PHSDSBC

PUBLIC HEALTH AND SOCIAL DEVELOPMENT SECTORAL BARGAINING COUNCIL

ARBITRATION AWARD

Case No: **PSHS377-16/17**

Commissioner: **Gerald Jacobs**

Date of award: **24 April 2017**

In the matter between:

PSA obo Godfrey Moncho (Union/Applicant)

and

Department of Health- Northern Cape (Respondent)

Details of hearing and representation

1. This is the award in the arbitration between the applicant (referring party) Public Servants Association of South Africa (PSA) on behalf of Godfrey Moncho and Department of Health- Northern Cape, the respondent.
2. The arbitration took place on 10 April 2017 and held under the auspices of the Public Health and Social Development Sectoral Bargaining Council ("the Bargaining Council") in terms of section 186(2)(b) of the Labour Relations Act, 1996 as amended (the "Act").
3. The applicant was represented by Mr R Scholtz an official of the trade union PSA while the respondent was represented by Mrs Ingerbore Dithebe-Thole its Human Resources Manager.
4. The proceeding was digitally recorded.

Issue to be decided

5. I am required to determine whether the suspension of the applicant amounted to an unfair labour practice in terms of s 186(2) (b) of the Labour Relations Act 66 of 1995 ("the LRA"). In regards to the unfair labour practice claim, the applicant content that his suspension is not consistent with the provisions of Resolution 1 of 2003 relating to suspensions. The respondents dispute that.

6. The applicant seeks the upliftment of his suspension and compensation on the ground that his suspension is unfair and that it is inequitable in the light of the facts of the case.

Background to the issue

7. For the most part, the material facts relevant to the case are common cause. This case arises out of the suspension of the applicant by the respondent. The applicant is the Deputy Director of the respondent's plant engineering division and earned a monthly salary of R77 847.56. The applicant is responsible for the mechanical, electrical and structural maintenance of the respondent's buildings situated in the Northern Cape Province. He was written a formal letter of the intention to suspend dated 20 October 2015. This letter was written by the Head of Department Ms G E Matlaopane, and it is annexed to the Bundle of Documents handed in by the applicant on page 3. In the letter, the aforesaid Department Head informed the applicant that;

   ..... *"In light of information received from stakeholders in business with the department, the above step is prudent in that there are allegations brought forward against yourself, which are: Flouting of Supply Chain Management Processes, Misrepresentation and Dishonesty, in that you failed to disclose your involvement and/or relationship with the companies that the department was doing business with during the period of August 2014 to date. These companies include Isiseko Sommqophiso, Afrollah Trading, Nodoba Trading".*

8. The applicant was also told in the letter that he had the right to make a representation within three (3) working days, as to why you should not be precautionary suspended if he so desired. The applicant wrote a letter in the exercise of this right wherein he mentioned just two issues. Those were the following;

   > *"Clause 7(seven) of the disciplinary code Resolution 1 of 2003 and procedure that an employee may only be suspended if its alleged that he/she committed a gross act of misconduct and if the employer is of the opinion that the presence of the Employee in the workplace will endanger safety of any person or state property or will jeopardise the investigations.*
   >
   > *The allegations in your letter are vague: You do not state what is my purported "involvement" and /or relationship with the companies in question"*

9. On 29 October 2015, the respondent informed the applicant in writing of his suspension. In that letter, the applicant was advised of the reasons for his suspension and paragraphs (a) – (j) of that letter says that the applicant had the right to choose a representative who may be a fellow employee or a recognised trade union to assist in the preparation and presentation of his defence at the disciplinary hearing. His entitled to the assistance of an interpreter, call witnesses to testify on his behalf and to cross-examine the respondent's witnesses. The applicant was also advised that the disciplinary enquiry would proceed in his absence if he fails to attend and may result in his dismissal.

