ARBITRATION AWARD

Panelist/s: A BEVAN

Case No.: PSCBC336-19/20

Date of Award: 23 JUNE 2020

In the ARBITRATION between:

PSA obo MOSWELE G K

(Union / Applicant)

and

DEPARTMENT OF PUBLIC WORKS & ROADS, NWP

(Respondent)

Union/Applicant's representative: M Kabelo (of the PSA)

Respondent's representative: M G L Rakgoale (Labour Relations official of Respondent)

DETAILS OF HEARING AND REPRESENTATION

1. The arbitration into the abovementioned interpretation and application of collective agreement; PSCBC Resolution 1 of 2003 ("the Resolution") was set down to be heard on 5 May 2020, but due to the lockdown process as a result of the COVID-19 pandemic the parties agreed that the matter can be decided on paper.
2. The Applicant was represented by M Kabelo of the PSA and the Respondent was represented by M G L Rakgoale, a Labour Relations Official of the Respondent.
3. The parties agreed that the matter can be considered on paper. The Applicant to submit arguments on 12 May 2020, Respondent to answer on 19 May 2020 and Applicant to reply on 22 May 2020.
4. On receipt of the written arguments it seems that the parties were not in agreement as to what clauses of the Resolution is in dispute. The parties were then requested to submit signed pre-arbitration minutes and new dates were agreed upon in the pre-arbitration minutes signed on 10 June 2020, namely the Applicant to submit on 12 June 2020, Respondent to answer on 19 June 2020 and Applicant to reply on 22 June 2020.

ISSUE TO BE DECIDED

5. I am required to determine whether –
   - 5.1 or not the Respondent correctly interpreted and applied clause 8.8 of the Resolution by not finalizing the appeal within the prescribed 30-day period;
   - 5.2 the non-compliance of the Respondent with the time frame set in clause 8.8 of the Resolution warrants a setting aside of the sanction;
   - 5.3 the suspension of the Applicant effective from 1 August 2019 can be lawful if the applicant appealed the outcome of the sanction three years earlier?

6. The Applicant is seeking the following relief:
   - 6.1 Setting aside the period of suspension without pay, as well as the reimbursement of the Applicant for the period in question.

BACKGROUND TO THE MATTER

7. The Applicant referred the dispute to the Council relating to the interpretation and application of the Resolution on 9 September 2019. The dispute remained unresolved and a certificate of non-resolution was issued, where after the matter was set down for arbitration on 5 May 2020.
8. In terms of the pre-arbitration minutes agreed to between the parties on 10 June 2020, the parties agreed that the following issues were common cause:
   8.1 The Applicant is a Senior Administrative Clerk (salary level 7) and was appointed at the Respondent on 2 July 1990.
   8.2 The Applicant was charged with misconduct and called to a disciplinary hearing in terms of the Resolution.
   8.3 The Applicant was found guilty as charged and a sanction of a final written warning coupled with three months' suspension without pay was meted out. The Applicant submitted an appeal on 16 August 2016.
   8.4 The Applicant received the outcome of the appeal on 31 July 2019 and the Applicant's suspension was implemented for the period in 1 August 2019 to 31 October 2019.

SUBMISSIONS OF THE PARTIES

Applicant's submissions:

9. The parties to this dispute are bound by the provisions of the Resolution, which set out procedures to be observed during disciplinary hearing. This Resolution is regarded as the bible to manage disciplinary hearings in the public service. In terms of section 23 and 31 of the LRA a collective agreement binds all parties, not only the actual parties to the agreement, but each member of the trade unions in question or employers' organization are also bound including the state as employer.
10. The Resolution in para 8.8 states that Departments must finalise appeals within 30 days, failing which, in cases where the employee is on precautionary suspension, he/she must resume duties immediately and await the outcome of the appeal while on duty. This time frame for the completion of appeals must be observed by the department, in line with the principles that informs the Code and Procedure and must inform any decision to discipline and employee, namely that (a) discipline is a corrective measure and not a punitive one; and (b) discipline must be applied in a prompt, fair, consistent and progressive manner. The Applicant appealed the outcome of the disciplinary hearing within 5 days of receiving the outcome. The sanction was not implemented whilst awaiting the outcome of the appeal. The appeal

outcome was however only released three years down the line. This is clear non-compliance with para 8.8 of the Resolution.

