



Arbitration Award

Case Number: NWVB440-19
Commissioner: Mooketsi Molamu
Date of Award: 24 October 2019

In the **ARBITRATION** between

PSA obo Molamela, R.P

(Union/Applicant)

and

SASSA North West

(Respondent)

Union/Applicant's representative: Mr. K Moalosi: PSA Representative

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DETAILS OF HEARING AND REPRESENTATION

1. This matter was set down for arbitration on **07 August 2019**, was part heard and finalized on the **14 October 2019** at the Garden View Guest Lodge in Mahikeng, North-West Province.
2. The employee party, **Mr. Rantlhai Petrus Molemela** ("the Applicant") was present and represented by Mr K Moalosi a union official from PSA. The employer party, **SASSA North West** ("the Respondent"), was represented by Mr. S Malane, its Labour Relations Manager.
3. The proceedings were mechanically recorded. Closing arguments were submitted on 21 October 2019 as per the parties' agreement.

THE ISSUES TO BE DECIDED

4. I am required to decide whether or not the Respondent's actions amounted to and constituted an Unfair Labour Practice in terms of **section 186 (2)(b) of the Labour Relations Act 66 of 1995**, as amended. If I find that the actions of the Respondent were unfair I am to determine the appropriate relief. The Applicant seeks compensation.

BACKGROUND TO THE DISPUTE

5. The Applicant was employed by the Respondent on 01 October 2014. The Applicant occupied a position of Manager Supply Chain Management. The Applicant dispute allegedly arose on 12 April 2019. The Applicant was charged with six charges and was found guilty on charges two and five which are-

CHARGE 2

INSOLENCE

it is alleged that on or about March and April 2017 at or near Mahikeng Regional Office you displayed rude, disrespectful, impudent or offensive behavior towards your senior and other employees in the work place and demonstrates abusive or insolent behavior in that: it is alleged that on 09 March 2017 you responded to Ms Goitselwe I and unbecoming, insulting, disrespectful and derogatory manner by stating in an e-mail that she must be "considerate and think".

CHARGE 5

FAILED TO COMPLY WITH, OR CONTRAVENED AN ACT, REGULATION OR LEGAL OBLIGATION.

It is alleged that during 2017 you failed to tender your services in terms of his/her contract of employment by taking leave without following normal leave procedure hence your absence in those occasions were not permitted or justified, thereby committing an act of misconduct.

The sanction was a two months suspension without pay.

6. On 15 April 2019 the Applicant through the union referred the dispute to the CCMA challenging two months suspension without pay. The matter was set down for Con/Arb on 13 June 2019. At the proceedings the Respondent representative raised a point in limine challenging the jurisdiction of the CCMA to conciliate or and arbitrate this dispute. Commissioner Collins Makama issued a ruling and found that the CCMA has the jurisdiction to conciliate and arbitrate the dispute. He also issued a certificate of non-resolution and instructed the CCMA to reschedule the matter for arbitration. The arbitration was set down for 07 August 2019 before me and could not be finalized on that day, It was then rescheduled for 14 October 2019. The parties agreed to submit the closing arguments on 21 October 2019 which they did.
7. The Applicant's representative submitted a 40 pages bundle of documents which was marked Applicant's bundle "A". The Respondent's representative submitted a 49 pages bundle of documents which was marked Respondent's bundle "B" and later submitted additional bundle which was marked Respondent's bundle "C". Documents were accepted for what they purport to be. No challenge was made to the authenticity and veracity of the documents.

SURVEY OF PARTIES' EVIDENCE AND ARGUMENTS

8. In capturing the evidence of the parties I will focus on the relevant evidence presented relating to the issue at hand. I will therefore not capture the parties evidence verbatim.

Applicant's evidence

9. The Applicant testified as the only witness.

At the end of the Applicant's testimony before cross examination, parties asked for a 45 minutes break for lunch, after the break the Respondent introduced a new document, a signed charge sheet which indicated on the Applicant's part that he refused to sign. The Applicant's representative

objected to the introduction of same. I ruled that we proceed with that document and will decide on whether to put any weight on it after evidence was led.

