



# ARBITRATION AWARD

**Panellist/s:** M Reza Slamang  
**Case No.:** GPBC 524/2021  
**Date of Award:** 17 August 2021

In the **Matter** between:

**Public Servants Association of South Africa obo Patrick Boetie Khohlani**  
(Union / Applicant)

and

**Department of Correctional Services – Western Cape**  
(Respondent)

Applicant's representative: Deneal Johnson  
Applicant's address: % Public Servants Association of South Africa

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[pkhohlani@gmail.com](mailto:pkhohlani@gmail.com)

Respondent's representative: Kaizer Luphondo  
Respondent's address: % Department of Correctional Services

Telephone: 082 374-1585  
Email: [kaizer.luphondo@gmail.com](mailto:kaizer.luphondo@gmail.com)

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## **ARBITRATION AWARD**

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### **DETAILS OF HEARING AND REPRESENTATION:**

1. This matter was scheduled for arbitration to take place on 29 July 2021.
2. The proceedings were conducted on the Zoom online video conferencing platform.
3. The respondent is the Department of Correctional Services – Western Cape who was represented by Kaizer Lufhondo an employee of the respondent.
4. The applicant is Patrick Boetie Khohlani who was in attendance and represented by Deneal Johnson a fulltime shop steward of the Public Servants Association of South Africa.
5. The proceedings were conducted in English and digitally recorded.
6. During the proceedings the parties referred to bundles of documentary evidence, adduced evidence and on 06 August 2021 addressed written closing arguments in summation of their respective cases.

### **ISSUE TO BE DECIDED:**

7. The issue to be determined is whether the respondent had committed any unfair act or omission relating to the unfair suspension of the applicant or any other unfair disciplinary action short of dismissal, as contemplated by section 186(2)(b) of the Labour Relations Act 66 of 1995 as amended (LRA) and if so, I must determine the appropriate relief.

## **BACKGROUND TO THE MATTER:**

8. This dispute concerns allegations of an unfair labour practice relating to the unfair suspension or any other unfair disciplinary action short of dismissal vis-à-vis the applicant.
9. The applicant worked in the Regional Commissioner's Office as a Regional PERSAL Manager. He is remunerated at salary level 9 which in terms of the establishment table is the equivalent of an Assistant Deputy Director.
10. The applicant noted that on or about 13 April 2021 he discovered that he had been transferred on the PERSAL system from the Regional Commissioner's Office to form part of the establishment table of the Pollsmoor Management Area in the role of Senior Administrative Officer: HR Support Manager.
11. This role is on the establishment table of the respondent and has attached thereto a salary level 8 which is lower than the level of an Assistant Deputy Director. The applicant also discovered that the respondent had formerly recorded a final written warning against his personnel profile.
12. In consequence hereto, the applicant activated the dispute resolution procedures of the Bargaining Council. The relief sought by him is an order that the conduct of the respondent was both procedurally and substantively unfair and thus an unfair labour practice.
13. In the event of a finding of unfairness, the applicant sought an order that the final written warning be set aside together with an order that his alternative placement to the Pollsmoor Management Area be set aside with a concomitant return to his role as Regional PERSAL Manager in the office of the Regional Commissioner. In all the circumstances the applicant also sought an order of compensation as a solatium for the unfair conduct that he has had to endure.

## **SURVEY OF EVIDENCE AND ARGUMENT:**

14. While, for purposes of brevity in issuing this award, I do not restate the evidence, submissions and argument in full, I note though that I have considered all the evidence, submissions and argument of the parties, but shall only refer to that which I regard as necessary to substantiate my findings and the determination of the dispute.
15. The factual matrix in this matter is expediently common cause.
16. The applicant caused that the PERSAL Department in the Head Office of the respondent remove a HR post from the establishment table of the Regional Commissioner. He did not have the requisite authority nor did he inform his supervisor prior to implementing the change.
17. As a result of this misconduct the respondent addressed correspondence to the applicant (dated 25 June 2020) calling on him to provide reasons why he should not be placed on a precautionary suspension pending the finalisation of an investigation into the misconduct.
18. In his reply, the applicant, inter alia, unreservedly apologised for his actions and noted that a precautionary suspension in the circumstances of him having acknowledged and therefore not disputing his conduct would not be in the interest of justice and fairness.
19. He noted further that he would consequently not interfere with any investigation and proposed that the respondent should not implement a precautionary suspension and instead consider a temporary alternative placement the implementation of which he would not oppose.
20. Subsequent to his written representations, the applicant was informed that given the gravity of the allegations and in order to properly gather all the facts relating to his conduct, a formal investigation would be instituted to inter alia decide on any further action to be instituted against him.
21. The respondent also elected not to place the applicant on a precautionary suspension and instead implemented an alternative placement with effect from 01 July 2020. The

applicant was deployed to the Pollsmoor Management Area for the duration of the investigation.

