMPLOYER'S EVIDENCE.

33. **Alfred Van Der Merwe's** testimony was that he was the Acting Deputy Principal, Finance Department, at the Capricon TVET College.
34. His duties included managing finances of the College. Mr Ravhuandzo submitted inflated quotations which were one month old. Because of the inflated prices, one company had to be paid R 871, 756, 50. In terms of the Supply Chain Policy, an expense in excess of R 500.00, had to go through a tender process. He only had the authority to approve an expense of R100.000 or less.
35. On the basis that the quotations were in excess of R 100.000, he advised Mr Thema to advertise a tender. He offered to get a separate quotation from Nashua and two other companies. In the process of seeking a quotation, he spoke to a Nashua employee who told him that she had sent a quotation dated 26 February 2018. The email was sent 28 February 2018. He requested her to forward the quotation which she did by forwarding the original message which was sent to the employee on 28 February 2018. Nashua was deliberately omitted by the employee, hence the charges against her. Only companies with inflated prices were considered. Nashau's quotation should have been submitted for adjudication because it had the cost of 27c per copy.
36. When cross examined he agreed that the employee was not implicated in inflating prices, but was charged because she disregarded Nashau's quotation. He also agreed that the email forwarded to him had no attachment in the form of a quotation which was alleged to have been sent by Nashua.
37. He did not know if the employee requested a quotation from Nashua. Although the prices were inflated, he could not return the quotations because it was already late and was told by Ravuandzo that the stationery was needed urgently. He did not know if Nashua got the information earlier than the date requisitions for quotation were sent to service providers. Nashau's quotation was not requested by him, but by Supply Chain Management. It was only forwarded to him upon request.

38. **Kwena Victoria Langa** testified that she was present when the employee was ordered to vacate her office after having been suspended. On the day in question, she and a security officer were called to escort the employee to her office to take her belongings. The employee was never ill-treated.
39. **Mokgadi Magreth Makanani-Mphaka** testified that she was the chairperson of the disciplinary hearing. According to the evidence presented before her, the employee invited three quotation. Nashua responded the same day in terms of the email which the employee had deleted.
40. Because the employee had committed an act of dishonesty, she could have dismissed her if it was not for the employer who submitted to her that the trust relationship had not broken down. The employee intentionally colluded with the suppliers by inflating prices. The IT officer's testimony during the disciplinary hearing that the email was supposed to be encrypted based her evidence on common sense.
41. She based her findings on Nashua's deleted email of a quotation which was deleted by the employee. She agreed that she was not shown a proof during the disciplinary hearing that Nashua had submitted its quotation.

CLOSING ARGUMENTS

THE EMPLOYEE

42. The employer did not submit its closing arguments.

THE EMPLOYER.

43. Thangeni Tshifhiwa submitted in his arguments that the employee conceded to have received Nashua's quotation and that she deleted it. The employee did not communicate to her supervisor that she deleted the email. Both Ravhuanzo and the employee failed to prove that Van Der Merwe had a close relationship with Nashua.
44. They deliberately overlooked Nashua for their own benefits by inflating prices. The employer proved beyond reasonable doubt that the employee committed misconduct.
45. The rest of the other arguments were a mere repeat of the evidence tendered. It is therefore, not worth repeating.

ANALYSIS AND FINDINGS.

46. In my analysis I have considered arguments by the employer. The employee did not submit any closing arguments. Section 186 (2) (b) of the LRA defines Unfair Labour Practice as "*any unfair act or omission that arises between an employer and an employee involving the suspension of an employee or any other unfair disciplinary action short of dismissal in respect of an employee*".
47. It was a common cause issue that the employee was subjected to a disciplinary hearing and that she was given a sanction of two months suspension without pay. The employee was not happy about the two processes and sought reversal thereof.
48. Three charges were levelled against the employee. Two charges were about the alleged omission of Nashua's quotation for evaluation and adjudication purposes. The other charge was for colluding on prices for printing works.
49. Although the LRA is silent on the incidence of the onus to prove an Unfair Labour Practice, it is generally accepted that he or she who alleges an unfair labour practice (the employee) must prove the allegation. I do

not agree with the employer's representative in his arguments that the employer had the onus to prove an unfair labour practice dispute.

50. In my analysis, I have dealt with each charge separately.

OMISSION OF NASHUA'S QUOTATION.

