



ARBITRATION AWARD

Case No: PSHS678-20/21

Commissioner: Allan Kayne

Date of award: 24 February 2021

In the matter between:

PSA OBO JOHN GABORONE SELEKE

(APPLICANT/UNION)

and

DEPARTMENT OF HEALTH – NORTH WEST

(RESPONDENT)

DETAILS OF THE HEARING AND REPRESENTATION

1. The Public Servants Association ("PSA"), on behalf of Mr. John Gaborone Seleke (the applicant), referred an unfair labour practice dispute to the Public Health and Social Development Sectoral Bargaining Council ("the Council"), in terms of section 186(2)(b) of the Labour Relations Act 66 of 1995 ("the LRA"). The arbitration took place on 12 February 2021 at the General de la Rey ("GDLR") Hospital in Lichtenburg. It was agreed that the parties could submit closing arguments in writing, which they subsequently did.
2. The applicant who was in attendance throughout the proceedings was represented by Zulfa Greeff, a PSA union official, while Bontle Boikanyo appeared for Department of Health- North West (the respondent).

3. The applicant and respondent parties submitted separate bundles of documents to be utilised during the arbitration proceedings.
4. The proceedings were electronically recorded, and the record filed with the Council's administration.
5. This award is issued in terms of section 138(7) of the LRA, which requires a commissioner to provide brief reasons for his/her outcome.

ISSUE/S TO BE DECIDED

6. I must determine whether the respondent subjected the applicant to an unfair labour practice in terms of section 186(2)(b) of the LRA and if so, the appropriate relief should follow.
7. Of the applicant's prayers, he seeks that his precautionary transfer be declared unfair, it be fully uplifted, he be returned to his former post, and he be awarded compensation for the prejudice he suffered.
8. The following issues were agreed to be common cause and, therefore, not in dispute:
 - 8.1. The applicant was employed by the respondent as the Thusong/GDLR Hospital Complex's Chief Executive Officer, earning a monthly remuneration package of R62,000.
 - 8.2. The respondent verbally suspended the applicant with effect from 22 September 2020.
 - 8.3. The respondent transferred the applicant, on a precautionary basis, to the Ngaka Modiri Molema ("NMM") District Offices on 28 September 2020, where he has been required to render service in an alternate position ever since.
 - 8.4. During the precautionary transfer, the respondent reimbursed the applicant for the additional travel expenditure incurred by him due to the displacement.

SURVEY OF EVIDENCE AND ARGUMENT

9. The following constitutes a summarised version of the parties' respective evidence and has not been captured verbatim. The fact that I have not captured all of it should not be misconstrued that I have not taken it into account. My findings are accordingly within the context of all of the evidence tendered.

APPLICANT'S EVIDENCE

John Gaborone Seleke ("Seleke")

10. The applicant testified under oath that he was verbally notified of his suspension on 22 September 2020 and received a letter from the Chief Director, dated 25 September 2020, confirming his precautionary transfer and reassignment of duties to the NMM District Office. The correspondence indicated the reason for the precautionary transfer as one to *"allow the investigation to proceed unhindered on the allegations raised by organized labour"*. He responded to the respondent, in writing, requesting clarity regarding the allegations.
11. On 28 September 2020, he received further correspondence from the Chief Director in which the allegations made by NEHAWU against him were listed as:
- *HR Issues*
 - *Intimidation of staff*
 - *Arrogant CEO*
 - *Corrupt activity on appointments citing the Admin clerk post, Dark room assistance post and purging of union members*
 - *Morakabe appointment denied with no valid reason*
 - *Attending of a civil matter, worker denied a special leave*
 - *Suspension of the HR manager*
 - *Re-assignment of staff without capacity building*
 - *Labour forum not a consultative forum but a telling approach platform*
 - *Non compliance to Covid-19 regulations re work from home for workers above 60yrs and those with co-morbidities (sic)*

12. On 25 January 2021, he received further correspondence from Legobye, advising him that the investigation had been completed and confirming that a copy of the preliminary report had been provided to him. In her letter, Legobye indicated that, based on the report, the relationship between the applicant and hospital board was broken and irreparably damaged. She suggested alternative placement in the Ditsobotla Sub-District, overseeing quality in the NMM District. However, her correspondence did not refer to the initial allegations preferred by NEHAWU against him. He questioned how the board's lack of confidence in him related to the initial reasons for his precautionary transfer. A further concern was that the report was compiled without him being interviewed by the investigating officer.
13. On 08 February 2021, the respondent addressed further correspondence to him, reconfirming the conclusion of the investigation, the upliftment of the transfer with immediate effect but that he would not be returned to his original place of work and was required to indicate his preferred alternative placement.
14. He testified that the situation was emotionally very taxing on him, considering that he had not misconducted himself. His attempts to discuss his concerns with the employer had failed, and the respondent insisted on proceeding with the investigation without any input from him. He understood that the respondent ought not to have taken more than 60 days to finalise its investigation without convening a formal hearing to consider granting an extension or commencing disciplinary action. The respondent's conduct affected his home life, his relationship with his wife, demoralised him. He noted how he was treated very differently as people were afraid to be associated with him. The community had even questioned him as to why he was no longer based at the hospitals and had asked him if he had done something wrong or been involved in corrupt activities.
15. During cross-examination, Seleke testified that an employer was not limited to dealing only with pre-identified concerns when conducting an investigation. He indicated that he had not consulted with a medical practitioner regarding the impact of the situation on him but that he had experienced an emotional burden as a result of it.

