PHSDSBC

Public Health and Social Development Sectoral Bargaining Council

ARBITRATION AWARD

Case No: **PSHS795-21/22**

Commissioner: **Leonard Van Leeuwen**

Date of award: **30 March 2022**

In the matter between:

PSA obo Jasper Chimanzi Applicant

and

Department of Health- Mpumalanga Respondent

DETAILS OF HEARING AND REPRESENTATION

1. The arbitration hearing into an alleged unfair labour practice dispute, referred in terms of Section 186 (2)(b) of the Labour Relations Act 66 of 1995, as amended ("LRA") was held at the Offices of Department of Health- Mpumalanga (the Respondent) in Mbombela on 22 March 2022. The award is issued in terms of Section 138 (7) of the LRA and is a summary of the evidence I considered, with brief reasons for my findings and is not intended to be a *verbatim* record of the proceedings.
2. Mr. Jasper Chimanzi (the Applicant), was present and represented by Ms N G Mlangeni, an official from Public Servants Association (PSA). The Respondent was represented by Mr Jerry Mnisi, Deputy Director Employee Relations.
3. The hearing was held in English and was both digitally and manually recorded.

4. The Applicant is employed as the Director Information Technology at the Provincial Office of the Respondent in Mbombela. He was summary suspended with full pay on 13 September 2021 while on leave as per pages 1 and 2 of the bundles ''R'' and pages 14 and 15 of bundle ''A'' pending an investigation into alleged misconduct relating to equipment that was delivered for the new provincial Hospital in Middelburg.

5. The Applicant on his return from leave on 14 October 2021 made written submission to the Acting Head: Health as to why his suspension should be uplifted. He however did not receive any reply from the Respondent where after he decided to refer a dispute regarding an alleged unfair suspension to the Bargaining Council on 03 November 2021. A Certificate indicating the matter remained unresolved was issued on 15 December 2021 whereafter the Applicant on 31 January 2022 submitted a request for arbitration whereafter the matter was set down for arbitration before me.

6. As to relief, the Applicant requested that his suspension be uplifted.

ISSUE TO BE DECIDED

7. I must determine whether the Respondent committed an unfair labour practice in terms of Section 186 (2) (b) of the LRA in determining if the suspension was fair or unfair.

8. He is challenging the procedural and substantive fairness of his suspension as he is of the view that the process followed in effecting his suspension was flawed and that there is no valid reason for suspending him.

9. He further also claimed that the Respondent was inconsistent in suspending employees involved in the alleged misconduct as they failed to suspend Sydney Nkosi, Ellias Mokwane and the CFO Mr Mamogale.

10. If found that the Respondent had committed an unfair labour practice, to award the appropriate relief.

SURVEY OF EVIDENCE AND ARGUMENTS

Evidence

Documentary

11. Both parties submitted documentary evidence in support of their respective case. The Respondent's bundle was marked Bundle ''R'' and that of the Applicant marked Bundle "A''.

EVIDENCE AND ARGUMENT FOR THE APPLICANT

12. The Applicant after having been sworn in, testified as follows:
13. He is currently on suspension since 13 September 2021. He was informed of his suspension by means of ''WhatsApp''. He was not given a notice of intention to suspend but was summary suspended and as such was not afforded an opportunity to be heard prior to being suspended. He was only asked on 13 October 2021 to submit a written response as to why his suspension should be uplifted which he did. The basis for his suspension is that he allegedly signed for receiving goods which he denied having done although his signature is on the document. He claimed his signature was forged.
14. Mr Nkosi was suspended after him despite him having signed for the goods. Despite another report implicating the CFO he has as yet not been suspended.
15. No hearing has been held during this period. He was however notified on 09 December 2021 to attend a disciplinary hearing on 14 December 2021, but the Respondent failed to attach the charges levelled against him in the said notice as they had not yet been drafted. The Respondent as a result failed to comply with the requirements of paragraph 2.7 (1) (c) of the SMS handbook as per page 7 of bundle ''A'' which states a description of the allegations of misconduct and the main evidence they would be relying on must be attached to the notice to attend a hearing. He on the same day by means of a written request directed to the Respondent by his legal representatives as contained on page 33 of bundle ''A'' requested that they provide him with the charges which they failed to do.

