PHSDSBC

Public Health and Social Development Sectoral Bargaining Council

ARBITRATION AWARD

Case No: **PSHS955-21/22**

Commissioner: **Bonge Masote**

Date of award: **10 July 2023**

In the matter between:

Stephen James Heinrich Hendricks Applicant

and

Department of Health – Gauteng Respondent

DETAILS OF HEARING AND REPRESENTATION

1. This is an award issued in the arbitration process between Professor Stephen James Heinrich Hendricks, the Applicant, and the Department of Health – Gauteng, the Respondent. The hearing was conducted under the auspices of PHSDSBC ("the Council"), and was set down on 03 February 2023, 27 March 2023, 08 May 2023, and 27-29 June 2023 at 260 Basden Avenue, Lyttelton, Centurion, Sefako Makgatho Medical University ("SMU"), and Kalafong Hospital Training Centre. The proceedings were manually and digitally recorded. There was no request for the services of an Interpreter for any of the other 11 official languages.

2. The Applicant was represented by Mr. Patrick Morake, the official from Public Service Association ("PSA"). The Respondent was represented Mr. Hebert Leshaba, the Assistant Director: Employee Relations. The parties submitted bundles of documents into evidence. The bundle submitted by the Applicant was marked "A", and the bundles submitted by the Respondent were marked "B" and "R".

BACKGROUND TO THE DISPUTE

3. The Applicant referred a dispute in terms of **Section 186(2)(b) of the Labour Relations Act No. 66 of 1995**, **as amended ("the LRA")**, concerning "**Unfair Labour Practice (ULP)**" relating to the precautionary suspension.

ISSUES THAT ARE COMMON CAUSE

4. The Applicant was placed on precautionary suspension in terms of **Clause 7.2 of the Public Service Coordinating Bargaining Council Resolution 1 of 2003**, ("the Resolution"), pending the investigation into to the allegations of misconduct levelled against him by the "Clinical Heads of Departments at SMU Oral Health Centre / School of Oral Health Sciences".

5. The letter of suspension was dated 08 February 2022, and was served on the Applicant on 09 February 2022. On 04 July 2022, the Applicant was served with the notice to attend the disciplinary hearing.

DUTY TO BEGIN

6. Based on the nature of the dispute, I ruled that the Applicant had the duty to begin to present evidence. Both parties called one witness to testify and prove their case.

ISSUE/S TO BE DECIDED

7. I am required to determine whether the precautionary suspension of the Applicant is in accordance with **Clause 7.2(c) of the Resolution** or not, as per the dispute referred by the Applicant?

8. The Applicant prayed for the upliftment of his precautionary suspension and compensation of up to twelve months.

SUMMARY OF THE PARTIES' EVIDENCE AND ARGUMENTS

SUMMARY OF THE APPLICANT'S EVIDENCE

Professor Stephen Johannes Heinrich Hendricks ("the Applicant") testified under oath as follows:

9. He was employed by the Respondent in January 2019, and when he was suspended, he held the position of CEO/Head of School: Sefako Makgatho University Oral Health Centre / School of Oral Health Sciences. He had been on precautionary suspension for close to 400 days calculating from the date of his suspension on 09 February 2022 to the date of this arbitration.

10. In terms of **Clause 7.2(c) of the Resolution**, the Respondent was required to hold a disciplinary hearing within a month or 60 days, depending on the complexity of the allegation/s against him, and the length of the investigation. His suspension was signed by the MEC and not his Line Manager.

11. He was served with the notice of the hearing on 04 July 2022, which was set down on 07 July 2022. The hearing was postponed due to the unavailability of the Chairperson. The hearing was never scheduled before 07 July 2022, that is, after 09 February 2022 and before 07 July 2022. Accordingly, the Respondent did not comply with the time periods set out in the Resolution, thus rendering his precautionary suspension unfair.

12. As a result of the suspension, he suffered prejudice in that he was chased out of his office and marched out of the Respondent's premises. He was humiliated by this treatment considering that he is the Head of the Dental Institutions in the various Medical Institutions in South Africa.

13. As a result of the suspension, he could not conduct any research, or train the research students, or be assessed at PMDS Level 14, or qualify for the performance bonus, or liaise with Dental Schools in

Rwanda and Tanzania. He could not give leadership or attend conferences. His salary was reduced as a result of his precautionary suspension as per Doc. 25A.

