

Date: 27 July 2023

Enquiries:

Name: Abram Phokojoe
Tel: 012 663 7446
Fax: 012 643 1601
Email: AbramP@elrc.org.za

(Applicant)

TO: PSA obo Neo Legoshe

(Respondent)

TO: Department of Basic Education Northern Cape

Dear Colleagues,

RE: Arbitration Award

CASE NUMBER: ELRC479-21/22NW

I transmit herewith a copy of the Arbitration Award for the above-mentioned matter for your attention and information.

The matter will now be closed by the council.

We thank you for your co-operation in this regard.

Kind regards


General Secretary

Education Labour Relations Council

27/07/2023



OFFICE OF THE GENERAL SECRETARY

All correspondence should be addressed to:

The General Secretary
ELRC
Private Bag X126
Centurion
0046
Gauteng
RSA

Enquiries:

Foca N.O

Tel: 012 663 7446

Fax: 012 663 9604

E-mail: cindyfoca@elrc.org.za

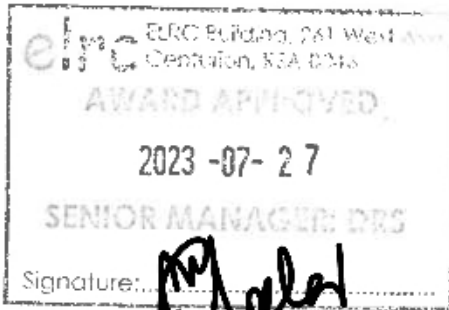
Website: www.elrc.org.za

Physical Address:

ELRC Building
261 West Avenue
Centurion
0046
Gauteng
RSA



ARBITRATION AWARD



Panelist: Selolong Mosoma
Case No.: ELRC479-21/22NC
Date of Award: 24 July 2023

In the ARBITRATION between:

PSA obo Neo Legoshe

(Union / Applicant)

and

Department of Basic Education: Northern Cape Provincial Government

(Respondent)

Applicant's representative: Mr. Eugene Louw
Applicant's address: PSA

Telephone: _____
Telefax: _____
Email: _____

Respondent's representative: Mr. Gavin George
Respondent's address: Department of Education Northern Cape

Telephone: _____
Telefax: _____
Email: _____

DETAILS OF HEARING REPRESENTATION

1. This is an arbitration award in a matter between Mr. Neo Legoshe and the Department of Education Northern Cape Provincial Government. The matter was scheduled both virtually and face to face at the Respondent's premises on 05 July 2022, 18 January 2023, 23 March 2023, 17 May 2023, 03 July 2023. The Applicant was in attendance and represented by Public Servant Association official Mr. Eugene Louw. The Respondent was represented by Mr. Gavin George, an employee of the Respondent.
2. Both parties submitted bundles of documents and accepted the bundles to what they purported to be.
3. The Applicant testified in his own case and called one witness to testify. The Respondent called two witnesses to testify.
4. The proceedings were conducted in English and mechanically recorded.

ISSUE TO BE DECIDED

5. I must determine whether the Respondent committed an unfair labour practice relating to unfair suspension as contemplated in section 186 (2) (b) of the Labour Relations Act.

BACKGROUND TO THE DISPUTE

6. The Applicant was employed by the Respondent as a Principal at Homevale High School in Kimberley on 01 January 2018. At the time of this action, the Applicant was remunerated at monthly salary of R 49 000.00.
7. It is common cause that the Respondent placed the Applicant on special leave on 19 January 2019. The Applicant continued to receive his full salary and benefits throughout the special leave period.
8. The Special leave ran from 01 January 2019 until 28 February 2021. The Applicant was returned back to work on 01 March 2021, and he was moved to office-based position.
9. According to the Applicant he was placed on suspension and not special leave as alleged by the Respondent. He seeks a relief of compensation for an unfair labour practice committed against him by the Respondent.
10. On the other hand, the Respondent contends that the Applicant was placed on special leave and the Respondent did not commit any unfair labour practice. The Respondent sought as a remedy, that the Applicant's matter be dismissed.