16. The Respondent had failed to convene a hearing within 60 days as prescribed by paragraph 2.7 (2) (c) of the SMS handbook as contained on page 8 of bundle ''A''.
17. He has yet to be contacted by the investigation officer to obtain any affidavit from him in response to the allegations.
18. During cross examination he stated that although he was given a notice to attend a hearing no hearing was held or could be held as they failed to level any charges against him.
19. He however agreed that paragraph 2.7 (2) (c) does indicate that the chair must decide on any further postponements but that the hearing held on 14 December 2021 was convened after the 60 days as required. Pages 11 and 12 of bundle ''R'' is a postponement ruling issued by the chairperson of the hearing on 14 December 2021 and that paragraph 5.2 of the ruling states that the main reason for the postponement is that the Respondent had indicated that the investigation was not finalized. His representative did not oppose the request for postponement. He however did not attend the proceedings on the day. The Respondent however on 15 December did provide him with the charges levelled against him as contained on pages 22 and 23 of bundle ''A'' which would entail that the investigation was finalized. in terms of clause 3 (a) of the SMS handbook a hearing must be held within 10 days of the delivering of a notice as referred to in clause 2.7 (1) of the SMS Handbook.
20. He did contact the HOD when he received the ''WhatsApp'' message informing him of his suspension who informed him he can acknowledge receiving the suspension letter on his return from leave as she had already informed the National Office of his suspension which he did on 13 October 2021. The hearing was held 65 calendar days after he had been suspended. The message was sent to him by Msiya who is employed in the employee relations section.
21. In closing argument, the Applicant submitted that the alleged disciplinary enquiry that was held on 14 December 2021 did not comply with the requirements as contained in the SMS handbook and that the Respondent had failed to submit any proof that the investigation was still ongoing nor did the Respondent dispute that they had not provided the Applicant with a letter informing him of their intention to suspend him. The chairperson cannot postpone a hearing outside of the 60 days period. The fact that Nkosi was only suspended after the Applicant is an indication of inconsistency.

22. In support of their submission, they also referred to the case of *PSA obo Jimmy Swift vs DCS* in which it was found that a suspension was unfair even if a hearing was postponed.

EVEDINCE AND ARGUMENT FOR THE RESPONDENT

23. Jerry Mnisi (Mnisi), after having been sworn in, testified as follows:
24. Pages 1 and 2 of 'bundle 'R '' is the notice of suspension which was signed by the HOD. He prepared the said document on behalf of the Respondent.
25. Page 7 of bundle "R" is the dispute which the Applicant had referred in which he states that the dispute had arose on 01 November 2021. The Applicant did not submit any grievance prior to referring the dispute.
26. Page 11 of bundle ''R'' is the postponement ruling issued by the chairperson of the disciplinary hearing which took place on 14 December 2021. There is nothing in the SMS handbook which states if notified of a hearing you must also at the same time receive the charges.
27. They are still busy with the investigation due to the Applicant implicating other employees in the alleged misconduct.
28. Mr Nkosi was suspended a few weeks after the Applicant.
29. In closing argument, the Respondent submitted that the SMS handbook allows for precautionary suspension if it is alleged that a member has committed serious misconduct or if there were a possibility of that they would interfere with the investigation. The Applicant was suspended with full pay. They had complied with the requirements of the SMS handbook in effecting the suspension.
30. The ''WhatsApp'' message cannot be considered as proof of service of his suspension. He was suspended on 13 October 2021 when he signed acknowledgement of his suspension.
31. They did convene a hearing on 14 December 2021 and the notice to attend the said hearing was given to the Applicant 5 working days prior to the hearing. They applied for a postponement which was granted, and the hearing was postponed *sine die* as per the chairpersons ruling. This was in compliance with the SMS handbook. In support they referred to the matter of *Vusi Mashiane vs Department of Public Works*

in which the Court said the 60 days in which a hearing must be held is peremptory and the discretion to postpone the matter rest with the chairperson.