10. For the purposes of this award, the suspension was with pay. The applicant was suspended on 29 October 2015 and was then charged with twenty-three counts of misconduct for flouting of Supply Chain Management processes, misrepresentation and dishonesty. The workplace disciplinary enquiry was scheduled for hearing at the EMS Committee Room on 14 and 15 December 2015. The applicant did not challenge his suspension at the time and it is common cause that the enquiry did commence on 14 December 2015 but was postponed. There is some dispute over the exact basis upon which the matter could not proceed on 14 December 2015. Suffice to say that the chairperson was not available and the applicant was advised in writing that the enquiry would not be proceeding on 15 December 2015. The union attempted to secure a date with the respondent for the hearing to reconvene but without success. On or about 27 June 2016, the applicant through his union referred an unfair suspension dispute to the bargaining council, for conciliation. However, the 30-day time period expired and the council issued a certificate that the matter remained unresolved on 11 October 2016. Thereafter the applicant requested to finalised the matter through arbitration.
11. Eventually eleven months later the applicant was informed by email on page 26 of the bundle that his hearing was scheduled to reconvene on 14 and 15 November 2016. The disciplinary hearing proceeded on 14 November 2016 before the chairperson by the name of Ms Ianthe Wessels. According to the minutes of the hearing, of the several objections raised by the applicant's representative at the commencement of the hearing the pertinent issue was that the applicant's suspension exceeded the 60-day time period allowed in terms of Resolution 1 of 2003 and should be uplifted. At the conclusion of the disciplinary enquiry the chairperson made the following recommendations;

    "that the Employer complete the investigation by obtaining statements from Mr Moncho; and that Mr Moncho's suspension be uplifted and that he returns to work on 15 November 2016, since the investigation has largely been completed and the threat of his interfering with the witnesses no longer existed. All the working tools that he had to return to him, so that he can continue with his duties".
12. The disciplinary hearing was adjourned and it was agreed between the parties to reconvene on 14 and 15 December 2016. The applicant reported for duty as per the chairperson's recommendations. However, he was denied access to his office. The Acting Chief Director informed him verbally that the department was not prepared to be dictated upon by the chairperson and his being placed on special leave. The applicant then demanded this in writing.
13. The following day the Acting Head of the Department Ms S Wookey dispatch a letter to the applicant and the chairperson of the disciplinary enquiry that reads as follows under the heading *"RE-DISCIPLINARY HEARING-YOURSELF"*;

    " I refer to the ruling made by the chairperson of the above disciplinary enquiry which aims to uplift your suspension with effect from today (15 November 2016)

We have taken legal counsel on the status of the ruling and we have reached the conclusion that the chairperson acted in excess of her powers in that she is not empowered to pronounce on the suspension.

If you wish to challenge the lawfulness of your suspension you are entitled in law to utilize the dispute resolution mechanisms provided for in Labour Relations Act, as you have done.

You are therefore advised that the department will not be implementing the Chairperson's ruling for the reasons stated above. Your suspension will continue until set aside by a competent authority".

14. In a reply in an email dated 16 November 2016, the chairperson stated that she did not issue a ruling but made recommendations. She added that "*the role of the presiding officer is to act in fairness in view of the evidence presented and in this case the evidence suggested that the entire case is flawed with procedural unfairness. In light of the letter, suggesting that I overstepped my authority on the matter, I would like to indicate that I would rather withdraw as Presiding officer with this matter. I do not see how nay further discussions can continue if the basic fairness of the case is in jeopardy".*

Survey of evidence and argument

Documentary evidence:

15. The parties submitted bundles of documents in evidence. The documentation therein was agreed to be what they purport to be and evidence would be led on the contents. The bundles were marked Bundle A and Bundle B.
16. I have considered all the evidence and arguments, but because the LRA (s138 (7)) requires an award to be issued with brief reasons for the finding, I have only referred to the evidence and arguments that I regard as necessary to substantiate my findings and the determination of the dispute.

Oral evidence

17. The applicant called one witness, his daughter Ms Naledi Muncho to testify on the impact his suspension. The respondent did not call any witness to testify on behalf of its case.

Ms Naledi Muncho

18. She testified that her father became socially withdrawn after an article was published in the local newspaper about his suspension. He no longer attended church, and his family relationship began to deteriorate as a result of the suspension. She testified that these symptoms were not present prior to 29 October 2015.

Cross-examination

19. She testified under cross-examination she said that he father was prescribed chronic medication and the family attends church counselling to cope with the situation at home.

Applicant's arguments

20. Mr Scholtz on behalf of the applicant challenges the fairness of his suspension and applicant contends that it was unfair and unlawful because the length of the applicant's suspension exceeded the prescribed 60-day period. He went further to say that this was in breach of clause 7.2 of Resolution 1 of 2003 of the PSCBC and the disciplinary enquiry held on 14 December 2015 into the alleged misconduct of the applicant was postponed due to the unavailability of the chairperson and not on behest of the union. He explained on the day someone else was asked to stand-in as chairperson and no hearing took place on the day.