PRELIMINARY ISSUE

11. The Respondent made an application for my recusal and submitted the following grounds to substantiate their application;
12. That I have issued a ruling that the Council has jurisdiction to entertain the Applicant's matter. It was the Respondent's submission that, I indicated in my ruling that the conduct of the Respondent in placing the Applicant was unfair suspension.
13. Lastly, it was the Respondent's submission that they do not believe that the Commissioner was biased.
14. The Applicant in response submitted the following;
15. The Applicant submitted that nothing stopped the Respondent from taking the ruling on review.
16. It was the Applicant's view that they were comfortable with the Commissioner presiding over the matter.
17. CCMA's Guidelines on Misconduct Arbitration state in section 16 that "an arbitrator must conduct the arbitration impartially. This means that an arbitrator must act in a manner that is fair to both parties and not engage in conduct that is biased or that might reasonably give rise to a party forming a perception that the arbitrator is biased. If an arbitrator, or one of the parties at an arbitration hearing, believes that the arbitrator is unsuitable to arbitrate the case, due to the fact that they may not be able to apply their minds impartially, he/she must recuse him or herself.
18. In a matter between **President of the Republic of SA and others v Sa Rugby Football Union and Others 1999 (4) SA (CC) at para 48** the court said, *"The question is whether a reasonable, objective and informed person would on the correct facts reasonably apprehend that the judge has not or will not bring an impartial mind to bear on the adjudication of the case, that is a mind open to persuasion by the evidence and submissions of counsel. The reasonableness of the apprehension must be assessed in the light of the oath of office taken by the judges to administer justice without fear or favour; and their ability to carry out that oath by reason of their training and experience. It must be assumed that they can disabuse their minds of any irrelevant personal beliefs or predispositions. They must take into account the fact that they have a duty to sit in any case in which they are not obliged to recuse themselves. At the same time, it must never be forgotten that an impartial judge is a fundamental prerequisite for a fair trial and judicial officer should not hesitate to recuse herself or himself if there are reasonable grounds on the part of a litigant for apprehending that the judicial officer, for whatever reasons, was not or will not be impartial"*.
19. After consideration of the above test for recusal, it is therefore my considered view that the Respondent representative did not make a full and satisfactory grounds that gave rise to the apprehension of bias. This I say, because the Respondent's submission was based on my previous ruling that the Council has jurisdiction to hear the Applicant's matter. This ground on its own cannot create an apprehension of bias or mean that an impartial mind that is open to persuasion by evidence and submissions. Therefore, on that basis the application for recusal was dismissed and I proceeded with the arbitration.

SURVEY OF SUBMISSIONS AND ARGUMENT

Applicant's submissions

20. The Applicant Mr. Neo Legoshe testified under oath as follows;

21. He testified that he was appointed as the principal of Homevale High School, a school that comprised of 80% of coloured people. The school had lot of challenges and was sitting at 53 % of performance.
22. He encountered lots of resistance from the staff and they made it clear that they were not going to rest until he was removed from the school. They even went to an extent of going into a go-slow. He received less or no support from the Respondent even after reporting what he was encountering at the school.
23. He stated that the situation at the school let him being booked off due to stress and headaches. He was verbally abused by some of the educators in front of the School management team and informed his immediate supervisor Ms. Abrahams. He even opened a criminal case with the South African Police Services.
24. In September 2018, he was admitted at the psychiatric hospital, and he was booked off until December 2028. On the 12 December 2018, whilst on sick leave the Respondent served him with a letter that he will be placed on special leave effective 01 January 2019. The special leave was from 01 January 2019 to 13 March 2019, and it was with full pay.
25. He testified that he was confused by the reasons provided for placing him on special leave which was to allow the Respondent to conclude investigation of poor work performance/ill-health and grievances submitted by him. He further averred that the Respondent never made him aware of alleged challenges at the school as per the letter to place him on special leave. He stated that the Respondent never said anything about investigation with regards to poor work performance/ill-health.
26. It was his evidence that the Respondent informed him not to report for duty on 01 April 2019, after special leave came to an end on 31 March 2019, and they will come back to him. He further stated that he enquired from his immediate supervisor about the situation, and she promised to return to him, but she never did. He remained home for the whole month of April 2019.
27. On 28 May 2019 he received a letter from the Respondent extending his special leave. This was done despite the fact that there was no communication or whatsoever between 01 April 2019 to 27 May 2019. He stated that he was left confused after receiving the letter because he did not know what the unresolved issues and investigation were that the Respondent was referring to on that letter.
28. He testified that he was never interviewed nor gave any statement with regards to the alleged investigation or received any investigation report.