14. In his view, the suspension did not make the dispute complex as he first became aware of the charges when he was served with the notice to attend the hearing. He denied that he had ever threatened or intimidated staff.

15. Docs. 11A-13A contain his Letter of Appointment into the positions mentioned above on a five-year performance- based contract which ends on 31 December 2023. He denied that he delayed the finalization of the matter, and if there was any delay, it was caused by the Respondent.as it indicated that it would seek a mandate to settle. The Respondent did not provide any reason for suspending him for more than 60 days.

Cross examination of Professor Hendricks by Mr. Leshaba

16. It was put to the witness that for the period August 2022 to January 2023, he deliberately delayed the finalization of the disciplinary hearing, in particular, in respect of change in representation, and requesting postponements on two different occasions that the matter was set down on two consecutive days, as he was booked off sick. The witness denied the proposition and responded that some postponements were occasioned by the exchange of documents. On the two postponements when the matter was set down on consecutive dates, he could not attend as he was sick.

17. After the Applicant was re-examined by Mr. Morake, this concluded his evidence and case.

SUMMARY OF EVIDENCE SUBMITTED BY THE RESPONDENT

The Respondent's witness was Dr. Sandile Khayalethu Mpungose ("Dr. Mpungose") who testified under oath as follows:

18. He commenced employment with the Respondent in January 2021 and currently holds the position of Head of Clinician and Senior Lecturer, and reports to the Head of Clinical Section. He never expected to report to the Applicant, but had to, because of structural arrangements.

19. Annexure "B" is the message on the Group WhatsApp from one of his colleagues, Dr. Irene Munzhelele, indicating that she received a call from Dr. Pekane, Chief Director: Oral and Therapeutic Service concerning the reinstatement of the Applicant. She requested that they indicate in writing that the Applicant's coming back will be counterproductive and toxic. Her suggestion was that it should be a group objection to avoid victimization.

20. He is of the view that the reinstatement of the Applicant will not be in the best interest of the Institution as articulated in Annexure "B", in view of the victimization and toxic environment it would generate. The environment will not be conducive to work in as it was not good for their health. Should the Applicant be reinstated, the probability is that the Respondent will lose staff.

21. The witness testified on the charges brought against the Applicant which are contained in Docs. 7A-10A. He stated that there was no team building and congeniality under the leadership of the Applicant. The Applicant did not allow them to raise their opinions or views, otherwise there will be consequence management which included to be reprimanded. They had to comply with what the Applicant said. For example, if you did not want to bend the rules, you are an enemy.

22. Should the Applicant be allowed back, he would run SMU down. In his view, the conduct of the Applicant to allow a student to sit for assessment without meeting the requirements, amounted to sabotaging SMU and the student from the disadvantaged community.

23. Should the Applicant be reinstated, he would submit his letter of resignation to avoid further harassment by the Applicant. The school is required to register 45 students, but during the time of the Applicant more than the number and up to 90 students were registered, and this almost caused the University to close.

24. Should the Applicant be transferred to another University such as Pretoria University, this will not change his academic status or affect his research work or membership with medical professional bodies. The

Applicant's refusal to be transferred is an indication of verified interest in SMU. In his view, this is an element of wanting to settle scores.

Cross-examination of Dr. Mpungose by Mr. Morake

25. The witness testified that he is not part of the Respondent's management. He has a fair knowledge of labour relations issues, and is aware that the Applicant's claim concerns unfair labour practice relating to suspension. He is aware that there is another process relating to the disciplinary action against the Applicant which differs from the unfair labour practice. The witness confirmed that the allegations against the Applicant on Docs. 7A-10A have not yet been tested, and that the current dispute concerns a claim of unfair suspension.

26. The witness agreed that **Resolution 1 of 2003** was agreed upon between the Unions and the Respondent. The witness did not dispute the proposition that the Applicant's hearing did not take place within 60 days from the date of suspension as he did not know the details.

27. It was put to the witness that the Applicant was suspended pending investigation, which had been concluded and there is therefore no reason for the Applicant's suspension to be still in place. The witness responded that paragraph 3 of the letter of suspension states that: "…pending the investigation and outcome thereof endorsed by the MEC for Gauteng Health".