11. The court had actually found that no-compliance with peremptory time periods in a collective agreement amounts to the fallen away of the disciplinary charges (see ***Van Eyk v Minister of Correctional Service & Others [2005] 6 BLLR 639 (EC)).***
12. As discipline does not include only the institution of disciplinary charges, but encompasses the whole disciplinary process, it goes without saying that undue delay in the finalization of the appeal is a contravention of the Resolution.
13. The clear purpose of para 8.8 of the Resolution is to ensure that employees' disciplinary hearings are dealt with in an orderly, fair and controlled manner and finalized within the stated time frames. This is in line with the principles of labour disputes to be resolved in a fair and speedy manner.
14. It is the argument of the Applicant that the institution of the sanction three years after the matter was appealed was unlawful. The unlawfulness is founded in the Respondent not complying with its own rules (see ***Manamela Nnana Ida v Department of Co-Operative Governance, Human Settlements and Traditional Affairs, Limpopo Province and Another [2013] ZALCJHB 225).***

Respondent's submissions:

15. It is agreed that the Applicant submitted the appeal on 19 August 2016. The Respondent provided the Applicant with the outcome of the appeal as is provided for in para 8.2 of the Resolution dated 26 June 2019, which was received by the Applicant on 31 July 2019.
16. The Respondent agrees that the right to appeal is regarded as trite law and the Applicant was granted an opportunity to let the appeal be heard by the Executive Authority without interference and undue influence.
17. The Applicant's appeal documents were however misplaced due to a reshuffle and deployments of Members of the Executive Committee that was effected after the elections.
18. The Applicant did not suffer any prejudice as a result of the purported delay, as the Applicant was receiving his salary in full during the period of delay.
19. The Resolution is not a static, rigid or conservative document and essentially remains to be a guideline because this was also determined as such by a court of law. This applies to all collective agreements and if there is good cause to deviate from the collective agreement, then such a deviation is not unfair. The courts have repeatedly said that collective agreements were not to be rigidly interpreted and rational deviations were permitted.
20. In the case of ***Dell v Seton (Pty) Ltd & others [2009] 2 BLLR 122 (LC)*** the employer failed to keep to its own disciplinary code when dismissing an employee. However, the Labour Court found that the procedure that was followed, despite deviating from the disciplinary code, was not unfair and that the

deviation did not result in any prejudice to the employee. This meant that the deviation from the code did not, in itself, result in any detriment to or negative effect on the employee. The Court therefore upheld the fairness of the dismissal.

21. Similarly, in the matter of ***De Jager v Minister of Labour & Others [2006] 7 BLLR 654 (LC)***, the Court held that where a disciplinary tribunal had failed to provide written reasons for dismissal as required by disciplinary code the appropriate relief was to order the presiding officer to provide reasons i.e. the Court did not set aside the dismissal because of the failure to comply with the code – it simply ordered the chairman to provide those reasons.

22. The principles enunciated in these cases support the generally recognized view that a disciplinary code, even an agreed code is a guideline and is not a document written in stone which the chair of an inquiry or an arbitrator is bound to slavishly follow. The overriding principle in every case is – was the procedure that was followed a fair procedure? If it was, then issues of minor technical non-compliance ware irrelevant or in any event do not warrant the entire disciplinary process being declared null and void.

23. The Respondent is therefore of the view that the non-compliance by the Respondent with the time frames held no prejudice for the Applicant. It was a mere technical non-compliance and therefore there is no reason to declare the outcome of the disciplinary hearing null and void.