32. The 60 days are not calendar days but working days and if one counts from 14 October 2021 then the hearing was held within the 60 days.
33. There is nothing preventing the Respondent from summary suspending the Applicant. He is not suffering any prejudice as he is still receiving his full salary while on suspension. They request that the application be dismissed.

ANALYSIS OF EVIDENCE AND ARGUMENT

34. Section 185 of the Labour Relations Act (LRA) 66 of 1995 as amended, stipulates that every employee has the right not to be subjected to an unfair labour practice.
35. The meaning of unfair labour practice is found in Section 186 of the Labour Relations Act (LRA) 66 of 1995 as amended.
36. In unfair labour practice disputes, the Applicant bears the onus to prove on a balance of probabilities that the Respondent's conduct amounted to an unfair labour practice.
37. The list of unfair labour practices as contained in Section 186 (2) of the LRA, is a closed list. This entails that only actions that fall within the scope of the four categories, expressly listed in Section 186(2)(a)-(d), could be an unfair labour practice.
38. Unfair labour practice as per Section 186(2)(b) of the LRA is defined as any unfair suspension of an employee or any other unfair disciplinary action short of dismissal in respect of an employee.
39. The present matter refers to the summary precautionary suspension of the Applicant who is allegedly being accused of being involved of having committed serious misconduct as to allow the investigation into the alleged misconduct.
40. In coming to a finding, I have taken into consideration the oral evidence, the documentary and written closing arguments submitted by the parties during the arbitration.
41. It is common cause that the Applicant is employed as the Director: Information technology which is a senior managerial position.
42. He is of the view that his suspension is unfair as there is no *prima facie* basis for the suspension and furthermore that the Respondent had failed to comply with chapter 7 of the SMS handbook in effecting his suspension as they failed to notify him of

their intention to suspend him therefore depriving him of the right to make submissions as to why he should not be suspended. They failed to convene a disciplinary hearing within 60 days as required by paragraph 2.7 (2) (c) of the SMS handbook and that the hearing which was eventually convened did also not comply with the requirements as set out in paragraph 2.7 (1) of the said SMS handbook as no charge sheet was attached.

43. In *POPCRU obo Masemola and others v Minister of Correctional Services (2010) 31 ILJ 412 (LC*) the Court Held, relying on *Mogothle v Premier of the Northwest Province and Others (2009) ILJ 605 (LC)* that fairness requires the following before suspending an employee pending an investigation or disciplinary action:

(a) First that the employer has a justifiable reason to believe, prima facie at least that the Employee has engaged in serious misconduct.

(b) Secondly, that there is some objectively justified reason to deny the Employee access to the workplace based on the integrity of the pending investigation into the alleged misconduct or some other relevant factor that would place the investigation or the interest of the affected parties in jeopardy; and

(c) *Thirdly and lastly, that the employee is given the opportunity to state a case before the employer makes a final decision to suspend the employee.*

44. I will firstly deal with the issue relating to the failure to issue a letter of intention to suspend the Applicant as he was just summary suspended and as a result deprived of the opportunity to make submission as to why he should not have been suspended. Secondly, I will deal with the issue regarding his contention that there was no valid reason for suspending him.

45. From the above sited case law, it appears that it is a prerequisite to give an employee an opportunity to be heard before imposing a suspension. The Respondent did not dispute the fact that the Applicant was not given such an opportunity but that he was summary suspended. At first glance this would then appear to render the Applicant's suspension procedurally unfair as this was a requirement as confirmed by the Courts as held in *POPCRU obo Masemola and others v Minister of Correctional Services (2010) 31 ILJ 412 (LC*) relying on *Mogothle v Premier of the Northwest Province and Others (2009) ILJ 605 (LC).*