28. The witness did not dispute the proposition that **Clause 7.2(c) of Resolution 1 of 2003** does not refer to the endorsement by the MEC for Gauteng Health, and agreed that the Applicant was suspended pending the investigation. It was put to the witness that the Applicant had never threatened anyone at SMU. The witness denied and said his lived experience is that the Applicant had threatened staff and did not call security in an incident where students manhandled staff, and he did not stop those students.

29. The witness confirmed that the people who are involved in the text on Annexure "B", are senior, independent, and responsible. The witness was asked the purpose for the text, and he responded that it was to raise concerns about the Applicant.

30. The witness confirms that this arbitration will determine whether the suspension of the Applicant was fair or unfair. It was put to the witness that the aggrieved staff members should have testified to enable the Applicant to cross-examine them. The witness responded that he was testifying on the issues.

31. The witness was asked whether he had lodged any grievance against the Applicant, and he referred to Annexure "B". However, on the issues that affected him personally, he did not lodge any grievance against the Applicant.

32. The witness testified that he agrees with the Respondent's offer to the Applicant to be transferred to the University of Pretoria or any other University because bringing him back to SMU would reverse the gains made. The witness was asked why he preferred the Applicant to be transferred to another University if he would cause damage. The witness responded that in fact, in his view, the Applicant should not be going to any University. The witness reiterated that if he had money, he would have paid the Applicant off not to return to SMU.

33. The witness was asked for his views on the prolonged suspension of the Applicant at the expense of the taxpayer. The witness responded that it was a small a price to pay. The witness denied the proposition that his evidence that he would resign if the suspension of the Applicant was uplifted, was an attempt to influence the process.

34. The witness was asked why he did not resign when he allegedly received bad treatment from the Applicant. The witness responded that had the Applicant not been suspended, he would have resigned already

35. After the witness was re-examined by Mr. Leshaba, this concluded his evidence, and the Respondent's case.

ANALYSIS OF THE EVIDENCE AND ARGUMENTS

36. In making this award, I had considered the oral and documentary evidence submitted by the parties, written closing arguments, **the relevant provision/s of Resolution 1 of 2003, the relevant provision/s of the LRA, and relevant legal authorities.**

37. **Section 186(2)(b) of the LRA**, in terms of which the Applicant referred the dispute, provides that: "**Unfair Labour Practice** means any unfair act or omission that arises between an employer and an employee involving the unfair suspension of an employee or any other disciplinary action short of dismissal in respect of an employee".

38. **Clause 7.2 of the Resolution** provides for "**Precautionary suspension**". The Applicant 's claim of unfair suspension is based on **Clause 7.2(c) of the Resolution** which provides that: "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".

39. In this matter, as indicated above, the Applicant was suspended on 09 February 2022, and issued with the notice of the hearing on 04 July 2022, and the hearing commenced on 07 July 2022. It stands to reason that in terms of **Clause 7.2(c) of the Resolution**, the Respondent was supposed to have held the disciplinary hearing against the Applicant by 11 April 2022, as 10 April 2022, was a Sunday. The Respondent held the Applicant's disciplinary hearing on 07 July 2022, which was 86 days after the expiry of the required 60 days.

40. It is evident that the Respondent did not comply with **Clause 7.2(c) of the Resolution**. In total, the Respondent held the disciplinary hearing against the Applicant in 146 days. In my view, this rendered the Applicant's precautionary suspension and its continuation an unfair labour practice. It is clear that on the Respondent's failure to comply with **Clause 7.2(c) of the Resolution**, it should have immediately uplifted the Applicant's suspension

41. The Applicant presented undisputed evidence that supported his claim of unfair suspension, and the basis of seeking the relief of upliftment of his suspension and compensation. The Applicant was extensively cross-examined by Mr. Leshaba on his role in delaying the finalization of his disciplinary hearing, which he denied. In my view, the cross-examination in this regard lacked relevance as **Clause 7.2((c) of the Resolution** does not deal with the delay in concluding a disciplinary hearing, but the requirement to hold a disciplinary hearing within 60 days of service of the letter of suspension. I am of the view that the Respondent misconstrued the nature of the dispute.