Oral evidence

Mr. Rantlhae Petrus Molemela ("the Applicant") testified under oath that:

10. He was instructed together with other Managers attend a meeting in Pretoria on 06, 07 and 08 March 2017. On 07 March 2017 he received an email from Ms Goitselwe (Goitselwe) the Branch Coordinator which read as follows: *"Kindly be reminded that the month end close report is due on 08 March 2017, colleagues please communicate with your managers and assist them with the report as they are not in the office."* He could not submit the report then as he did not have a 3G card. He was able to submit the report on 09 March 2017 when he was in the office. On the same day in the afternoon he wrote an email to Ms Goitselwe expressing his dissatisfaction about her email. The email read; "You should be considerate and think. Managers were in Pretoria and I do not know how were you expecting them to give you reports by that time." There was nothing disrespectful on the email and Ms Goitselwe did not raise any dissatisfaction about his email. He received an email from Ms Matshidiso Mokwena (Mokwena) the General Manager (Ms Goitselwe's supervisor) saying that he must apologise to Goitselwe. Under cross examination he agreed that the message from Goitselwe was a reminder to all managers but do not agree that there was no schedule. On the issue of apologising to Goitselwe he remained silent.
11. He was invited for interviews at Cogta in Bloemfontein, he arranged with Mr Modisakeng (Modisakeng) to attend same on 12 March 2019 and he agreed. Modisaeng asked him to go and do barcoding in Klerksdorp and then drive to Bloemfontein from there. On Friday whilst driving to Klerksdorp he received a call informing him that the interviews were postponed. He then sent a message to Modisakeng informing him that the interviews were postponed and that he will not proceed to Klerksdorp for barcoding. On 16 March 2019 he saw an email from Cogta Bloemfontein inviting him for interviews on 20 March 2019. He then electronically submitted two applications for leave, vacation leave and special leave for 19 and 20 March 2019 respectively and attached the invitation to interviews. On 19 March 2019 whilst in Bloemfontein he received an email indicating that the interviews were rescheduled for 22 March 2019. He forwarded the email to his supervisor and could see that he read it.
12. He returned to work on 23 March 2019 and realised that his leave was not approved. On enquiry he was informed that he did not receive a prior approval. He was given leave without pay for 19 to 22 March which

he contested and was unsuccessful. At that time he had 15 leave days and 28 capped leave days to his credit.

13. He was charged and given an unsigned charge sheet and he brought this to the attention of the chairperson. The charge sheet was supposed to have the signature of the regional Manager in terms of the Human Resource Delegation. He was not served with the outcome of the hearing until he enquired about same. He could not appeal the sanction he was not aware of which charges was he found guilty on. Under cross examination he agreed that the approval of leave must be online.

Respondent's evidence

14. The Respondent called three witness, who testified under oath.

Oral evidence

Ms Motshidisi Elizabeth Mokwena ("Mokwena") testified under oath that:

15. She was the General Manager (GM) responsible for Supply Chain Management and Financial Accounting. Tumelo Goitselwe was her Personal Assistant, Modisakeng was the Senior Manager Supply Chain and report to the GM. The Applicant reports to Modisakeng. She gave Goitselwe instruction to send the email to the units. The Managers were in Pretoria when the report became due and Goitselwe was to request them to send the reports. They were all aware that they had to send the report and Goitselwe was just reminding them. She did not understand why the Applicant said Goitselwe must be considerate and think as there was a schedule and she was only reminding them. She asked the Applicant to apologise and he refused.

16. She believes that the words used by the Applicant were derogatory and equal to referring to a person as an animal. Goitselwe came to her almost in tears feeling insulted because when a person say be considerate and think that is insulting.

Mr Abner Raphefo Modisakeng (Modisakeng) testified under oath that:

17. He was the Applicant's immediate superior. On 19 to 22 March 2017 he went to work in Pretoria and before he left he informed the Applicant. On 19 March 2017 the Applicant did not report for duty. He found that the Applicant had send a request for leave on the work flow. He rejected the leave because they had

not talked about it. The proper procedure was that they have to discuss the leave before it is approved because the Applicant is a manager. When the Applicant return to work he did not give any explanation. He wrote an email and told him that he went on leave without permission and that he must explain why it should not be treated as leave without pay. His response was that when he took leave he (Modisakeng) was not in the office and he knew that he will receive it. He further said that he needed to prepare for the interviews and was not aware that he had to ask for permission to go on leave and that he can give him unpaid leave. The leave was treated as leave without pay and reported to Labour relations to deal with Manager who went on leave without arrangement. When he is not available the Applicant could have arranged the leave with the General Manager. Under cross examination he indicated that he was aware of the interview of 12 March 2017 and that the Applicant send him the message when they were postponed. He had approved Applicant's leave before and that happened after they had discussed it. He had also rejected his leave on the previous occasion and he (Applicant) went to the Acting Regional Manager and after the intervention he approved it.