46. It however should also be noted that the Respondent did give the Applicant an opportunity when he returned from leave on 13 October 2021 to make written submission in regards as to why his suspension should be lifted which he did as contained on pages 51 to 59 of bundle ''A'' thus in my view complying partially in any event with the *Audi alteram partem* rule.
47. The Constitutional Court however in *Long v South African Breweries (Pty) Ltd and Others (CCT (2019) 40 ILJ 965 (CC)* held that where a suspension is precautionary and not punitive there is no requirement to afford an employee an opportunity to make representations as to why he should not be suspended. I align myself with the above stated case and as such I find that the Respondent in this regard did not act unfairly in summarily spending the Applicant.
48. Secondly it was his contention that there was no valid reason for suspending him. Once again, the Constitution Court in *Long v South African Breweries (Pty) Ltd and Others [2019] ZACC (2019) 40 ILJ 965 (CC)* supported the Labour Courts reasoning in determining if a precautionary suspension was permissible in that one must first assess if there is a fair reason for suspension and secondly whether it prejudices the employee. The Court found that the suspension was for a fair reason namely investigation and secondly that there is no real prejudice suffered as his suspension was on full pay.
49. In the present matter the Respondent's reason for suspending the Applicant was for purposes of investigating the alleged allegations of improper conduct and or dishonesty in that he improperly received goods at the office from a supplier (EPITECH Pty Ltd) which contributes to allegations of fraud. His suspension was also with full pay. Having regard to the Courts finding above with which I align myself I find that his suspension was for a fair reason and permissible.
50. I will now address the issue regarding the inconsistency in suspending other employees allegedly involved in the misconduct which was raised by the Applicant. According to the Applicant Nkosi was only suspended after him which was not disputed by the Respondent. It was further his testimony that the CFO, Mr. Mamogale and Mokwane had also not been suspended despite of another report also implicating them in the same alleged misconduct. This was denied by the Respondent. The fact that Nkosi was suspended although later and his failure to submit any documentary proof regarding his allegation with respect to Mamogale

and Mokwane I as a result find that he had failed to discharge the onus in proving that the Respondent had acted inconsistently in suspending employees.

51. I will lastly deal with the requirements of paragraph 2.7 (1) (c), 2,7 (2) (c) and 3 (a) of chapter 7 of the SMS handbook which deals with the procedures that must be applied in cases of misconduct and incapacity. This is stems from PSCBC Resolution 1 of 2003 which makes provision for the issuing of a directive by the Minister for Public Service and Administration to cover the disciplinary matters of members of the SMS.

52. It was the Applicant's evidence and view that the Respondent had failed to comply with the requirements of paragraph 2.7 (2) (c) of the SMS handbook in that they failed to hold a disciplinary hearing within 60 days and secondly that the disciplinary hearing which was convened did not comply with the requirements of paragraph 2.7 (1) (c) as they failed to attach a description of the allegations of misconduct and the main evidence on which the employer will rely on.

53. It is the Applicant's contention that he was suspended by means of a ''WhatsApp'' message that was send to him on 13 September 2021 which he views as a valid means of service. The hearing was however only held on 14 December 2021 which is outside the 60 days. It is however the Respondent's submission that the Applicant was not suspended on the said date but only on 13 October 2021 when he signed acknowledgment of his suspension. It was further also their argument that the hearing must be held within 60 working days.

54. It was the Applicant's undisputed evidence that the HOD had informed him that she had already informed Head Office of his suspension and that he could just acknowledge receipt there off on his return from leave. As this is uncontested, I have no valid reason as to not accept this as being what had transpired and to be correct.

55. With regards to proof of service I find the relevant provisions of the Electronic Communications and Transaction Act 25 of 2002 applicable in respect of any issue concerning service by e-mail or the service of notice of proceedings by means of short message service (SMS) as permitted. "WhatsApp'' message would be covered by the said Act and as such this would constitute valid service of the suspension notice that was send to the Applicant on 13 October 2021 which was the method of service chosen by them.

56. Paragraph 2.7 (2) (c) states:

if a member is suspended or transferred as a precautionary measure, the employer must hold a disciplinary hearing withing 60 days. The Chair of the hearing must then decide on any further postponement.

57. It is the Respondent's submission as indicated that it is 60 working days which argument I reject as the clause does not mention working days but days which is to be accepted as referring to 60 calendar days in terms of the Interpretation Act. My conclusion is further supported by the fact that the Respondent on certain occasion specifically refer to working days such in the following instance: 2.7 (1)(a) The Member must be given notice at least five working days before the date of the hearing.