RESPONDENT'S EVIDENCE

Nomvula Hazel Legobye ("Legobye")

16. Legobye testified under oath that the applicant reported directly to her. On 22 September 2020, the Chief Director of Corporate Services advised her of problems at the Thusong District Hospital, having been notified by the applicant. She immediately drove there, where NEHAWU members had blocked access to the facility. She was also instructed to intervene by representatives of the respondent's Head Office, including the Administrator herself. On arrival, she and the applicant met in her car, where they discussed the concerns raised by NEHAWU and their primary demand that he be replaced. She tried to engage with the crowd, but they demanded the intervention of the MEC and the respondent's Administrator. Eventually, some representatives agreed to meet with her in the boardroom on condition that the applicant was not included, and she proceeded to discuss each of the issues systematically. She only had personal knowledge of one of their grievances regarding the appointment of Administration Clerks as she had chaired a committee tasked with investigating it but was informed by the representatives of their other concerns pertaining to the applicant's conduct for the first time during that session. She agreed that their concerns should be investigated and decided to remove the applicant from the dangerous environment out of concern for him.
17. She explained that she decided to release the applicant from his duties on 22 September 2020, given the refusal of NEHAWU members to allow him access into the facility, but more especially out of concern for his safety in the volatile environment, and she arranged for his precautionary transfer to the District Office. She subsequently issued him with the formal notice of precautionary transfer and the appointment of the investigating officer.
18. Upon receipt of the investigating officer's preliminary report, she submitted a copy to the applicant, noting that his findings were that the relationship between the applicant and hospital board had irretrievably broken down and that they did not want him to return but rather have him accommodated him in an alternate position. She, the Chief Director and the Labour Relations Officer, considered the options available and communicated their findings to the applicant, in writing,

on 25 January 2021, suggesting that he accept an alternate position in the Sub-District. The applicant advised her that he rejected the alternative placement and that he wanted to return to his position as CEO. She commented that, despite the precautionary transfer, he had adjusted well to the duties he was temporarily tasked with and did not complain about them.

19. Under cross-examination, Legobye clarified that, although she sent the applicant home on 22 September 2020, she had not suspended him. They had even joked about the situation, adding that it was because NEHAWU members refused access to him at the hospital pending resolution of their grievances. Before that date, she was only aware of the Administration Clerk issue.
20. She indicated that she was unable to identify the union members present. However, She recalled that, during the consultative meeting, the representatives introduced themselves as being from the local branch and other branches. However, most were employed at the Thusong Hospital. As their allegations were unproven, she advised that the respondent would need to appoint an officer to investigate the concerns. She conceded that, in effecting the precautionary transfer, the applicant had not been accused of misconduct. Instead, he was merely removed from the volatile environment.
21. Legobye acknowledged that the investigating officer's report was only a recommendation, part of which touched on the Administration Clerk issue. However, she was unable to talk to its contents as she was not the author thereof. She further conceded that it was unfair for the employer not to include the applicant in its investigation process. She confirmed that she was duly authorised to place the application on precautionary transfer, having been delegated this responsibility verbally by the Chief Director.

ANALYSIS OF EVIDENCE AND ARGUMENT

22. Section 186(2)(b) of the LRA defines an unfair labour practice to include, amongst others, any unfair act or omission that arises between an employer and an employee involving the unfair suspension of an employee. In disputes of this nature, the onus rests with the referring party to prove its case on the balance of probabilities.
23. Notably, the provision relied upon by the applicant talks only to a suspension and no reference is made to the concept of precautionary transfers.
24. The respondent's disciplinary code, outlined in the Public Sector Coordinating Bargaining Council's Resolution 1 of 2003 ("PSCBC Resolution 1/2003"), however, provides at paragraph 7.2 that:

"Precautionary suspension

- a. *The employer may suspend an employee on full pay or transfer the employee if*
- i. *The employee is alleged to have committed a serious offence;*
 - and
 - ii *The employer believes that the presence of an employee at the workplace may jeopardise any investigation into the alleged misconduct or endanger the well-being 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.*
25. In *Minister of Correctional Services v General Public Services Sectoral Bargaining Council and Others* (J1525/15) [2018] ZALCJHB 218 (4 July 2018), the Labour Court held, at paragraph 35, that it was not unreasonable for the arbitrator in that dispute to equate precautionary suspensions with precautionary

transfers. It is, therefore, my considered view that precautionary transfers must be considered in the same light as precautionary suspensions, with each being an alternative to the other, the purpose of each being the temporary removal of the employee from his/her usual workplace pending a disciplinary hearing, subject to meeting the requirements outlined in paragraph 7.2(a) of PSCBC Resolution 1/2003.