Respondent's argument

21. In response, Ms Dithebe-Thole for the respondent contended that clause 7.2 (c) clearly state that the disciplinary enquiry should be held within 60-days. The respondent scheduled the initial disciplinary enquiry held on 14 December 2015 within the 60 days and there was a signed document (see page 15 Bundle A) on the agreement to postpone. She went on to say that the respondent thereby complied with the resolution.

Analysis of submissions received

22. The issue before me is whether the respondent committed an unfair labour practice by suspending the applicant with pay pending an investigation into the alleged misconduct. Section 186(2) (b) suggest that an unfair labour practice that arises between an employer and employee will be deemed unfair if there is an unfair act or omission by an employer relating to the issue of suspension of the employee concern. Section 23(1) of the Constitution of the Republic of South Africa, Act, 1996, entrenches the right of every person to fair labour practices. Section 1(a) of the Act states that one of the primary objects is to give effect to and regulate the fundamental rights conferred by the Constitution. In terms of section 10(a) of the Act, a party who alleges that a right or protection conferred by the Act, and hence by the Constitution, has been infringed, must prove the facts of the conduct in question. It is, consequently, incumbent on the applicant to prove that the respondent's conduct, constituted an unfair labour practice as contemplated by section 186(2) (b) of the Act. Put differently, the applicant bears the onus to prove that his suspension was unfair.

Legal principle

23. The resolution 1 of 2003 regulates the suspension of the applicant. In order to decide whether or not the applicant suspension was unfair, resolution, 1 of 2003 must be taken into consideration. Clause 7.2 of the Public Service Discipline Code and Procedure, Under the heading, "**Precautionary suspension**", reads as follows:

    (a) *The employer may suspend an employee on full pay or transfer the employee if the employee is alleged to have committed a serious offence, and the employer believes that the presence of an employee at the workplace might jeopardise any investigation into the alleged misconduct, or endanger the wellbeing or safety of any person or state property.*

(b) *A suspension of this kind is a precautionary measure that does not constitute a judgement and must be on full pay.*

(c) *If an employee is suspended or transferred as a precautionary measure, the employer must hold a disciplinary hearing within a month or 60 days, depending on the complexity of the matter and the length of the investigation. The chair of the hearing must then decide on any further postponement".*

24. A number of issues become apparent from this regulation. However, clause 7.2(c) are of relevance and states that after an employee has been suspended that a disciplinary hearing must be held within a month or 60 days. If the matter is complex, the disciplinary hearing must be held within 60 days and the chairperson of the hearing must then decide on any further postponements. The suspension can therefore not exceed more than 60 days without a disciplinary hearing being held. Facts can be placed before the chairperson to grant a further postponement due to the complexities of the matter.

25. It was common cause that the applicant was suspended on 29 October 2015 and the suspension was with full pay and no loss of benefits. The applicant was given the notice to attend a disciplinary hearing on 14 and 15 December 2015. He was also served with a charge sheet.

26. Now coming to the issue raised by the applicant, I start first with whether a disciplinary hearing was held within the 60-day time period. It was Mr Scholtz contention that the chairperson appointed to conduct the hearing on 14 December 2015 was unavailable on the day and someone else was asked to stand-in for the purpose to postpone the hearing. He went further to say that no hearing took place on the day and the first hearing held was on 14 November 2016 since the applicant's suspension. In response, the respondent admitted that the appointed chairperson was not available on 14 December 2015. She submitted in argument that in view of the situation created by the unavailability of the chairperson, it was necessary to find a replacement chairperson to postponed the hearing. The parties agreed to the postponement and a document signed by both parties was issue reflecting this intention. This much was clear on the face of the postponement document that the hearing on 15 December 2015 was postponed on request of the union. The document was signed by the applicant's union representative Mr Louw. The fact that the applicant's representative signed the document and the contents of paragraph 5 of the minutes of the hearing held on 14 November 2016, in which it was recorded that Mr Louw had no problem with the replacement of the chairperson at the hearing held on 14 December 2015 confirms the respondent's case that the postponement was by agreement. What the union representative had done wrong was to sign the postponement document signifying that he agreed on behalf of the applicant with the postponement if that was not his intention. In my view, nothing turns on the argument that no hearing took place on 14 December 2015. Even though the substitute chairperson was called to chair the hearing, it still continued and yet the appointment of the chairperson was not invalidated as a result. As a consequence, I find that the disciplinary held was held before the 60-day time period expired.