29. On 20 August 2019 the Respondent served him with a letter terminating his employment effective 01 September 2019. He then submitted a response to the Respondent with regards to the termination letter and argued that the relied section to terminate his services does not apply to him. He then appealed the decision to terminate his services to the Member of the Executive Council (MEC). The Appeal was finalized on 28 May 2020, and he was reinstated but had to wait for another nine (09) months before he was allowed to resume his duties. He returned to work after nine (09) months, and nothing was said to him hence he regards this conduct as unfair suspension.
30. He stated that there was no communication from the Respondent with regards to his resumption of duty and he had to initiate the communication on his side. He was transferred to provincial office and resumed duties on 01 March 2021.
31. On 05 May 2021 he addressed a letter to the Respondent seeking clarity with regards to his special leave from 01 January 2019 to 31 August 2019. No response was given by the Respondent to date.
32. He stated that he also requested the minutes of the meeting that took a decision to terminate his services and Respondent could not provide them with such minutes.
33. He testified that it was very clear that he was placed on suspension based on the Respondent's won documentation.
34. He stated that this whole thing had a negative impact on his life, family, studies, integrity, finances, and image. He further stated that his integrity was tarnished when the local newspaper published an article about the happenings of Homevale school.
35. It was evidence that he does not have a cordial relationship with Chief Director Human Resources Management and believes that he was behind him because he lied on the School Management Team that he brought instability to the school.
36. Lastly, he stated that from strange reasons he was suspended by the provincial office instead of district office. And his immediate supervisor was not involved in this whole process.
37. Under cross-examination he stood his ground and maintained that the purported special leave was in fact a suspension. He denied all other facts put through by the representative of the Respondent.
38. Second witness of the Applicant **Ms. Abrahams Anthea Felicity** testified under oath as follows;
39. H testified that she is currently employed by the Respondent as Chief Education Specialist.
40. She testified that she has been the circuit manager for almost ten years, and she was the Applicant's immediate supervisor.

41. She stated that the Applicant was a disciplinarian, knowledgeable, leader, very approachable and she had a good rapport with him.
42. She stated that she was aware of the letter to place the Applicant on special leave, but she cannot say under whose instruction was the letter drafted. She was not sure whether the delegation to place the Applicant on special leave lies with the District or Provincial office. She further stated that it was the District that was supposed to deal with the Applicant's matter. It was her who was supposed to escalate the matter to the Provincial office and not other way around. The provincial office got involved in the Applicant's matter after a protest at Homevale high school.
43. She testified that she was aware of the situation at Homevale high school and incident where the Applicant was verbally abused by fellow educators. She further testified that she received a grievance from the Applicant regarding the happenings at Homevale high school and abuse he endured from Messrs. power and Davids. She averred that attempts were made to try and deal with the issues raised by the Applicant in his grievance.
44. It was her evidence that the school governing body wanted the Applicant to dance to their tune and also that there were challenges at Homevale high school prior to appointment of the Applicant. The Respondent addressed some of those challenges by removing the school principal and appointed deputy principal to act as the school principal. The challenges negatively affected teaching and learning at the school and overall discipline at the school.
45. She testified that she was not aware of the Applicant's poor work performance but aware his of ill-health.
46. She averred that the Applicant was supposed to resume duties on 01 April 2019. She stated that the Applicant remained at home for the period 10 April 2019 to 27 May 2019, on her request based on instructions she received. She further stated that she told the Applicant to remain at home even though it was not official. She could not explain the type of leave the Applicant was placed for period 01 April 2019 to 27 May 2019, but agreed with the Respondent that the Applicant was placed on unlawful suspension.
47. Under cross-examination she stated that it was expected of the Applicant to put measures in place when he was appointed. She denied all other facts put through by the representative of the Respondent.