ANALYSIS OF THE SUBMISSIONS

24. I intend to offer brief reasons in my analysis as per Section 138 (7) of the *LRA* as amended, which provides that, *"Within 14 days of the conclusion of the arbitration proceedings – the commissioner must issue an arbitration award with brief reasons".*

25. The Legal Principles underpinning the interpretation of contracts and or collective agreements are set out in **Coopers & Lybrand v Bryant 1995 (3) SA 761 (A) 767E-768** Joubert JA said" According to the golden rule" of interpretation the language in the document is to be given its grammatical and ordinary meaning, unless this would result in some absurdity or some repugnancy or inconsistency with the rest of instrument... the mode of construction should never be to interpret the particular word of phrase in isolation (in vacuo) by itself...The correct approach to the golden rule of interpretation after having ascertained the literal meaning of the word or phrase in question is broadly speaking, to regard: (1) to the context in which the word or phrase is used with its interpretation to the contract as a whole , including the nature and purpose of the contract, (2)to the background circumstances which explain the genesis and purpose of the contract, i.e to matters probably present to the minds of the parties when they contracted.

26. According to the principle, the starting point is to try and determine the intensions of the parties from the words used. The word appearing in clause (o) of the Resolution must therefore be attributed the ordinary, literal and grammatical meaning. It is only if there is ambiguity in the plain language that an additional approach to interpretation becomes necessary.

27. There is no dispute between the parties as to whether or not the Respondent adhered to the timeframes set out in the Resolution. It is common cause that the Respondent took close to three years to provide the Applicant with the outcome of the appeal.

28. The Respondent provided reasons as to why it took three years and the reasons relate to changes occurring within the office of the Executive Authority. However, these reasons are at best flimsy and cannot explain the Respondent's not taking action over a span of three years.

29. If one look at the paragraph 8.8 in the Resolution, it reads as follows: "Departments **must** finalise appeals within 30 days, failing which, in cases where the employee is on precautionary suspension, he/she must resume duties immediately and await the outcome of the appeal while on duty."

30. It is clear that the language used in this paragraph is peremptory in nature. It does not give the Department an option to finalise appeals in more than 30 days, except when an employee is on precautionary suspension. This exception is sensible and the intention was to ensure that suspensions are not unnecessarily extended for lengthy periods of time, whilst another employee in an acting basis take over the duties of the suspended employee, thereby increasing the Respondent's salary bill. It is clear that the exception only relates to employees on precautionary suspension, otherwise the paragraph would have clearly stated that the 30-day period rule does not apply and that employees must patiently await the outcome of the appeal. Furthermore, the Resolution only makes provision for a condonation process for the employee if the appeal is filed late. The absence of a condonation process for the Department to finalise appeals if a longer period is needed, clearly shows that the intention of the parties was that 30 days should be more than sufficient for the appeal authority to consider the appeal and give an outcome.

31. This is clearly also in line with the primary objects of the LRA of having speedy dispute resolution processes and that disciplinary should be promptly handled.

32. It is also clear that this paragraph placed a responsibility on "departments" to finalise appeals and not on the appeal authority. Whether or not there is a high turnover of Executive Authorities in a certain department, can therefore never be an excuse as to why appeals are not finalised within the prescribed time limits, as the duty clearly lies with the administrative personnel to see to it that there is compliance with the timeframes.

33. A proper interpretation of paragraph 8.8 of the Resolution therefore clearly means that a department ONLY has 30 days to finalise appeals. The Resolution does not empower departments to finalise appeals after the 30 day-prescribed period.