42. The witness of the Respondent, Dr. Mpungose, presented extensive evidence on the charges brought against the Applicant. It is common cause that the disciplinary hearing against the Applicant was still underway when this arbitration was concluded on 29 June 2023, and it obviously deals with the charges brought against the Applicant. Dr. Mpungose conceded in cross-examination that disputes of unfair labour practice and disciplinary processes are different. He further conceded that the guilt or otherwise of the Applicant has not yet been determined.

43. Dr. Mpungose also testified on the WhatsApp text, of which he was not the author. I find it difficult to understand why the Respondent did not call the author of the text and the people referred to therein to testify and confirm that he/she authored the text and give context. In fact, in cross-examination by Mr. Morake, Dr. Mpungose testified that the text is not complete as certain messages are missing to give context. It stands to reason that the WhatsApp text amounts to hearsay evidence and cannot be relied on as admissible evidence. The person/s mentioned in the text were also supposed to testify and verify certain issues, and be subjected to cross-examination by the Applicant.

44. The further evidence by Dr. Mpungose concerned his personal unhappiness with the Applicant. In cross-examination by Mr. Morake, Dr. Mpungose conceded that he did not lodge any grievance against the Applicant. I am the view that any staff member who was unhappy with the Applicant should have lodged a grievance to afford the Applicant the opportunity to know about the unhappiness and to present his version and deal with the issues relating to the unhappiness. This is the purpose of exhausting internal remedies and in keeping with the **Audi Alteram Partem Rule**.

45. It is evident from the above that the Respondent did not challenge the Applicant's evidence that it failed to comply with **Clause 7.2(c) of the Resolution**. Put differently, the Respondent did not present evidence that it complied with **Clause 7.2(c) of the Resolution**.

46. The Respondent did not call any of its Senior I.R. or Legal Services employee/s to testify on **Clause 7.2(c) of the Resolution** and any possible existence of exceptional circumstances that resulted in the Respondent's failure to comply with holding the disciplinary hearing against the Applicant within 60 days from the date of service of the letter of suspension. Dr. Mpungose conceded that he had limited knowledge on the subject.

47. In **Minister of Labour v General Public Service Sectoral Bargaining Counciland Others (JR723/05) [2006] ZALC 90; [2007] 5 BLLR 467(LC) (17 October 2006)**, the Court had to deal with the dispute referred in terms of **Clause 7.2(c) of the Resolution**.

48. **In paragraph 1**, with the heading "**Introduction**", the Court summarized the dispute as follows: "This is an application to review an arbitration award in terms of which it was found that the third respondent's suspension by the applicant for more than 60 days is an unfair labour practice. The applicant was ordered to uplift with immediate effect the third respondent's suspension".

49. **In paragraph 5**, the Court stated that: "The arbitrator found that in terms of clause 7.2(c) of the Resolution an employee had to be brought into a hearing within 60 days and if the investigation was not yet completed, the parties had to go to the hearing and request a postponement for a further investigation. Any delay that exceeded 60 days without the employee being brought into a hearing was unfair. The arbitrator found that no evidence was placed before her that suggested the exceptional circumstances that warranted more than 60 days of suspension. The arbitrator found that the applicant had committed an unfair labour practice by suspending the third respondent for more than 60 days and ordered the applicant to uplift the suspension with immediate effect".

50. **In paragraph 13**, the Court stated that: "It is clear from the facts placed before the arbitrator that the suspension of the third respondent exceeded 60 days. The arbitrator correctly found that the applicant committed an unfair labour practice. The arbitrator did not commit any reviewable irregularity. She understood what the issues were that she was required to determine. She correctly applied the law to the facts. There is a rational objective basis justifying the connection she made between the material placed before her and the conclusion she reached". The employer's review application was dismissed with costs.

51. The facts of the above case are not materially different from the facts of the dispute before me in that they involve the interpretation of **Clause 7.2(c) of the Resolution**. In terms of the South African Law precedent system, I am bound to follow the judgment. In any event, I would not have found differently based on the interpretation of **Clause 7.2(c) of the Resolution**. The purpose of having **Clause 7.2(c) of**

the Resolution is to ensure that employees are not suspended for unreasonably long periods of time without the holding of disciplinary enquiries.

52. The Respondent also cross-examined the Applicant extensively on the claim that his conduct delays the finalization of the disciplinary hearing, which is currently underway, and the Applicant disputed this claim. However, this is not the nub of the dispute. This is an issue that the Chairperson of the disciplinary hearing should deal with if raised by the parties.

