



ARBITRATION AWARD

Case Number: **PSCBC151-23/24**

Commissioner: **Minette van der Merwe**

Date of Award: **31 August 2023**

In the **ARBITRATION** between

PSA obo Mthetheledi Edwin Mopako and another

(Union/Applicant)

And

Department of Public Works and Roads – Northwest

(Respondent)

DETAILS OF HEARING AND REPRESENTATION

1. This is the arbitration award in the matter between the Public Servants Association (PSA) on behalf of Mthetheledi Edwin Mopako and another (Thapelo Alloycious Motwedi), the Applicants, and the Department of Public Works & Roads – Northwest, the Respondent, which matter was scheduled for arbitration by digital means (Microsoft Teams) on 31 August 2023 (09h00) and held under the auspices of the Public Service Co-ordinating Bargaining Council (PSCBC).
2. Parties were invited and had attended proceedings. The Applicants were represented by Mr A Ramahosh, whereas the Respondent was represented by Mr L Disipi.
3. Proceedings were digitally recorded, and handwritten notes were kept. No interpretation was required.

ISSUE(S) TO BE DECIDED

4. The matter was referred to the PSCBC as a dispute relating to the interpretation and application of Resolution 1 of 2003, and in terms of section 24 of the Labour Relations Act, 66 of 1995, as amended ("LRA").
5. I am called upon to determine whether or not the Respondent was in contravention of clause 8.6 of Resolution 1 of 2003 by the appeal authority imposing a harsher sanction on appeal than what was issued as a result of a disciplinary hearing.

BACKGROUND TO THE ISSUE

6. The Applicants have an unfair dismissal dispute pending before the GPSSBC, which is scheduled for arbitration on 1 November 2023. This did not affect the jurisdiction of the PSCBC to determine this dispute.

SURVEY OF ARGUMENTS AND EVIDENCE

Bundles "A" was submitted into evidence on behalf of the Applicants, and both parties relied on this bundle. The veracity of the documents was not disputed, and it was accepted as it purported to be.

Arguments of the Applicants (brief summary):

7. The Applicants were called before a disciplinary hearing and a sanction of three months' unpaid suspension as well as a final written warning was imposed. On appeal, the appeal authority imposed a harsher sanction, being that of dismissal. This was in contravention of clause 8.6 of Resolution 1 of 2003.

Arguments of the Respondent (brief summary):

8. Clause 8.6 of Resolution 1 of 2003 clothes the appeal authority with a discretion, and the appeal authority imposed a harsher sanction due to the seriousness of the misconduct, having been theft. A proper definition of "may" in the context of clause 8.6 need to be applied, which would lead to a finding that the Respondent was not in contravention of Resolution 1 of 2003. The Respondent was not specifically prohibited from imposing a harsher sanction on appeal, in terms of clause 8.6.

ANALYSIS OF EVIDENCE AND ARGUMENTS

9. It was held in *Tabane v PSCBC and others* (LC) C27/15 (28 September 2017) that "*the purpose of section 24 of the LRA is to resolve disputes where a party to an agreement is alleged to have been in breach of the provisions of that agreement by failing to apply its terms either correctly or at all. The principles applicable to the interpretation of collective agreements are trite as restated in Western Cape Department of Health v Van Wyk & others* (2014) 35 ILJ 3078 (LAC) [22]."
10. It is trite law that a Commissioner may only make an order that gives effect to a collective agreement (section 138(9) of the LRA). A Commissioner is called upon to interpreter and/or apply a collective agreement (or Resolution) to give effect to its purpose and aim.
11. Resolution 1 of 2003 has at its purpose the following:

"1. PURPOSE AND SCOPE

1 The purpose of this Code and Procedures is:

1.1 to support constructive labour relations in the public service;

1.2 to promote mutual respect between employees and between employees and employer;

1.3 to ensure that managers and employees share a common understanding of misconduct and discipline;

1.4 to promote acceptable conduct;

1.5 to provide employees and the employer with a quick and easy reference for the application of discipline;

1.6 to avert and correct unacceptable conduct; and

1.7 to prevent arbitrary or discriminatory actions by managers toward employees."

12. Resolution 1 of 2003 has as its principles the following:

"2. PRINCIPLES

2 The following principles inform the Code and Procedure and must inform any decision to discipline an employee.

2.1 Discipline is a corrective measure and not a punitive one.

2.2 Discipline must be applied in a prompt, fair, consistent and progressive manner.

2.3 Discipline is a management function.

2.4 A disciplinary code is necessary for the efficient delivery of service and the fair treatment of public servants, and ensures that employees:

- a. have a fair hearing in a formal or informal setting;*
- b. are timeously informed of allegations of misconduct made against them;*
- c. receive written reasons for a decision taken; and*
- d. have the right to appeal against any decision.*

2.5 As far as possible, disciplinary procedures shall take place in the place of work and be understandable to all employees.

2.6 If an employee commits misconduct that is also a criminal offence, the criminal procedure and the disciplinary procedure will continue as separate and different proceedings.

2.7 Disciplinary proceedings do not replace or seek to imitate court proceedings.

2.8 The Disciplinary Code and Procedures constitutes a framework within which departmental policies may be developed to address appropriate circumstances, provided such policies do not deviate from the provisions of the framework."

13. It is trite law that any party to a Collective Agreement does not have a discretion to comply with such a Collective Agreement or Resolution but is obliged to comply with it. Resolution 1 of 2003 is applicable to all parties to this dispute, and subsequently, binding on all parties.
14. Clause 8.6 of Resolution 1 of 2003 states as follows:

"8.6 The appeal authority may

 - a. uphold the appeal, and/or*
 - b. reduce the sanction to any lesser sanction allowed in terms of clause 7.4.a of the Code, or*
 - c. confirm the outcome of the disciplinary proceeding."*
15. The Respondent argues that clause 8.6 does not specifically prohibit the appeal authority from imposing a harsher sanction on appeal because of the wording "may". If the intention of the parties, when Resolution 1 of 2003 was concluded, was to allow for the appeal authority to be able to impose a harsher sanction on appeal, it would have specifically stated such as an option in clause 8.6. The absence of such an option does not mean that there is no prohibition against an option to impose a harsher sanction on appeal.
16. It is important to further consider clause 8.7, which states that: *"the employer shall immediately implement the decision of the appeal authority. Where the appeal authority decides to reduce the sanction or to confirm the outcome of the disciplinary proceedings (e.g. dismissal cases), the sanctions will be implemented by the employer from a current date"*. It is further clear from this clause that it is not within the power of the appeal authority to impose a harsher sanction than the sanction, which was imposed at the disciplinary hearing, else PSCBC Resolution 1 of 2003 would have expressly provided this as an option in clause 6.8 thereof.
17. We are not dealing with an ordinary employer that has developed a disciplinary code, and then decided to impose a harsher sanction on appeal. This is a PSCBC Resolution, which has the same legal status as a Collective Agreement, which was concluded as a result of a collective bargaining process, and parties are bound by its stipulations.
18. The interpretation of Resolution 1 of 2003 and having considered the parties' arguments, I find that the Respondent has contravened clause 8.6 of Resolution 1 of 2003 by the appeal authority imposing a harsher sanction than the sanction imposed as a result of the disciplinary hearing.

AWARD

19. The Respondent, **the Department of Public Works & Roads – Northwest**, has contravened of Resolution 1 of 2003 by the appeals authority imposing a harsher sanction on appeal for the Applicants, **Mthetheledi Edwin Mopako and Thapelo Alloycious Motwedi**.
20. No order is made as to cost.



PSCBC Panelist: **Minette van der Merwe**