34. The Respondent argued that the disciplinary code is only a guideline. In **South African Municipal Workers Union obo Jacobs v City of Cape Town & others (2015) 36 ILJ 484 (LC) concerns** the effect of non-compliance with disciplinary code which has the status of a collective agreement on the outcome of the disciplinary proceedings. The Court rejected the Municipality' s argument that the disciplinary code was just a guideline. The **Court held that the applicable provision of the code was peremptory and formed part of the employee's conditions of service.**

35. The courts are actually clear on this issue that an employer may not depart from the provisions of a disciplinary code arbitrarily (***Trans Hex Group Ltd v CCMA [2016] 2 BLLR 144 (LAC). See also SAMWU obo Abrahams v City of Cape Town [2008] 7 BLLR 700 (LC) at 706. See also Trans Hex Group Ltd v CCMA [2016] 2 BLLR 144 (LAC)*** and, where the provisions of a disciplinary code are stated in peremptory terms, as is the contention of the Applicant in the present matter, the parties will not be at liberty to treat them as mere guidelines (***Hendricks v Cape Peninsula University of Technology (2009) 30 ILJ 1229 (C) 1255).***

36. Therefore, as paragraph 8.8 of the Resolution is also drafted in peremptory terms, it is clear that the Resolution is more than a guideline and that the Respondent is not entitled to depart from it arbitrarily.

37. It is therefore clear that the Respondent did indeed interpret paragraph 8.8 of the Resolution incorrectly.

Relief

38. Section 138(9) of the LRA determines that a "commissioner may make any appropriate arbitration award in terms of this Act, including, but not limited to, an award – (a) that gives effect to any collective agreement; (b) that gives effect to the provisions and primary objects of this Act; (c) that includes, or is in the form of a declaratory order.

39. The relief sought by the Applicant is to declare the decision of the appeal authority unlawful and null and void; and to be reimbursed for the suspension without pay period.

40. In ***Viedge v Rhodes University and Others [2019] 3 BLLR 318 (ECG)*** the high court found that the non-compliance with the disciplinary policy constituted a breach of the employee's contractual right to a fair disciplinary procedure, rendering the disciplinary action taken against him unlawful and void ab initio.

41. Is the Council empowered to make the same decision as that of the high court? Although it is true that Judge Steenkamp made a decision to declare the disciplinary proceedings null and void in the matter of ***SAMWU obo T Jacobs v City of Cape Town (2014) Case no. C701/13 (LC),*** it is also true that Judge H.Rabkin-Naicker in ***A Tsengwa v Knysna Municipality & Others LC Cape Town C 457/14 delivered 16 April 2015*** came to a different conclusion, which decision I support. Her reasoning was as follows:

*"**There** is a further important issue at stake in this matter – the notion that because section 138(9) of the LRA provides that a commissioner may make a declaratory order that this means that it is within the power of commissioners to declare disciplinary proceedings null and void, and of no force and effect. There appears to be a misconception that the power to issue a declaratory order equates with the jurisdiction to declare acts to be unlawful and invalid. This is not the case – a tribunal or court which does not have inherent powers is limited as to the type of declaration of rights it may make. For example, a commissioner or an arbitrator's power to make a declaratory order is limited by the ambit of disputes they are permitted to preside over by virtue of the LRA and other employment statutes.*

[15] Perhaps the clearest way to debunk the notion that arbitrators and commissioners can set aside irregular proceedings as unlawful is to remind ourselves that they exercise an administrative function within the contemplation of s 22 of the Constitution. ***(Sidumo & another v Rustenburg Platinum Mines Ltd & others 2008 (2) SA 24 (CC); (2007) 28 ILJ 2405 (CC) at paragraph 88)***

[16] The above applies equally to arbitrators performing functions in a bargaining council such as second respondent in this case - they perform administrative functions and their decisions are monitored by this court in terms of the LRA. The case for the applicant proposes that an administrative functionary such as the arbitrator in this matter, can declare proceedings presided over by another administrative functionary (i.e. the chairperson of the disciplinary hearing appointed by an organ of state, the municipality) to be unlawful and invalid. The definitive feature of our model of administrative law is that administrative bodies are subject to the supervision of ordinary courts of law. The task of reviewing the legality of administrative decisions has always fallen on the courts. This principle goes to the heart of the separation of powers entrenched in our Constitution."