Ms Tumelo Goitselwe(Goitselwe) testified under oath that :

18. She was the departmental coordinator and she consolidate reports for the branch. On 09 March 2017 the Applicant and other Managers were in Pretoria and she sent them an email reminding them that the reports were due and that they must communicate with their subordinates. Other Managers submitted except for SCM. She then sent another email to Modisakeng informing him of the non-submission by his unit. Applicant was copied in that email, the General Manager called her in the afternoon and asked if she saw the email response from Applicant. The email said she must be considerate and think. The general Manager then wrote an email to Applicant telling him to apologise. The Applicant's email made her feel belittled and insulted. Under cross examination she admitted that the Applicant is superior to her in terms of position. She had not communicated her feeling to the Applicant.

CLOSING ARGUMENTS

19. Both parties submitted their closing arguments in supporting their versions which submissions I took into consideration in coming to my decision. I do not intend repeating them but I will only state in brief in my analysis what a party believe to be its strong contention or version which is in line with the issues in dispute.

ANALYSIS OF EVIDENCE AND ARGUMENT

20. Section 186 (2)(b) of the Labour Relation Act 66 of 1995, as amended provides that-

- (2) **'Unfair labour practice'** "means any unfair act or omission that arises between an employer and an employee involving-
- (b) the unfair suspension of an employee or any other unfair disciplinary action short of dismissal in respect of an employee"

21. Professor John Grogan in his book **Employment Rights** second edition at page 167 wrote –

To fall within the terms of S 189(2)(b), disciplinary action against an employee short of dismissal must be disciplinary both in nature and intent. Action is disciplinary if it is aimed at correcting errant behaviour for which the employee is responsible.

22. In **Koka v Director General: Provincial Administration North West Government (1997)7BLLR874 (LC)** the court distinguished between two kind of suspension. The first being a "holding operation, where the purpose of suspension is not to impose discipline but is imposed for reasons of good administration. The second being suspension as a form of a disciplinary penalty. The court concluded that the definition of "unfair labour practise" was sufficiently broad to cover both forms of suspension.

23. The matter before me falls within the second kind of suspension being suspension as a form of disciplinary penalty. I will therefore proceed to look at the party's submission on the merits of charges that the Applicant was found guilty on, make analysis and my decision.

24. The Applicant was charged with six charges of misconduct and was found guilty on two of them (Charge 2 and 5) and was imposed with a sanction of two months suspension without pay. The Applicant has served the sanction. That sanction is the reason the matter was brought to the CCMA. The Applicant believes that the sanction unfair. The parties agreed that the issues to be dealt with are only on that relates to the two charges and there was no need to deal with other charges.

25. I do not intend to regurgitate the party's submissions but will only deal with the part of evidence that I see relevant to the dispute and my ruling.

26. On the charge 2 of **Insolence**, the Applicant gave evidence that whilst they were in Pretoria on work related matters, he and other Managers received an email from Goitselwe that they must forward their reports. He could not submit his as he was not in possession of a 3G card but on his return to the office he forward the report as requested. He then sent an email to Goitselwe used word **must be considerate and think**. According to him he was expressing his dissatisfaction as she knew that they were out of the office. He was

not being disrespectful and Goitselwe never raised any dissatisfaction to him. He was told by the General Manager (Mokwena) to apologise to Goitselwe.

27. The General Manager (Mokwena) testified that Goitselwe came to her almost in tears complaining about the email from the Applicant. She regards the words used by the Applicant as derogatory and equal to calling a person an animal. She told the Applicant to apologise to Goitselwe and he did not. Goitselwe testified that General Manager called late in the afternoon and asked her if she had seen the email from the Applicant and she had not seen it at that time. The contents of the email made her feel belittled and insulted.

28. I have applied my mind to see what could be insulting about the word be considerate and think and I believe under normal circumstances one will not react angrily to such words, if not happy with the words one will bring that to the attention of that person who said such words to impress upon him/her that the use of such words were not acceptable. During her testimony I observed that Goitselwe was sensitive to words used as she was offended when the Applicant's representative asked her whether a reasonable person will feel offended by those words. She felt that he was saying that she was unreasonable, the commissioner had to intervene and explain the use of that word and she understood. The testimony of both witness did not collaborate, Mokwena testified that Goitselwe came to her almost in tears whilst Goitselwe testified that the Mokwena called her and asked if she had seen the email. There was no evidence from Goitselwe were she lodged a grievance against the Applicant or asked for action to be taken. I believe that the General Manager was the one who took offence and decided to take action. There was also no evidence to prove that the Applicant had contravened a rule in terms of their disciplinary code.

