



ARBITRATION AWARD

Commissioner: Michael Howitz
Case No.: PSCBC324-19/20
Date of Award: 30 August 2020

In the ARBITRATION between:

PSA obo Rakau & 3 Others (Union / Applicant)

and

Department of Health – North West (Respondent)

Union/Applicant's representative: Ms. Zhulfa Graaff – Union Official from PSA.

Respondent's representative: Mr. Pogiso Monchusi – Director for Employee Relations.

Details of hearing and representation

1. This award follows the arbitration that took place on 21 January 2020 at the New Office Park Block in Mafikeng. The applicants, Mr Mmule Rakau, Ms Leah Rakama, Ms Sarah Mokgathla and 1 other were represented by their union official Ms Zhulfa Graaff of PSA. The respondent, Department of Health – North West, was represented by Mr. Pogiso Monchusi who is the Director of Employee Relations for the department.
2. The hearing concerned a dispute relating to the interpretation and application of PSCBC Resolution 1 of 2003 which is to be arbitrated in terms of the Labour Relations Act 66 of 1995, section 24(2), [24 (5)] - Collective Agreement – interpretation or application.
3. At the beginning of the proceedings the parties requested and then agreed to submit written submissions in this regard. The consideration, format and conclusion of the arbitration process were based on the written submissions received from the parties. The heads of argument were to be exchanged by the parties on 4 February 2020, then replies to be exchanged on 11 February 2020. The closing arguments were to be sent to each other and the Council by 17 February 2020.
4. The applicant party submitted its closing arguments on 3 February 2020. On 18 February 2020 the respondent wrote to the Council to inform them that they were unable to send their arguments because they were experiencing huge problems with their server. The respondent indicated that they would need some indulgence so as to sort their server out in order to be able to source their information for their arguments and defense for their reply to the applicants' allegations and dispute referral. To date no heads of argument or closing arguments from the respondent have been sent to the Council. I have therefore only considered the applicants arguments, contentions and closings.

Issues to be decided

5. To interpret and decide as to whether the respondent had correctly applied PSCBC Resolution 1 of 2003 (Res1/03) in particular Clause 7.3. (b) where this clause specifically states that "*The chair of the hearing must be appointed by the employer and be an employee on a higher grade than the representative of the employer*" and then clause 7.3 (f) (i) which dictates and spells out that "*In a disciplinary hearing neither the employer nor the employee may be represented by a legal practitioner, unless- (i) the employee is a legal practitioner, or the representative of the employer is a legal practitioner and the direct supervisor of the employee charged with misconduct.*"

Background to the dispute

6. The applicants were charged for gross misconduct. The respondent had elected to make use of legal practitioners to conduct the applicants' disciplinary inquiry. An Advocate and an attorney were being used as representatives to act as initiators to handle the case and an attorney was being used as the chairperson.
7. The applicant party then contended that the respondent had not complied with PSCBC Resolution 1 of 2003 (Res1/03) in particular Clauses 7.3. (b) where this clause specifically states that "*The chair of the hearing must be appointed by the employer and be an employee on a higher grade than the representative of the employer*" and then in clause 7.3 (f) (i) it states that "*In a disciplinary hearing neither the employer nor the employee may be represented by a legal practitioner, unless- (i) the employee is a legal practitioner, or the representative of the employer is a legal practitioner and the direct supervisor of the employee charged with misconduct*". The applicants declared a dispute because they believed that the respondent had not correctly applied clauses 7.3 (b) and 7.3 (f) (i) as contained in Res1/03.
8. The applicants are seeking to receive a ruling in an award to state that the respondent is not complying with resolution 1 of 2003, clauses 7.3 (b) and (f) (i) and should therefore be ordered to comply with Res1/03 Clauses 7.3 (b) and Clause 7.3 (f) (i).
9. The respondent has not sent any stated cases, heads of argument or its closing arguments to the Council. I have therefore been asked to continue and issue the award in the absence of the respondent's version and arguments. This award was due within 14 days as from 17 February 2020. The Council informed me that the respondent was experiencing difficulties with their server and therefore were unable to send their arguments at that time. I waited for an indication as to when the respondent would be ready and able to send their arguments to the Council but they had not done so as yet.

Survey of the evidence and argument

10. The provisions of S138 LRA 66/95, as amended, enjoin me to issue the arbitration award with brief reasons. I intend in this award to focus only on the issues that I perceive to be pertinent to the issues that were disputed by the parties.

Applicant's version

11. The applicant party argued that the matter was not a complex matter and that the respondent should be ordered to follow and conform to Res1/03. The applicant party contends that the respondent was not interpreting or applying Res1/03 correctly. The outline and specifics of the applicant party's contentions and arguments have been highlighted in the background section of this award.

Respondent's version

12. The respondent had not contested the applicant party's arguments. The respondent had informed the Council that it needed time to extract certain information from the server but was unable to until the server had been sorted out. I am therefore unable to compare or consider the respondent's version against that of the applicant party.

Analysis of the evidence and argument

13. The applicant party submitted their closing arguments and I have read and considered their undisputed contentions. I have studied Res1/03 clauses 7.3 (b) and Clause 7.3(f) (i) and compared what the applicant party had presented, argued and highlighted. The applicant highlighted their main factors of concern and emphasized that the respondent was neither interpreting nor complying with Res1/03.
14. With regards to Clauses 7.3. (b), it is simple and clear when it states that "**The chair of the hearing must be appointed by the employer and be an employee on a higher grade than the representative of the employer.**" This can only mean and intend that the chairperson must be an employee of the department in question that is senior to the initiator who is to be representing the employer.
15. Then in clause 7.3 (f) (i) it dictates and spells out further that "**In a disciplinary hearing neither the employer nor the employee may be represented by a legal practitioner, unless- (i) the employee is a legal practitioner, or the representative of the employer is a legal practitioner and the direct supervisor of the employee charged with misconduct.**" This concludes to mean that only an employee who is a legal practitioner and who is the employee's supervisor may represent at a disciplinary inquiry.
16. My understanding and interpretation of Res1/03 Clause 7.3 (b) and Clause 7.3 (f) (i) goes further for me to state that the respondent may not appoint an attorney or Advocate to chair the inquiry or to represent

the employer at a disciplinary inquiry under the present conditions. The fact that the respondent had elected to bring in an attorney and an Advocate, who were not employees, to do the disciplinary inquiry was in direct contravention with Res1/03 Clauses 7.3 (b) and Clause 7.3 (f) (i).

- 17 The actions and decisions of the respondent have persuaded me to believe that they have not complied with Res1/03 and should therefore amend their choice of representative and chairman to that of an employee in each instance.

Award

18. I find that the respondent, the Department of Health – North West, had not complied with PSCBC Resolution 1 of 2003 as per clauses 7.3 (b) and 7.3 (f)(i).
19. The respondent is ordered to comply with PSCBC Resolution 1 of 2003 Clause 7.3 (b) which states that the employer must elect an employee on a higher grade than the representative of the employer to chair the disciplinary inquiry and then to also conform to clause 7.3 (f) (i) which states that in a disciplinary hearing neither the employer nor the employee may be represented by a legal practitioner, unless- (i) the employee is a legal practitioner, or the representative of the employer is a legal practitioner and the direct supervisor of the employee charged with misconduct".



THE PANELLIST

MICHAEL L. HOWITZ
PSCBC PANELIST