IN THE PUBLIC SERVICE COORDINATING BARGAINING COUNCIL

HELD VIRTUALLY ON 4 MARCH 2021

PSCBC302-20/21
Date of Ruling: 29 March 2021
Panellist: S Osman

IN THE MATTER BETWEEN:

PSA obo Masha **Applicant**

AND

DEPARTMENT OF DEFENCE **1st Respondent**

DEPARTMENT OF PUBLIC SERVICE AND ADMINISTRATION **2nd Respondent**

JURISDICTIONAL RULING

DETAILS OF HEARING AND REPRESENTATION

1. The present dispute between PSA obo Masha (hereinafter referred to as the applicant) and The Department of Defence (hereinafter referred to as the 1st respondent) & The Department of Public Service and Administration (DPSA) (hereinafter referred to as the 2nd respondent) was referred to Arbitration in terms of Section 24 (2) of the Labour Relations Act no 66 of 1995, as amended (the Act). At the Arbitration hearing which was scheduled to be held virtually on, 4 March 2021, the applicant was represented by Mr. Joel Ntwampe, of PSA and the 1st respondent was represented by Mr. M Dhluli, whilst the 2nd respondent was represented by Ms. Teresa Maile.
2. The applicant raised the issue in regard to the applicant's bundle containing confidential and classified documents, and that these documents could not be used at the hearing.
3. All parties were allowed the opportunity to submit written arguments. The 1st respondent was allowed to submit his founding argument by no later than 11 March 2021. The applicant was to submit his opposition by no later than 18 March 2021. Should the 1st respondent wished to reply, such reply was to reach Council by no later than, 25 March 2020.
4. The 2nd respondent chose not to participate in the preliminary issue, raised. Quiet understandably so.

BACKGROUND TO THE ISSUE

5. The applicant referred an interpretation and application dispute to Council in terms of Section 24 of the Act. The dispute between the parties is in respect of Clause 3.6.2.2 of Council's Resolution 3 of 2009. The applicant seeks to be ungraded from level 6 to salary level 7.
6. The Conciliation failed and a certificate of non-resolution was issued.
7. The applicant referred the dispute to Arbitration, for adjudication in terms of Section 24 of the Act.
8. At the virtual Arbitration, the respondent raised the issue of the use of certain documents by the applicant in the present dispute.

ISSUE TO BE DECIDED

9. Whether the documents handed up by the applicant on pages 41 to 47, the *"confidential"* documents, may be used in the Arbitration proceedings. The respondent also challenged whether, the Council has jurisdiction, as the applicant had since retired.

1st RESPONDENT'S SUBMISSION

10. The respondent argued that the documents in question contained the unit structure of the respondent's Logistic Support Formation Head Quarters, including names, force numbers, military ranks; post names; post usages & post levels of individuals who were not party to the dispute or had anything to do with the dispute. These individuals had entrusted the safeguard of their personal information to the respondent and therefore the information was confidential. These personnel would be uncomfortable for their information to be distributed to stakeholders outside the department. These documents were classified "confidential" for a purpose.
11. He submitted that this information was not available to all personnel and that to review or print the information, an employee must be placed in the relevant post and are allocated a username and a password. An employee must have specific security clearance in order to be given access to the programme.
12. He further argued that the respondent was not aware of the security clearance of the applicant's representative; the Commissioner and the Administrator's. He also was concerned about who else had had the information. He conceded that the fact these documents appeared on the applicant's bundle, they had lost their classification as confidential.
13. He cited the respondent's policy on the *conduct of counter intelligence* which dealt with the classification of information; the access to classified information and the release of the information. These policies provided for the categorisation of information; that access is granted to persons with possession of the correct security clearance status and that the information could not be released without the correct authorisation.
14. He insisted that the applicant did not prove that he had received the documents through a request in terms of the Promotion of Access of Information Act 2 of 2000 or that the documents were declassified at any stage. He suggested that the respondent would not be willing to continue with the arbitration if the applicant was not willing to withdraw these documents.
15. The respondent went on to insist that the applicant was not a public servant. The Collective Agreement had bound employees who were members of trade unions; the employer and those employees who were not registered members of the union but fell within the scope of the Council and employees appointed in terms of the Public Service Act, 1994, as amended.
16. He submitted that the applicant had retired from the respondent's service on 30 April 2019. The applicant's referral to Council indicated that the dispute arose on 25 November 2020. He suggested that the applicant was not employed by the respondent when the dispute arose. Therefore, the applicant could not be in dispute with an organisation, she no longer worked for.
17. Furthermore, he suggested that Commissioners were appointed to deal with disputes employees

of the public service and not pensioners. He concluded that Council lacked jurisdiction as the applicant was neither employed in terms of the Public Service Act nor did she fall, within the registered scope, of the Council.

18. The respondent in its reply, submitted that the applicant's representative was not a security agent therefore, therefore he was not placed to determine the security risk to the state. He insists that his argument is based on statute and policy. He suggests that the applicant agreed that the information was confidential.
19. He insisted that the issue was an interpretation and application dispute, and not about a grievance.
20. He denied Council was the appropriate forum to handle the dispute, as the applicant was not an employee and insists that the dispute arose after the applicant had retired. He contended that the Constitutional Court case mentioned below, dealt with the suspension of employees and the failure of the employer to re-employ the employees and was not applicable in the present case.