42. It should therefore be clear that as a commissioner I am making administrative decisions, just like a chairperson in a disciplinary hearing or a decision of an appeal authority at the workplace. The task of reviewing the legality of administrative decisions therefore lies with the court. I am therefore not able to declare the decision of the appeal authority unlawful.
43. I would have been able to issue an award to give effect to the collective agreement, if this dispute was referred whilst the Applicant was still awaiting the outcome of the appeal. An award ordering the Respondent to comply with paragraph 8.8 of the Resolution within a specified time period would then have been appropriate.
44. If I was to determine the fairness of the decision of the appeal authority, based on the below case law, it is clear that the extensive delay in finalising the matter would most probably have resulted in decision to find that the Respondent had committed an unfair labour practice that was procedurally unfair, and the procedural unfairness was such that it might even have impacted the substantive fairness or otherwise, see the Constitutional Court case of Stokwe below.
45. The Constitutional Court is very vocal on the issue of employers dragging their feet to institute and

finalise disciplinary proceedings of employees: In ***Toyota SA Motors (Pty) Ltd v CCMA [2016] (3) BCLR 372 (CC)*** at para 1, the court observed, "any delay in the resolution of labour disputes undermined the primary object of the LRA." Nkabinde J also emphasized the importance of time frames in the speedy resolution of labour disputes and called time frames "essential".

46. The Constitutional Court had recently decided in ***Stokwe v MEC Department of Easter Cape (CCT 33/18) [2019] ZACC 3 ([2019] 6 BLLR 524*** that an extraordinary delay in instituting and concluding the disciplinary proceedings expeditiously made the Applicant's dismissal procedurally unfair, despite substantive fairness. This seems to suggest that the unfair procedure seriously impacted the fairness of the entire process and that reinstatement could be a distinct possibility. The Applicant in this case was dismissed on 22 June 2011 for an incident that took place in August 2009. The employer only dismissed the Applicant's appeal on 14 February 2014. The matter was remitted to the labour court to determine the appropriate sanction.

47. In 2005 the Labour Court had already expressed the same sentiment in ***Department of Public Works, Roads and Transport v Motshoso [2005] JOL 14643 (LC)*** where it held the failure by the employer to provide an explanation for a delay of almost 3 years in finalising the disciplinary proceedings rendered the dismissal procedurally unfair.

48. The issue also came under loop in the matter of ***SARS v CCMA (Kruger) [2015] ZALAC 62*** where the labour appeal court also dealt with deviations from disciplinary codes. The court clearly stated that a commissioner is entitled to determine that a decision of an employer was invalid, as there was no authority for such a decision in the disciplinary code or collective agreement and that there was therefore no need to look at the merits of the case.

49. In the case of ***SARS v CCMA & Others (Chatrooghoon) [2014] 1 BLLR 44 (LAC)*** the LAC held that invalidity vitiates the act completely, i.e. it cannot be made. Invalidity is more than procedural unfairness, it denotes an unlawful act, i.e. one the law will not acknowledge.

50. It is thus clear from the above case law that should this matter had been referred as an unfair labour practice (disciplinary action short of dismissal), that the outcome would have been that even though the sanction of the chairperson of the disciplinary hearing might have been substantively fair, the lengthy period that the Respondent took to finalise the disciplinary action made the unfair labour practice procedurally unfair.

51. In an ideal world an employer who is serious to sustain good and healthy labour relations, will consider the implications of this award and take appropriate steps. I trust that the Respondent will do the same and not expect of the Applicant to refer another dispute.

AWARD

52. The Respondent had incorrectly interpreted and applied paragraph 8.8 of the Resolution when it finalised the Applicant's disciplinary process three years after the Applicant appealed the outcome of the hearing.

PANNELIST: ANNELIE BEVAN