29. The evidence of the Respondent witnesses did not convince me that the words used by the Applicant and directed to Goitselwe were intended to be derogatory and insulting. Goitselwe may have felt offended but she did not lodge a grievance. In the case she lodged a grievance which she had the right to, the grievance procedure or other avenues could have been used to resolve this. The General Manager rushed to have disciplinary action be taken. It is probable that the Applicant used those words not to harm Goitselwe or any other official. I also find that charging the employee for such offence was too harsh not to mention the sanction imposed. I cannot rely on the witness's testimony due to its contradictions. The charge related to the display of rude, disrespectful, impudent, or offensive behaviour towards senior and other employees, no evidence was led in that respect the focus was on Goitselwe matter.

30. In *Palluci Home Depot (Pty) Ltd vs Herskowitz & others* [2015] 5 BLLR 484 (LAC), when looking at the difference between Insolence and Insubordination. The Labour Appeal Court found that there was a fine line between the two and that insolence may very well be insubordination where the employee out rightly challenges the authority of the employer. In the present case the evidence led was focused on Goitselwe whose position was junior to that of the Applicant. The evidence did not show that the Applicant was

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challenging the authority of the employer but the fact that the words used were insulting to Goitselwe or felt insulted. The actions of the Applicant were not wilful to warrant a harsh action. I therefore find the Applicant not guilty on the charge of insolence.

31. The Applicant was also found guilty for Failing to comply with, or contravening an act, regulation or legal obligation. He gave evidence that on 16 March 2017 he was invited to attend interviews at Cogta in Bloemfontein scheduled for 20 March 2017, he electronically submitted leave for 19 and 20 March 2017 and informed his superior Modisakeng by email. On 19 March 2017 he received another email from Cogta that the interviews were postponed to 22 March 2017 which he attended as scheduled. On his return to the office he found that his leave application was rejected and the reasons were that he did not receive a prior approval. He was given a leave without pay for 19 to 22 March 2019.

32. Mr Modisakeng on behalf of the Respondent testified that he was not in the office on 16 March 2017 and on his return he found that the Applicant submitted leave for 19 and 20 March through the work flow, he rejected the leave because it was not discussed with him before as is procedure and the Applicant was aware of that. He also applied a leave without pay for the days in question and reported to labour relations for disciplinary action to be taken. He admitted that he was aware that the same interview was supposed to be held on 12 March 2017 but was postponed, at that stage he had given the Applicant his blessings to attend.

33. During cross examination he avoided to answer some question by claiming that he could not remember most of the time. I agree with the Applicant that the Respondent acted harshly by imposing the sanction of no work on pay. There was also evidence that leave without pay was also imposed on the Applicant for the dates 19 to 20 March. Modisakeng also indicated that at that time there was no good working relations between him and the Applicant. It is not disputed that the Applicant went on leave without first ensuring that it was approved and on his return did not give an explanation or make a plea that the decision to reject it be reversed. When he became aware that his leave was rejected he could have at the least have approached Modisakeng with humility and respect to explain the reasons why he was absent and request the decision to be reversed, but due to the relations between the two he chose an arrogant attitude.

34. On the charge of going on leave without pre approval, I find the guilty verdict by the disciplinary chairperson to be correct. I however do not agree with the sanction imposed. The sanction was not applied progressively. There was no evidence to show that the Applicant was found guilty of any act of misconduct or similar act of misconduct before this one. I am also of the view that the fact that Modisakeng was aware and had approved that the Applicant attend the interviews on 12 March 2017 and being notified of the postponement of the interviews, mitigates for lenient sanction for the Applicant. I find that the sanction of no work no pay and the implementation thereof was too harsh. The Applicant should have been given a warning.

35. I therefore find that the Respondent committed an unfair labour practice relating to unfair suspension and should pay back the Applicant for the two months he was suspended.

AWARD

I make the following award:

36. The Respondent committed unfair labour practise relating to unfair suspension.

37. The sanction of suspension without pay for two months is set aside and replaced with **warning**.

38. The Respondent is ordered to repay the Applicant **R53 550.00 x 2 = R107 100.00** less statutory deductions being the two months' salary.

39. The total amount of **R107 100.00 (One Hundred and Seven Thousand one Hundred Rand)** less statutory deductions must be paid to the Applicant banking details known by the Respondent on or before 12 November 2019.

40. Should the amount of compensation awarded not be paid at the prescribed date then it will accrue interest in terms of **Sec 143(2) of the Labour Relations Act 66 of 1995**, as amended.

41. I make no cost order.

APPROVED



Signature: _____

Commissioner: **Mooketsi Molamu**

Sector: **Public Service (General)**