27. One cannot disregard the fact that the chairperson of the hearing held on 14 November 2016 held that the applicant no threat to the interference of the investigation and recommended the upliftment of applicant's suspension and return to work. The minutes of the hearing reflects that the respondent representative, Ms Dithebe-Thole agreed to finalise the investigation within 30-days and the next date of the hearing was set for 14 and 15 December 2016. The respondent disregarded the chairperson's recommendations and decided that the applicant remains on suspension. In the letter address to the applicant and the chairperson, the respondent failed to provide a reason as to why it believed contrary to the chairperson's finding that the presence of the applicant at the workplace might jeopardise the investigation into the allegations at that stage. What makes matter worse was that the scheduled hearing on 14 and 15 December 2016 did not materialise. To date, the applicant remains on suspension and it appears to be indefinite considering the length of time he remained on suspension. The suspension contemplated in clause 7.2 of the Resolution seems to indicate that it's a precautionary measure that does not constitute a judgement or a permanent disciplinary measure. In the absence of any justifiable reason for the applicant to remain on suspension pending the disciplinary hearing indicates that the suspension was imposed as a disciplinary measure. I accordingly find the suspension of the applicant by the respondent amounted to an unfair labour practice and set aside the suspension.

Relief

28. The applicant seeks compensation. The basis upon which the applicant avers that he has a right to the relief he seeks was that his entitled to a "right to fair labour practice". In terms of section 194(4) of the Labour Relations Act, "the compensation awarded to an *employee* in respect of an unfair labour practice must be just and equitable in all the circumstances, but not more than the equivalent of 12 month's *remuneration".* In *SA Post Office Ltd v Jansen Van Vuuren No & Others* (2008) 29 ILJ 2793 (LC) in dealing with compensation in terms of Section 194(4) held the view that the determination of appropriate relief calls for a balance of the various interests that may be affected by the remedy. The Court further held that there was, however, a need to send a message to employers that they should refrain from hastily resorting to suspending employees when there is no valid reason to do so. The suspension had a detrimental impact on the affected employee and may prejudice his or her reputation, advancement, job security and fulfilment. The suspension must, therefore, be based on substantive reasons and fair procedures must be followed before employees are suspended.

29. In this case, there was no valid reason for the applicant to remain on suspension which rendered it substantively unfair. The applicant did not suffer any actual financial loss as a result of his suspension. However, by the respondent delaying the disciplinary enquiry indefinitely has the effect of tarnishing the applicant reputation and status within the workplace. The applicant stated that an article was published in the local newspaper wherein he was depicted as a thief and corrupt. It was clear from daughter's testimony, Ms Naledi Muncho that the suspension strains the family relationship and cause the applicant withdraw from society. It's not clear, though, that the harm caused as a result of his suspension will be

irreparable. I'm of the view that the respondent's conduct in the circumstances was inexcusable and find ten months' remuneration just and equitable in the circumstances. As a result, I make the following award;

Award

30. The suspension of the applicant Mr Godfrey Moncho was substantively unfair and amounted to an unfair labour practice in terms of s 186(2) (b) of the Labour Relations Act 66 of 1995 ("the LRA"). The decision to suspend the employment of the applicant Mr Godfrey Moncho communicated to the applicant on 29 October 2015, is set aside.
31. The applicant is to tender his services to the respondent, the Department of Health- Northern Cape on 3 May 2017.
32. The respondent is ordered to pay the applicant R778 475.60 compensation equivalent to ten-month salary, minus such deductions as the respondent is in terms of the law obliged or entitled to make. The amount must be paid to the applicant into his bank account by no later than 15 May 2017.

The parties are reminded of section 143 of the Labour Relations Act 66 of 1995, which quoted here for their convenience:

"143 Effect of arbitration awards

1) An arbitration award issued by a commissioner is final and binding and it may be enforced as if it were an order of the Labour Court unless it is an advisory arbitration award.
2) If an arbitration award orders a party to pay a sum of money, the amount earns interest from the date of the award at the same rate as the rate prescribed from time to time in respect of a judgement debt in terms of section 2 of the Prescribed Rate of Interest Act, 1975 (Act 55 of 1975), unless the award provides otherwise.
3) An arbitration award may only be enforced in terms of subsection (1) if the director has certified that the arbitration award is an award contemplated in subsection (1)
4) If a party fails to comply with an arbitration award that orders the performance of an act, other than the payment of an amount of money, any other party to the award may enforce it by way of contempt proceedings instituted in the Labour Court".

Signature: 

Commissioner: ***Gerald Jacobs***