Respondent's submissions

48. The first witness of the **Respondent Mr. David Moreothata testified under oath as follows;**

49. He testified that he is currently employed by the Respondent as Director Labour Relations, and he has been in that position for the past thirteen years.
50. He stated that his functions or responsibilities includes amongst others grievance management, discipline, and collective bargaining.
51. He stated that he was familiar with the provisions of Employment of Educators Act that deals with educators issues such as suspension and both serious or less serious misconducts.
52. It was his evidence that the Applicant was not placed on suspension but special leave. He further stated that special leave falls under the office of the Head of Department.
53. He stated that he was not involved in the Applicant's matter but only acted on the instruction of his immediate supervisor. The instruction was given to him verbally in one of the meetings he attended.
54. He indicated that he knew the Applicant on a professional level because he used to assist the Respondent as a presiding officer whilst he was employed by the Department of Correctional Services.
55. Under cross-examination he conceded that neither the District office nor his office were involved in the Applicant's matter. He denied all other facts put through by the representative of the Applicant.
- 56. The second witness of the Respondent Mr. Isak Van Staden testified under oath as follows;**
57. He is testified that he is currently employed by the Respondent as Chief Director Human Resources Management Development.
58. He stated some of his responsibilities amongst others includes recruitment, conditions of services, training and Development, Performance Management, Employee Relations, Human Resources Policies, Post Provisioning and Employment Equity.
59. He testified that his office has interactive relationship with the district office, and they collaborate quite closely with regards to his own work.
60. He averred that the Respondent was aware of challenges at Homevale high School, and the Respondent was happy to have the Applicant as the school principal.
61. He stated that the Applicant was booked off sick for three months due to work-related stress. At the same time, he lodged a grievance, and one official was assigned to deal with the grievance but could not finalize it because the timing was not perfect. He averred that the Respondent acknowledge that the environment at the school was not conducive hence the Applicant suffered. The Applicant was afforded some time off in order for the Respondent to investigate his grievance and any other issues at the school.

62. He averred that the Human resources section prepared a letter for the signature of the Head of the Department to place the Applicant on special leave. The special leave was extended on 28 May 2019, because the administrative processes were not concluded. The special leave was extended until 31 August 2019.
63. He testified that the Applicant services were terminated due to Applicant's incompatibility at the school. The Applicant was reinstated after an appeal but remained at home due to the time it took to implement the decision.
64. It was his evidence that his role in the Applicant's matter was to find an amicable solution and suitable position for the Applicant considering the challenges at Homevale high school. A decision was taken to place the Applicant at office based-position after unsuccessful attempts to find him another school around Kimberley.
65. He indicated that there was a gross mistake made on the submission for the transfer of the Applicant. The Applicant was transferred to office based-position and he accepted the offer.
66. He stated that the Applicant was placed on special leave and not suspension because there was no suspension letter issued to the Applicant.
67. He further stated that he does not have any personal vendetta against the Applicant.
68. Lastly, he testified that he was in court due to sexual harassment allegations levelled against him and the Applicant was one of the witnesses. He does not have a reason to have any personal vendetta against the Applicant because there was nothing to gain. If he had any, then he would have declined the Applicant's transfer to the office-based environment.
69. Under cross-examination he denied all other facts put through to him by the representative of the Applicant.

ANALYSIS OF EVIDENCE AND ARGUMENT

70. Both parties submitted written closing arguments and were carefully considered. I will not repeat what was said by the parties, as the contents basically mirror what was put to the witnesses during the leading of evidence and cross-examination.
71. I have considered all the evidence and argument, but I shall only refer to the evidence and argument that I regard as necessary to substantiate my findings and the determination of the dispute.

