



GENERAL PUBLIC SERVICE
SECTOR BARGAINING COUNCIL



Physical Address:
260 Basden Avenue,
Lyttelton, Centurion,
Pretoria

Postal Address:
PO Box 16663,
Lyttelton, 1040

Tel: 012 664 8132
Web: <http://www.gpssbc.org.za>

ARBITRATION AWARD

Case Number: GPBC1913/2022
Senior Commissioner: Elsabé Harmse
Date of Award: 24 August 2022

In the **ARBITRATION** between

PSA OBO MR MAMABOLO AND 5 OTHERS

(Union/Applicant)

And

DEPARTMENT OF INDEPENDENT POLICIE INVESTIGATIVE DIRECTORATE

(Respondent)

Union/Applicant's representative:

Union/Applicant's address:

Telephone:

Telefax:

E-mail:

Respondent's representative:

Respondent's address:

Telephone:

Telefax:

E-mail:

DETAILS OF HEARING AND REPRESENTATION

- [1] This matter was set down for arbitration on 23 May 2022 at 9:00 am via Teams and online platform. The matter was heard over a period and was finalized on 16 August 2022. The dispute was referred to the Council in terms of section 186(2)(b) of the Labour Relations Act 66 of 1995 (hereinafter referred to as "The Act").
- [2] The Applicants were represented by Mr. Ntwampe an official from the PSA. Mr. Magadla, represented the Respondent during the proceedings. The Applicants did not require the services of an interpreter during these proceedings.
- [3] The arbitration proceedings were digitally recorded. Handwritten notes were also taken.

PRELIMINARY ISSUES

- [4] No preliminary points were raised.

ISSUE TO BE DECIDED

- [5] Whether the respondent committed an unfair labour practise by suspending the applicant prior to a disciplinary hearing?
- [6] In the event of a finding in favour of the applicant appropriate relief must be determined.

BACKGROUND TO THE ISSUE

- [7] I assisted the parties to conduct a pre-arbitration conference and the following was placed on record by the parties:

FACTS THAT ARE COMMON CAUSE:

1. The Applicants have been transferred on 28 January 2022 to another division.
2. The disciplinary matter is still being investigated.
3. The Applicants have been receiving all their statutory benefits during this period.

4. The Applicants referred this matter under section 186(2) as an alleged unfair labour practice dispute relating to suspension.

FACTS THAT ARE IN DISPUTE:

5. The Applicant inter alia alleges and the Respondent dispute that:
- 5.1. That the Applicants were suspended. The Respondent argued that the Applicant's were transferred and not suspended and that they are performing duties in another department until the finalization of the investigation.
- 5.2. Relief sought by the Applicants is the upliftment of the suspension and for the Applicants to return to their previous positions.
- [6] The Applicants submitted two (2) bundles of documents marked "A1" and "A2". The Applicants submitted written closing arguments. The Respondent did not submit closing arguments.

SURVEY OF EVIDENCE AND ARGUMENT

- [7] **I have considered all the evidence and arguments raised by the parties, but because the Act requires brief reasons (section 138(7)) I will however not regurgitate all the evidence led and will only refer to the evidence and arguments that I regard as necessary to substantiate my findings and decision in this matter.**

The Applicant's evidence

Mr. Robert Mamabolo, one of the Applicants testified on behalf of all the Applicants as follows:

- [8] He was employed as a deputy director: executive support. After the transfer he does not know what position, he is occupying. Before the transfer he was providing services to the executive director, and he was reporting to the Director Executive Support. On 27 January 2022 they were called to a meeting by the Executive Director. In the meeting she said the Minister was concerned about the information that was leaked from the department. The HR official advised that the Applicants rather be transferred than suspended. The Executive Director took the advice of HR and on 28 January 2022 they received their transfer letters as contained on p 19 of the Applicant's bundle. They wrote a letter to the Respondent as contained on p21 onwards. They were transferred to non-existent positions. They referred the matter to the council on 7 February 2022. They were not given an opportunity to respond to say why they do not want to be transferred.

(At this stage of the proceedings the Applicants contention that the transfer period does not comply with the policy was withdrawn as at the time of referral of the matter the Respondent was still within the time frame as allowed by the policy. This argument was abandoned by the Applicants.)