53. **Clause 7.2(a)(i) of the Resolution** provides that: "The employer may suspend an employee on full pay or transfer the employee if the employee is alleged to have committed a serios offence". The letter of suspension refers to the charges against the Applicant as being of a serious nature. However, this is inconsistent with the length of period it took the Respondent to hold a disciplinary hearing against the Applicant, that is, 146 days since the Applicant was issued with the letter of suspension. If indeed the charges are of a serious nature, the Respondent should have complied with **Clause 7.2(c) of the Resolution**.

54. **Clause 7.2(a)(ii) of the Resolution** provides that: "The employer may suspend an employee on full pay or transfer the employee if the employer believes that the presence of an employee at the workplace might jeopardize any investigation into the alleged misconduct, or endanger the well being or safety of any person or state property".

55. The Applicant testified that he had never threatened or caused any harm to any student or staff or SMU. On the other hand, Dr. Mpungose testified that the return of the Applicant will result in many staff members leaving SMU. He will personally submit a letter of resignation and leave SMU if the Applicant's suspension was uplifted. He also testified that if it was possible, he would pay off the Applicant not to return to SMU. He referred to the WhatsApp text. Dr. Mpungose also gave further evidence on his unpleasant personal encounters with the Applicant. I have addressed these issues above, and I am not satisfied that there is a valid reason or valid reasons advanced to justify the Applicant's continued suspension.

56. **Section 193(4) of the LRA** provides that: "An arbitrator appointed in terms of this Act may determine any unfair labour practice dispute referred to the arbitrator, on terms that the arbitrator deems reasonable, which may include ordering reinstatement, re-employment or compensation.

57. The Applicant prayed for a finding that his suspension constituted an unfair labour practice and that it be uplifted. The Applicant further prayed for the maximum compensation under the LRA for his unfair suspension.

58. I therefore find that the Respondent committed an unfair labour practice in suspending the Applicant in contravention of **Clause 7.2(c) of the Resolution**. Accordingly, the Applicant is entitled to the relief he prayed for.

59. In **Edumbe Municipality v Thabo Putini, and Others, (DA20/16) [2019] ZALAC 74**, the LAC stated as follows in paragraph 56: "Turning then to the question of whether the quantum of compensation awarded by the arbitrator was appropriate. This Court has repeatedly held that factors to be taken into account in determining the quantum of compensation include the following:

"…the nature and seriousness of the iniuria, the circumstances in which the infringement took place, the behavior of defendant (especially whether the motive was honourable or malicious), the extent of the plaintiff's humiliation or distress, the abuse of the relationship between the parties, and the attitude of the defendant after the iniuria had taken place".

60. **In paragraph 57**, the LAC stated that: "The factors to be taken into account are, however, not limited to those stated above. The award of compensation must be just and equitable having regard to all the relevant factors".

61. I am of the view that the Respondent's failure to follow a fair procedure in handling the Applicant's suspension, negatively impacted on his medical professional status. The compensation that will be just and equitable under the circumstances is R513, 644-25 **(FIVE HUNDRED AND THIRTEEN THOUSAND SIX HUNDRED AND FOURTY FOUR RAND AND TWENTY FIVE CENTS)**, which is equivalent to three months, calculated at the rate of the Applicant's remuneration at the time of the dispute.

AWARD

62. For the reasons set out above, I order as follows:

62.1 The suspension of the Applicant (Stephen James Heinrich Hendricks) by the Respondent (Department of Health – Gauteng) from 09 February 2022, constitutes an unfair labour practice, and is accordingly uplifted.

62.2 I order that the Applicant should report for duty on 17 July 2023 in the position he held before the unfair suspension.

62.3 The Respondent is ordered to pay the Applicant compensation in the amount of **R513, 644-25 (FIVE HUNDRED AND THIRTEEN THOUSAND SIX HUNDRED AND FOURTY FOUR RAND AND TWENTY FIVE CENTS)** in terms of **Section 193(4) of the LRA**, which is equivalent to three months, calculated at rate of remuneration of the Applicant.

62.4 I order the Respondent to pay the amount mentioned in subparagraph 62.3 above on or before 31 July 2023, failing which the amount will generate interest in terms of the **Prescribed Rate of Interest Act, as amended**.

63. I make no order as to costs.

Bonge Masote