72. The LRA under section 186 (2) (a) defines an unfair labour practice as meaning “any unfair act or omission that arises between an employer and an employee involving an unfair conduct by the employer relating to the unfair suspension of an employee or any other unfair disciplinary action short of dismissal in respect of an employee...”
73. The onus to prove the existence of conduct complained about of unfair labour practice within the meaning of section 186 (2) (a) of LRA rests with the employee, see **City of Cape Town v SA Municipal Workers Union obo Sylvester and Others (2013) 34 ILJ 1156 (LC)**. The employee must therefore be able to lay the evidentiary foundation to substantiate his or her claim of unfair labour practice.
74. It is common cause that the Applicant was placed on special leave on 01 January 2019 to 31 March 2019. It is further common cause that the Applicant's special leave was extended again on 28 May 2019 to 31 August 2019.
75. It is also common cause that the reasons for placing the Applicant on special leave was to afford the Respondent an opportunity to conduct investigation with regards to the Applicant's poor work performance, ill-health and grievance(s) lodged by the Applicant.
76. The Respondent relied on the provisions of both Employment of Educators Act and Council Resolution 01 of 2007 to place the Applicant on special leave, the provision which reads as follows;
- a. *“if in the opinion of the employer, circumstances justify it, it may grant or place an educator on special leave in extraordinary circumstances for any reasonable purpose and for any reasonable period and such leave shall be without any pay unless the employer determines otherwise”.*
77. The case of the Respondent is that it was entitled to place the Applicant on a special leave and require him not to report for duty pending finalization of the investigation regarding his poor work performance/ill-health and his grievance.
78. The Applicant's case is that the decision of the Respondent to place him on special leave amounts to an unfair labour practice relating to an unfair suspension based on the following reasons;
79. the Respondent informed him not report for duty on 01 April 2019, after special leave came to an end on 31 March 2019, and they will come back to him. Upon enquiry from his immediate supervisor about the situation, and she promised to return to him, but she never did. He remained at home for the whole month of April 2019.
80. On 28 May 2019 he received a letter from the Respondent extending his special leave. This was done despite the fact that there was no communication or whatsoever between 01 April 2019 to 27 May 2019.

He stated that he was left confused after receiving the letter because he did not know what the unresolved issues and investigation were that the Respondent was referring to in that letter.

81. He also indicated that he was never interviewed nor gave any statement with regards to the alleged investigation or received any investigation report whatsoever.
82. On 20 August 2019, the Respondent served him with a letter terminating his employment effective 01 September 2019. He then submitted a response to the Respondent with regards to the termination letter and argued that the relied section to terminate his services does not apply to him. He then appealed the decision to terminate his services to the Member of the Executive Council (MEC). The Appeal was finalized on 28 May 2020, and he was reinstated but had to wait for another nine (09) months before he was allowed to resume his duties. He returned to work after nine (09) months, and nothing was said to him hence he regards this conduct as unfair suspension.
83. Most surprisingly, the Respondent could not account or give reasons why and how did they arrive at the conclusion to terminate the Applicant's services after being placed on special leave. The only reason given was that the Applicant's services were terminated based on incompatibility.
84. The Respondent maintains that the Applicant was not suspended but placed on special leave as per the provisions of Employment of Educators Act and Resolution 1 of 2007, also grounds given on the letter of 01 January 2019.
85. It did not only require a naked eye to see the similarities between the conditions of the Applicant's special leave and suspension. I have no reason not to believe that indeed the Applicant was placed on suspension which by all account should be treated as such and with applicable prescripts. This I say, based on the reasons relied on to place the Applicant on special leave and subsequent termination of his services on 10 September 2019.
86. Even if the letter served as a formal notice of the Applicant being placed on special, it stated that the Applicant is granted special leave to allow the Respondent to investigate allegations of poor work performance/ ill-health and grievances lodged by the Applicant. To the extent that any allegations of poor work performance, ill-health and grievance lodged by the Applicant, any procedure to be followed in that regard could only be in terms of the Labour Relations Act, Employment of Educators Act, Collective agreement(s) and grievance procedure, something which the Respondent should be familiar with.
87. While I note that it's the prerogative of the Respondent to place an educator on special leave in extraordinary circumstances for any reasonable purpose and for any reasonable period. The evidence led during the arbitration proceedings suggest that there were no substantive grounds to place the Applicant on special for such a prolonged period. Further to that, there was no evidence to show that

there was any investigation conducted or report thereof as alleged by the Respondent. Again, no evidence was presented to show that the Applicant was furnished with the findings and recommendations of the investigation report or outcome of his grievances. Also, there was no evidence presented to show that the special leave was for a reasonable purpose, and it achieved its intended purpose. Lastly, the duration of the special leave was too excessive and unreasonable without any reasonable cause. Basically, there were no reasonable grounds to place the Applicant on special leave in the first place. It is therefore, not whether the Respondent believes that they had reason(s) to place the Applicant on special leave, but whether there were reasonable and probable grounds to place him on special leave. There were therefore no reasons to support the Respondent's decision to place the Applicant on special for such a prolonged period, nor was there any rational connection between the purpose and period of the Applicant's special leave. The special leave of the Applicant was accordingly unfair. It was unreasonable interference with his integrity and fundamental dignity.