During cross-examination:

- [9] The Head of the department is the Executive Director who reports to the Minister. It is the highest office in the department that deal with sensitive issues. He agreed that any leak from that office could cause serious harm to the department. A leak may also jeopardize the lives of the people of this country. If there is a leak there is a need for an investigation and such investigation would require the investigation of the officials in that office. Suspension or transfer may be sued in these circumstances in terms of the resolution and the department's disciplinary procedure. He read p19 par 3 into the record and confirmed that he has not been charged with misconduct. He is relying on the rule of natural justice. He further confirmed that he has been working and his benefits have not been changed.

The Respondent's evidence

Mr. Ephraim Makeke, the Assistant Director Labour Relations from the Respondent testified as follows:

- [10] In the meeting with the Applicants all six (6) applicants were present. The Executive Director explained the purpose of the meeting and that there was a leak in information. HR was also present in the meeting. The Executive Director was concerned about the impact of the leak of the information and the sensitivity thereof. That was the reason why she wanted to suspend everyone in her department to investigate the matter. HR advised that a transfer would be more appropriate because if they are suspended, they would receive a salary for not working. With a transfer they can still render their services to the Respondent. He was asked to explain what a precautionary suspension is as well as the difference between the two (2) types of suspension. Precautionary transfer as contained in Resolution 1 of 2003 par 7.3 was chosen as the way forward by the Respondent.
- [11] The allegations are very serious and the presence of the Applicants in the department of the Executive Director would have an impact on the workplace and the investigation. The Applicants were given an opportunity to ask questions during the meeting and some of the Applicants asked questions. The meeting was followed by formal letters of transfer given to all the Applicants. Every employee in the office of the Executive Director was transferred to different units. To date the office did not receive any complaints from the Applicants or grievances that they were prejudiced, not

working, or treated differently than other employees. An employee cannot be precautionary transferred and still do their normal duties.

During cross-examination:

- [12] The investigation has not been concluded. Transfer and suspension are not the same. In the beginning of the investigation there was a delay in appointing the service provider to conduct the investigation. There is *prima facie* evidence that the Applicants committed misconduct. The Applicants were given an opportunity to respond as to why they should not be suspended, that was the purpose of the meeting. It is the employer's prerogative to suspend or transfer an employee. He has not received any complaints from the Applicants that they are not working. The leak came from the office of the Executive Director and all the employees in that office have been transferred.

ANALYSIS OF EVIDENCE AND ARGUMENT

- [13] Section 186[2] [b] of the Labour Relations Act 66 of 1995 defines an unfair labour practice as follows:

[2] Unfair labour practice means any unfair act or omission that arises between an employer and an employee involving –

[b] the unfair suspension of an employee or any other unfair disciplinary action short of dismissal in respect of an employee"

- [14] The applicants had to prove, on a preponderance of probabilities, that they had been unfairly suspended. The Applicants' case rested on the following, namely the Respondent did not conduct an investigation before their suspension, the Respondent did not have a *prima facie* case to suspend the Applicants, and the Respondent did not consult with them before suspending the Applicants.
- [15] A factor to consider in determining whether a precautionary suspension is fair is whether the employer was able to adduce at least a *prima facie* case that the employee has committed some form of misconduct, and that, objectively speaking, there is a sound reason to keep the employee away from the workplace as was held in **NEHAWU obo Masilo v Department of Transport & Roads [2005] 4 BALR 424 (BC)** and **Marcus v Minister of Correctional Services (2005) 26 ILJ 75 (SE)**. This would have been applicable if the Applicants were indeed suspended. Which was not the case in this matter. The Applicants were transferred to different units, they are still working and receiving all their statutory benefits. This was not disputed by the Applicants. Further to that they were called to a meeting to inform them of the reason for the transfer, this evidence was not disputed by the Applicants. They were further

given an opportunity to ask questions and respond, this was also not challenged by the Applicants. The Applicants used the words “suspension” and “transfer” interchangeably during these proceedings and there is a clear difference between the two terms. Section 186(2)(b) does not deal with transfers of employees, only alleged unfair suspension.

- [16] There was no evidence placed before me by the Applicants that the Respondent acted in breach of their own policies or that it acted in bad faith, with improper motive, malice or grossly unreasonable. The Applicants could therefore not prove on a balance of probabilities that the Respondent committed an unfair labour practice as it was very clear from the evidence presented that they were transferred to other units and not suspended as defined by the LRA.

AWARD

- [17] The Applicants failed to prove the existence of an unfair labour practice and the dispute is subsequently dismissed.

DATED AT PRETORIA ON 24 AUGUST 2022.

Signature: 

Senior Commissioner: **Elsabé Harmse**