51. The employer's case was that the employee had intentionally omitted Nashua's quotation for evaluation and adjudication processes. In the converse, employee denied that she omitted Nashua's quotation. What was common cause is that Nashua's quotation was not part of the submission which was made by the employee. The question was whether the employee had omitted it or not.
52. In order to substantiate its allegations, the employer submitted what it alleged to be an email address from Nashua which was deleted by the employee. I did not find the employer's allegations to be persuasive. In the first place there was no evidence that the email address was deleted by the employee, save for the hearsay evidence that was presented by both Mokgadi Magreth Makanani-Mphaka and Van Der Merwe. The testimony by the employer's representative that the employee conceded to have received and deleted the email is untrue and misleading. It was the employee's case that she was informed of Nashua's alleged omitted quotation after the closing date of submission of quotations. I therefore did not find logic in the employer's arguments that the employee should have reported to Management that she had deleted the email.
53. I could not understand what was so special about Nashua that amongst all the printing shops in Polokwane, the employee had to invite it without fail to submit its quotation.
54. Van Der Merwe's testimony that the email was forwarded to him by Lauretta of Nashua, was not supported by any other evidence. The employer could at least have produced physical evidence in the form of such a quotation. Even if that was not possible, the employer should have at least called an employee of Nashua to confirm the allegations. The employer failed to do any of the two.
55. It was an accepted fact that it was not Van Der Merwe's task to invite quotations. Although I agree that as a Manager, Van Der Merwe had a responsibility to ensure compliance with Supply Chain Management prescripts, I find that he had misused his powers by going to an extent of phoning Nashua to check if it had submitted a quotation. The question was what was so special about Nashua to be accorded such a special treatment. There was no evidence that any other service provider was phoned by Van Der Merwe to ask if a quotation was submitted. I find the employee's testimony that she did not receive a quotation from Nashua to be more probable.
56. The email which was sent by Nashua to the employee was dated 26 February 2018, which was earlier than the day the employee invited quotations. The employer did not challenge that piece of evidence. The employee submitted three quotations for evaluation and adjudication. There was no point in my view for the employer to be concerned that Nashua's quotation was omitted.

COLLUSSION WITH BIDDERS.

57. There was no evidence as conceded by Van Der Merwe, that the employee colluded with the service providers to inflate prices. There was in fact, no evidence that prices were inflated. What was clear is that the prices were different. In the absence of evidence to support allegations of the employee's collusion to inflate prices, I find it to be reasonably probable that Nashua could have under quoted in order to be approved as a service provider.
58. If the prices were so high that they were above the market value, Van Der Merwe should have done the honourable thing by returning the quotations to SCM and instructed them to seek quotations from other service providers.

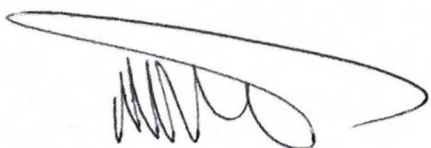
59. I was not convinced by his testimony that he could not return them because it was late. He too received them. It could not have taken more than two days to invite other quotations from other service providers.
60. I was also not persuaded by Mokgadi Magreth Makanani-Phaka's testimony that the employee had intentionally inflated prices. There was in fact no evidence to support such an allegation. Even if it could be accepted that the prices were inflated, it is service providers who should shoulder the blame. I could not understand why in the absence of evidence, the employer still pushed the notion that the employee was an accomplice in the alleged inflation of prices, if any of course.

DISHONESTY.

61. If there was evidence that the employee had deleted Nashua's email address containing its quotation, the employee would rightfully be blamed for being dishonest. However, there was no evidence that the employee deleted an email sent by Nashau. Such a conclusion by the employer was opinion based because it was only based on an email which was sent by Laurretta on 26 February 2021 with no attachment to substantiate the allegations that a quotation was indeed sent to the employee.
62. I reject that evidence on the basis that neither Nashua (Laurretta) nor a witness attached to Information Technology was called by the employer to tender such evidence about the circumstances leading to the sending and deleting of the email.
63. Van Der Merwe had in fact conceded during cross examination that the email sent to him by Nashau had no attachment in the form of a quotation. Even if it could be accepted to be true that the employee did delete the email, nothing prevented the employer to bring as evidence, the quotation which was sent by Laurretta (Nashua) to Van Der Merwe. Such evidence was not submitted. All we heard was that the email could not be produced as evidence because the employee had deleted it from the list of her emails. It was not the employer's evidence that Nashua's quotation was also deleted from its server. There was no evidence to substantiate allegations that the employee was dishonest. It is therefore my findings that the employee proved on a balance of probabilities that she was subjected to an unfair disciplinary action.
64. It is therefore my findings that the employee had proved on a balance of probabilities, that the employer had committed an unfair labour practice by subjecting her to an unfair disciplinary hearing which ultimately, resulted in a sanction of two months suspension without pay.
65. Considering the legal principle that the employee ought not to be neither impoverished nor enriched, but ought to be restored to the position she would have been in had it not been for the unfair disciplinary hearing, I find reversal of the sanction of two months suspension and a final written warning without a salary to be appropriate.

AWARD.

66. The employer is ordered to pay to the employee as compensation; an amount of R 32 612, 5 which is equivalent to two months of her monthly gross salary.
67. The amount of R 32 612.5 was calculated as follows:-
 $R\ 16\ 306.25 \times 2\ \text{months} = R\ 32\ 612.5$.
68. The employer is further ordered to pay the above mentioned amount of R 32 612.05 less statutory deductions, not later than R 15 June 2022.


MAHASHA THOMAS
GPSSBC PANELIST