26. In the dispute to hand, the applicant seeks *inter alia* for his precautionary transfer to be fully uplifted, that he be returned to his former position, and he further seeks to be awarded compensation based on the unfairness of the respondent's conduct and the emotional impact and humiliation he suffered as a result thereof.
27. On the evidence before me, it was common cause that the respondent formally implemented the applicant's precautionary transfer on 28 September 2020. Accordingly, the respondent had, in terms of paragraph 7.2(c) of Resolution 1/2003, until 27 November 2020 to convene a disciplinary hearing, which it failed to do. Despite its claim that the precautionary transfer was uplifted on 08 February 2021, I find this not to be the case entirely. In the original notification issued to the applicant, the respondent indicates that its decision to transfer the applicant was to "*allow the investigation to proceed unhindered on the allegations raised by organized labour*". However, in its upliftment letter, it fails to give effect to the reversal of the precautionary suspension in its entirety. Instead, it advises the applicant that he will not be returned to his former workplace and should consider alternative placements.
28. In this regard, the respondent's approach is problematic as this decision, which is directly linked to the precautionary transfer, appears to have been unilaterally taken by the respondent's representatives. On Legobye's version, she acknowledged that the respondent's decision was based on the preliminary investigation report in which its investigating officer simply denied an opportunity to the applicant to make any representations in response to the NEHAWU allegations. Notably, the actual report was never introduced into evidence by either of the parties. All that was before me was the oral evidence presented by the two witnesses, talking to the report, which did not convince me that the allegations made by NEHAWU were ever actually addressed. In lifting the

precautionary transfer, the reasonable expectation would be for the respondent to remove the temporary conditions imposed on the applicant and revert to the pre-transfer conditions. While the respondent's witness attempted to convince me that she intended to protect the applicant from harm, I find this to be highly improbable. Had this been the case, she would have indicated that the precautionary transfer was not only related to the investigation continuing unhindered but also that she had taken into account the employer's concerns for the applicant's safety. Her explanations amounted to nothing more than an excuse for the respondent's non-compliance.

29. Although the respondent submits that the applicant suffered no prejudice, questioning why he never produced medical certificates pertaining to his mental state, there is no reason not to accept the applicant's testimony that his precautionary transfer affected his psychological well-being, personal relationships, credibility in the community and ultimately, his dignity.
30. The Labour Court, in *SAPO Ltd v Jansen van Vuuren NO & Others* (2008) 8 BLLR 798 (LC), held that a suspension that exceeds 60 days, even whilst an investigation is underway, amounts to an unfair suspension. In the circumstances, the applicant has discharged the onus to show that his protracted precautionary transfer constitutes an unfair suspension in terms of section 186(2)(b) of the LRA.
31. I am further guided by the judgment of *IMATU obo of Senkhane v Emfuleni Local Municipality and Others* (2016) ZALCJHB 296, where the Labour Court considered, *inter alia*, the impairment to the employee's dignity during an unnecessarily protracted period of suspension, the employer's non-compliance to its own code, and the need to deter further comparable offending conduct, as grounds on which to award the applicant compensation. I am, however, cognisant that, during his precautionary transfer, the applicant continued to receive his full remuneration and benefits while rendering his service elsewhere within the District as well as a reimbursement owing to the additional travel required of him. Accordingly, given the applicant's position, the consequential impact of his unfair precautionary transfer and the respondent's non-compliance with its disciplinary code and procedure, a *solatium* equivalent to 2 weeks

remuneration, calculated to be R28,637.41 ($R62,000 \div 4.33 \times 2$), would be just and equitable in the circumstances.

AWARD

32. The precautionary transfer of the applicant, John Gaborone Seleke, was unfair and constitutes an unfair labour practice.
33. The respondent, the Department of Health – North West, is ordered to fully uplift its precautionary transfer of the applicant and allow him to resume his duties as Chief Executive Officer ("CEO") of the Thusong/GDLR Hospital Complex on Wednesday, 03 March 2021.
34. The applicant is directed to report for duty at the Thusong/GDLR Hospital Complex on Wednesday, 03 March 2021.
35. The respondent, the Department of Health – North West, is ordered to pay the applicant the amount of R28,637.41 by 31 March 2021.



Allan Kayne