PHSDSBC

Public Health and Social Development Sectoral Bargaining Council

# JURISDICTIONAL RULING

Case No: **PSHS584-22/23**

Commissioner: **Zuko Macingwane**

Date of ruling: **9 May 2023**

In the matter between:

**PSA OBO SAM WEYERS AND 3 OTHERS** Applicant

and

**DEPARTMENT OF LABOUR- FREE STATE** Respondent

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**Details of the parties and representation**

1. This matter was set down for arbitration before me on 8 May 2023 to commence at 10h:00AM at the Respondent's premises at Die Aker building in Sasolburg.

2. The Applicants, Mr. Sam Weyers, Ms. Lefentse Sibande, Ms. Dimakatso Yanta and Ms. Lucia Tsholo appeared in person and were represented by Mr. Michiel Willem Odendaal, an Acting Labour Relations Officer of the Public Servant Association (PSA). The Respondent, the Provincial Department of Labour in Free State was represented by Ms. Theron Makuya, its Deputy Director: Employee Relations. The proceedings were digitally recorded.

**Issue to be decided**

3. I am required to determine whether the Council has the requisite jurisdiction to deal with this matter.

**Background to the dispute and submissions on jurisdictional issues**

4. This matter was referred to the Council on 17 October 2022. As per the 7.11 referral form, the dispute arose on 19 September 2022. As per the grievance form filled in by the Applicant, the omission occurred on 8 November 2021. The nature of the dispute was categorized as an interpretation or application of a collective agreement, in particular, Resolution 2 of 2010. All the Applicants are Counsellors at Grade 2.

5. The relief sought by the Applicants was for the Resolution to be correctly interpreted and for them to be grade progressed to Counsellors: Grade 3 with the retrospective effect from 1 July 2018.

6. Upon engaging with the parties and on probing more on the date of the arousal of the dispute against the date of the referral, it became apparent that the dispute actually arose on 1 July 2018 when the Applicants initially expected to be grade progressed. It was on 8 November 2021 when they realized that some other employees had been translated to a higher grade. The Applicants could not comment on the categorization of the nature of the dispute.

7. It is trite that I am obliged to ask myself whenever disputes come before me whether the Council has jurisdiction to entertain those disputes. At times jurisdiction may emerge during the proceedings. It is a jurisdictional fact that must exist before power can be exercised. Jurisdiction is a matter of law.

8. I then afforded both parties an opportunity to address me on record and make submissions regarding the date of the arousal of the dispute and its characterization.

9. The Applicant conceded on record that this dispute has been referred late and sought an opportunity to file its application for condonation by way of an affidavit and in line with the Rules of conduct of proceedings before the Council.

10. The Respondent submitted that this matter has been referred late and that the council does not have jurisdiction to deal with this matter.

**Analysis of submissions and jurisdictional issues**

11. *In Hospersa obo Tshambi v Department of Health, KwaZulu-Natal [2016] 7 BLLR 649 (LAC)* in paragraph 32, the Court held that the determination of what constitutes reasonable time within which to refer a labour dispute when no fixed period is prescribed for that category of dispute, such as section 24 of the Labour Relations Act (LRA) dispute, is a fact-specific enquiry having regard to the dynamics of labour relations considerations. In true labour disputes, the provisions of Section 191(1) of the (LRA) are a more obvious general yardstick to test what is a reasonable time for a referral. In labour disputes, expedition is the watchdog, not simple because it is a good idea, but because the prejudice of delay in matters concerning employment often is not capable of remedial action.

12. Section 191 of the Labour Relations Act 66 of 1995 (the LRA) provides as follows: (1) (a) If there is a dispute about an unfair labour practice, the employee alleging the unfair labour practice may refer the dispute in writing to – (i) a council, if parties to the dispute fall within a registered scope of that council… (b) A referral in terms of paragraph (a) must be made within (ii) 90 days of the date of the act or omission which allegedly constitutes the unfair labour practice or, if it is a later date, within 90 days of the date on which the employee became aware of the act or occurrence. (2) If the employee shows good cause at any time, the council may permit the employee to refer the dispute after the relevant time limit in subsection (1) has expired.

13. *In Nteu obo Moeketsi v The CCMA and Others (Jr1157/20) [2022] ZA(LC)JHB,* it was held that generally, a grievance occurs when an employee or a person strongly feels that s/he has been treated unfairly. When parties fail to reach a solution, a dispute is not birthed then. This simply signifies to the disputing parties that it is time to escalate the already existing dispute to another level. In short, it signifies a deadlock. A deadlock typifies a situation where opposing parties are unable to make progress towards resolving an existing dispute. At that stage, ordinarily another deadlock breaking mechanism should be ushered.

14. *In Links v MEC: Department of Health, Northern Cape Province 2016 (4) SA 414 (CC),* it was held that acquiring knowledge means being in possession of sufficient facts to suspect that there is fault. It must follow that the becoming aware phase, as employed in section 191 (1) (b) (ii) of the LRA, should as a matter of course include deemed knowledge or awareness.

15. *In Madondo v SSSBC and others (Unreported judgment under case no D305/2013 delivered on 28 January 2015 at paras 57-58,* it was held that the effect of having to exhaust internal remedies as provided for in the above provisions does not extinguish the applicant's right to proceed to the bargaining council to determine

the alleged unfair dismissal; it simply required the applicant to take a compulsory procedural step before doing so

16. It is therefore, my considered view that the Applicants became aware of the omission on 1 July 2018, the date at which they indicated in express terms that it is the date at which they were expecting to be translated on, but the Respondent did not translate them. This date is the date which they wished the translation to be effected from, and it is the date when the omission occurred. They realized that there is fault on the part of the Respondent on that date. It is also the date when they strongly felt that they haave been treated unfairly. Emphatically put, that date (1 July 2018) is the date of birth of their dispute.

17. The fact that the Applicants had lodged a grievance does not mean that the dispute did not exist. A dispute exists before remedies can be explored, not the other way round.

18. It is crystally clear based on the authority cited in paragraphs 12 up to 16 above, that the date of conception is not the date when the outcome of the grievance was issued, but rather the date when fault occurred, which in actual sense is the date of the omission. It follows that I am convinced that indeed the matter was referred late, and without a condonation application.

19. Another hurdle that the Applicants faced was about the incorrect characterization of the nature of the dispute. It is my considered view that if an employee is grade progressed, there would be an increase of a salary, such is in essence a benefit, which clearly for the purposes of referring the matter it is an unfair labour practice dispute. The courts have pronounced that not every dispute regarding an aspect covered by a collective agreement is a dispute of interpretation or application of a collective agreement. In this matter a collective agreement is a source just to oil the wheels.

20. This was confirmed in *Hospersa obo Tshambi v Department of Health, KwaZulu-Natal [2016] 7 BLLR 649 (LAC)*, where the Court cautioned that section 24 of the LRA provides for a dispute device ancillary to collective bargaining, and can therefore, not be used to remedy an unfair labour practice under the pretext that a term of a collective agreement has been breached. It was further held that the idea that the breach of a right that derives from a collective agreement is automatically a dispute contemplated by section 24 is wrong.

21. A dispute that may arise under the circumstances is about fairness, hence it ought to have been categorized as an unfair labour practice dispute.

**RULING**

22. I hereby rule that this dispute has been incorrectly referred, and it has been referred late, and therefore the council lacks jurisdiction to deal with this matter.

23. The Council is to close the file.

24. Should the Applicants wish to pursue the matter further, they should correctly refer this matter and must apply for condonation for the late filing of the dispute.

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**Zuko Macingwane**