    - *3 (a) the disciplinary hearing must be held within ten working days after the notice referred to in 2.7 (1) (a) is delivered to the member.*

58. Should the Respondent intended it to be 60 working days he would have clearly stated it as in the examples listed above.
59. It is common cause that the Applicant was notified on 09 December 2021 to attend a disciplinary hearing on 14 December 2021. As I have already accepted the date of suspension to be that of 13 September 2021 the hearing should have been held on or before 12 November 2021 which thus renders the hearing 32 days outside of the required 60 days as requirement by paragraph 2.7 (2) (c) of the SMS Handbook.
60. It is further also common cause that the hearing was postponed *sine die* as per the chairpersons ruling which is contained on pages 11 and 12 of Bundle ''R'' which is indeed permitted by paragraph 2.7.(2) (c) as stipulated in paragraph 54 of this award.
61. The Court in *Mashiane v The Department of Public Works J 1773 /12 [2012] ZALCJHB 69 (18 July 2012)* held that the 60 days are peremptory, and that the chairperson of the disciplinary hearing must decide on the extension of the suspension. I align myself with the stated case.
62. In the present matter the Respondent failed to comply with the 60 days period as required nor did the chairperson in his ruling decided on the further suspension of the Applicant which in terms of the above cited case he was required to do. He merely decided on an application on postponing the disciplinary hearing.

63. It is also common cause that the Respondent did not provide the Applicant with the charges indicating the alleged misconduct prior to the hearing dated 14 December 2021 but only on 15 December 2021.

64. Paragraph 2.7 (1) (c) states-

The written notice of the disciplinary may be given in the form of annexure D of this chapter and provide-

- *A description of the allegations of misconduct and the main evidence on which the employer would rely.*

65. Paragraph 3 (a) states-

The disciplinary hearing must be held withing ten working days after the notice referred to in paragraph 2.7 (1) (a) is delivered to a member.

66. As the Respondent had given the Applicant the charges on the 15 of December 2021 one can reasonable then conclude that the investigation was concluded by 14 December 2021 and that there in fact was no valid reason for the Respondent to have request a postponement or not to have complied with the requirements of paragraph 3 (a) in convening a disciplinary hearing within ten working after having provided the Applicant with the charges. Surely the Respondent by now should have held the disciplinary hearing.

67. I find the above two paragraphs 2.7(1) (c) and 3(a) to be peremptory with which the Respondent had failed to comply with.

68. The Court in *SAPO Ltd V Jansen Van Vuuren NO and Others* (2008) BLLR 798 (LC) held that a suspension, even whilst investigations are underway, amounts to an unfair labour practice, if the period of suspension exceeds the period stipulated in a disciplinary code, collective agreement, regulations, or contract of employment. I find this to be relevant in the present matter.

69. Having regard to the above evidence I find that the Applicant had successfully discharged the onus in proving on a balance of probability that the Respondent's had not complied with paragraph 2.7 (1) (c), 2.7 (2) (c) and 3 (a) of the SMS handbook and as such there action constitutes an unfair labour practice as defined in terms of section 186(2) (b) of the LRA.

Relief

70. When it is found that the employer's conduct amounted to an unfair labour practice, the Arbitrator must determine an appropriate remedy.
71. In terms of Section 193 (4) of the LRA the remedies for an unfair labour practice are not specific. An Arbitrator can decide on any reasonable and appropriate relief which includes, but is not limited to, reinstatement, re-employment of the employee or the payment of compensation to the employee.
72. As to relief, the Applicant requested his suspension to be uplifted as the only remedy.
73. I am obliged to conceded to this request as there is no valid reason advanced by the Respondent as to why this would not be feasible.
74. I make the following award:

AWARD

75. The continued suspension of the applicant by the Respondent beyond the prescribed 60 days constitutes an unfair labour practice.
76. The Respondent is ordered to uplift the Applicant's suspension with immediate effect.
77. The applicant is to report for work on Monday 4 April 2022.

Leonard van Leeuwen