APPLICANT'S SUBMISSION

21. The applicant submitted that though the documents reflected they were "confidential" the contents of the documents were not confidential because of the following reasons: that the names; force numbers; military ranks; post names; post usage and post levels could not lead to reputational damage of the individuals.
22. He insisted that the disclosure of the documents would not cause harm to the respondent.
23. He suggested that the structure of the unit was not supposed to be classified as confidential because this information should be disclosed to any employee of that particular workplace. The salary levels are for the post and not for an individual employee.
24. He argued that the applicant filed a grievance, on, 2 January 2019, whilst, she was employed at the respondent at that time. The applicant received feedback on her grievance on 20 March 2020, after she retired on 30 April 2019.
25. He argued that termination of an employment relationship was not a bar to an aggrieved party to refer a dispute to remedy any wrong committed, during the employment relationship. He cited ***MEC for Tourism, Environmental & Economic Affairs & Nondumo and Others (2005) 10 BLLR 974 974 (LC)*** and ***Pretorius & another v Transport Pension Fund and others (2018) 7 BLLR 633 (CC)*** and argued that unfair labour practices in terms of the LRA may extend beyond the end of an employment relationship.

ANALYSIS OF SUBMISSIONS

26. I am not persuaded by the respondent's argument. Indeed the documents are marked "confidential" as ought to be the case with all employee related documents at an employer. These documents, particularly with the information it contains can hardly be considered state secrets, neither would this information impede on the privacy of any of the employees. It does not contain their personal information such as salaries; identity numbers or personal home addresses that would compromise these employees in any way whatsoever.
27. It is not for me to decide whether the applicant was authorised to get the information that she had gotten or the manner in which she got the information. It is for me to decide whether the applicant may use this "confidential" information in the present dispute.
28. I am alive to the statute and policies that might govern certain information and the need for state security, but I am hardly convinced that the legislation of policy was meant to deprive employees, information, that they might require to present their cases at labour dispute forums. Had the confidential information included any subject that might have breached the privacy of any of the respondent's employees, then, indeed I would not have allowed the use of same in the arbitration.
29. Section 32 of the Constitution grants access to information in the following terms: "(1) Everyone has the right of access to (b) any information held by the state; and (c) any information that is held by another person and that is required for the exercise or protection of any rights.
30. Section 23 of the Constitution grants everyone the right to fair labour practices.
31. It is against this backdrop that the applicant must be allowed to use the information that she has obtained. I am persuaded by the respondent's argument in that I do not see how this information would assist the applicant in the interpretation and application of a collective agreement dispute but nonetheless, I am persuaded that the information if used would prejudice the respondent or its employees.
32. I am also of the opinion that had the information been of such confidentiality, then it would have been hardly likely for the applicant to access the information. The respondent cannot rely on legislation which is meant to secure state information for its security, be used to secure information in respect of labour disputes.
33. There is nothing to suggest that information which the applicant seeks to introduce at the arbitration is legally privileged; that the employer cannot disclose without contravening any law or order of court; that is confidential, if disclosed would cause substantial harm to an employee or the employer or that it is private personal information relating to an employee.
34. In respect of the challenge that the applicant referred a dispute to Council whilst no longer an employee does not hold water. Indeed at the time that the dispute arose, the applicant was an

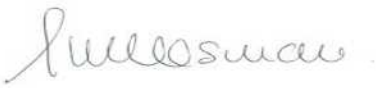
employee and the outcome of her grievance, which is the subject of her grievance, was received after she had retired from the employment of the respondent indicates that the dispute was still alive.

35. In terms of PSCBC Resolution 14 of 2002, an employer must respond to a grievance within 30 days. It is not in dispute that the applicant received the outcome of her grievance which she lodged on 2 January 2019, after over a year. Since the dispute arose whilst the applicant was in the employ of the respondent and she had received the outcome of her grievance, after she left the employment of the respondent does not preclude the applicant from referring a dispute to Council.
36. In ***Sithole v Nogwaza NO and others [1999] 20 ILJ 2710 (LC)*** the Court adequately answers the present contention in that, it held that an unfair labour practice can only be committed during an existing relationship between an employer and an employee. In ***Magoshi v Gauteng Department of Education and others [2019] 40 ILJ 168 (LC)*** the Court confirmed that an employee may, however, pursue a claim of unfair labour practice after his/her services were terminated provided that the unfair labour practice occurred during the period that the employee was employed.
37. Had the respondent concluded the applicant's grievance as per the prescribed timeframe in Resolution 14 of 2002, the applicant would have probably referred her dispute whilst she was in the employ of the respondent.
38. Nonetheless, the alleged unfair conduct took place whilst the applicant was in the employ of the respondent.

RULING

9. The preliminary issue raised by 1st respondent is dismissed.
10. Council has jurisdiction to arbitrate the dispute.

Signed at Kimberley on this 29th day of March 2021



SHIRAZ OSMAN – PSCBC Panellist