88. It is my considered view that there was no honest belief founded on reasonable grounds or whatsoever that placing of the Applicant on special leave was justified. Equally relevant to this discussion and finding is the contribution of the Respondent grappling with the explanation and justification of the duration of the special leave. Another important factor is that the Respondent could not account or give explanation of what happened between 01 April 2019 to 27 May 2019, after the special leave of the Applicant came to an end.
89. The nature and duration of the special leave itself was unreasonably long and extended without any reasonable and probable cause. In this case, given the haste and manner with which the special leave was imposed on the Applicant, it is apparent that the Respondent sought to subvert the provisions of the normal suspension procedures in line with the provisions of Schedule 2 (6) of the Employment of Educators Act.
90. To the extent that the Respondent insisted that the Applicant was placed on special leave rather than suspension for allegations of poor work performance, ill-health and grievances lodged which needed to be investigated, it is still not clear what is the source documents or authority relied upon by the Respondent in doing so.
91. There is nothing in the provisions of both Employment of Educators Act and Resolution 01 of 2007 that could lead to a conclusion that the prerogative of the Respondent to place an educator on special leave is immune from scrutiny, as instances of gross unreasonableness in its exercise may lead to drawing of inference of bad faith.

92. The facts of this case are curious in the extreme. First, the Applicant was informed verbally to stay at home after his special leave came to an end at the end of March 2019. The Respondent only served him with a letter on 28 May 2019, extending his special leave retrospectively. The Respondent sought to rely on an incomplete investigation as a reason for extending the special leave until 31 August 2019. On 20 August 2019, the Respondent served the Applicant with a letter terminating his services effective 01 September 2019. Be that as it may, there is no evidence to indicate what were the findings and recommendations of the purported prolonged investigation after his special leave was extended if indeed, he was not suspended.
93. I accordingly find, based on the above discussion that, what the Respondent labelled as special leave was nothing but suspension of the Applicant.
94. To conclude then in light of the above, I find that the Applicant has managed demonstrate that the Respondent committed an unfair labour practice and that he is entitled to the relief sought.

REMEDY

95. The Applicant sought compensation. In terms of section 193 (1) (c) of the LRA as amended, I am empowered to order the Respondent to compensate the applicant as a relief.
96. While I note the Applicant's case, it is my considered view that the compensation should be three month's (03) which is just and equitable in these circumstances. This is because I take into consideration the suspension was more punitive than precautionary. There was no basis for it being so prolonged for 820 days. The suspension was humiliating and had a negative impact on the Applicant's integrity and reputation. It also impaired his dignity.
97. The Applicant earned a gross monthly salary of R 49 000.00 at the time of this dispute. the compensation should be calculated at his gross monthly salary during the time of dispute.
98. Compensation should be (R 49 000.00 x 3 months) R 147 000.00.

AWARD

99. What the Respondent labelled as special leave was nothing, but suspension of the Applicant and it amounts to an unfair labour practice as contemplated by section 186 (2) of the Labour Relations Act, as amended.

100. The Respondent, Department of Education northern Cape Provincial Government, is ordered to compensate the Applicant, Mr. Neo Legoshe an amount of R 147 000.00 less statutory deductions by no later than 31 August 2023, into the Applicant's bank account known to the Respondent.
101. Failure to comply with the award the amount will accrue interests in line with the provisions of section 143(2) of the Labour Relations Act, act66 of 1995 as amended.

SIGNED AT BLOEMFONTEIN ON THIS 24th DAY OF JULY 2023.

Selolong Mosoma
ELRC Arbitrator