22. On or about 30 November 2020 the applicant was informed that the investigation had been completed and he was invited to attend a meeting scheduled for 04 December 2020 to discuss the findings and the outcome of the investigation. The applicant was afforded the right to be represented during this meeting.
23. As it turned out the respondent informed the applicant that pursuant to the investigation a decision had been taken to issue him with a final written warning, which warning was issued in accordance with the recognised informal procedure as provided for by GPSSBC Resolution 1 of 2006 and which is in operation within the structures of the respondent. This course of action the applicant rejected and during the meeting he insisted that a formal disciplinary hearing (instead of the informal process) should be instituted.
24. A formal disciplinary hearing was not convened although on 10 February 2021 the respondent confirmed in writing that the final written warning issued in terms of the informal procedures would remain in place. The respondent also informed the applicant that a further decision to consider alternative placement 'is still work in progress' and that he would be kept informed.
25. The respondent further informed the applicant that the alternative placement at that time which had been implemented instead of a precautionary suspension will no longer be the case. The applicant was however requested to liaise with the relevant management at Pollsmoor Management Area for an ongoing interim placement (a second alternative placement) while the respondent was in the process of finalising its further decision concerning his alternative placement.
26. The final written warning was implemented with effect from 01 January 2021 – ostensibly because the meeting occurred on 04 December 2020 and 01 January 2021 being the start of the successive month at which time the PERSAL system could be updated.

27. At this juncture I note that a final written warning is valid for a 6-month period and whether the warning was implemented as from 04 December 2020 or 01 January 2021 or 10 February 2021, as at the date of these arbitration proceedings the warning had already expired and been removed from the personnel profile of the applicant.

28. The applicant has however not been returned to his role of Regional PERSAL Manager and continues, to the present day, to work in terms of a second alternative placement.

#### **ANALYSIS OF EVIDENCE AND ARGUMENT:**

29. Section 186(2)(b) of the LRA defines an 'unfair labour practice' as: "any unfair act or omission that arises between an employer and an employee, involving the unfair suspension of an employee or any other unfair disciplinary action short of dismissal in respect of an employee."

30. Although the irrefutable evidence is such that the final written warning has already expired, I am of the view that the conduct of the respondent may still be considered against the requirements of fairness - this after all is the case of the applicant.

31. Of course, an order that the warning should be lifted and set aside is no longer possible given that it has already expired and been obliterated from the records of the respondent. The applicant however also sought an order of compensation for the unfair labour practice that he has had to endure. A consideration of the fairness of the warning is therefore apposite.

32. The point of departure of the applicant in attacking the procedural and substantive fairness of the warning is, in my assessment, fundamentally flawed. The applicant, it seems to me, is of the view that he is entitled to reject the warning and to instead insist that a formal disciplinary hearing should be instituted. This is entirely incorrect.

33. The prerogative to discipline and, or disciplinary action to be meted out in respect of employees of the respondent fall squarely within the discretionary purview of the respondent. An employee can in no way usurp and, or veto this authority lest his intransigence is regarded as undermining the lawful authority of the respondent. The applicant should adopt this approach with caution.

34. The respondent elected to approach the misconduct of the applicant through the recognised informal procedure and to issue him with a final written warning. That in the ordinary course must be the end of the matter, subject only to a permitted appeal and eventual recourse to the dispute mechanisms of the Bargaining Council.
35. In my assessment the applicant does not present a justifiable basis on which to challenge the procedural fairness of the written warning. In any event the applicant was aware of an investigation into his conduct. He was given prior notification of a meeting to discuss the findings and the outcome of the investigation. He was afforded the right to be represented during this meeting. All of the aforementioned procedural steps in my assessment are entirely in keeping with the requirement of procedural fairness.
36. The applicant acknowledged that he had perpetrated the misconduct for which an investigation had been initiated. He took full responsibility for his actions and unreservedly apologised for his conduct albeit that he did this in a somewhat convoluted explanation for why he should not be placed on a precautionary suspension. There can therefore be no doubt that he had perpetrated the misconduct which the respondent had assessed to warrant a final written warning.
37. In my assessment a clean disciplinary record as noted by the applicant does not mitigate the serious nature of his misconduct. Moreover, the sanction of a final written warning is not only in compliance with the standard set by the respondent but is also, in the circumstances, both appropriate and fair.
38. For the reasons discussed above I conclude that the sanction of a final written warning was both procedurally and substantively fair. The claim of an unfair labour practice relating to the final written warning must in the circumstances fail. The relief sought is dismissed.
39. The applicant also complained that the second alternative placement which persists to the present-day amounts to an unfair labour practice.

40. It is common cause that the applicant had been deployed to perform alternative duties within the Pollsmoor Management Area. The discretion to implement this course of action instead of a precautionary suspension vest in the respondent which the applicant does not challenge. The facts of this matter show that the applicant had proposed the alternative placement instead of a precautionary suspension.
41. On 30 November 2020 the respondent informed the applicant that the investigation into his misconduct had been finalised and he was invited to a meeting to discuss the finding and the outcome of the investigation. At this juncture neither a precautionary suspension and, or an alternative placement instead of a suspension could defensibly be maintained.
42. It seems to me though that when the respondent sought to communicate the decision to issue a warning the response of the applicant derailed these discussions. This is evidenced by his written recordal that the decision of the Regional Commissioner to impose a final written warning and alternative placement 'is rejected with the contempt it deserves'.
43. In my assessment this impasse ostensibly at the instance of the applicant resulted in the status quo being retained, namely alternative placement instead of a suspension despite the reason for the alternative placement, that being an investigation into his misconduct, no longer existing.
44. This status quo persisted until 10 February 2021 when the applicant was informed that the warning issued pursuant to an informal procedure would stand.
45. Notably the respondent also informed the applicant that the 'second decision' regarding his alternative placement was still work in progress and he would be kept informed thereof.
46. The respondent offers no reasonable explanation, if any, for why the status quo was maintained. After all the investigation into his misconduct which served as the primary reason for his alternative placement had been completed. The impasse between the applicant and the respondent regarding the formal or informal process to follow before issuing a final written warning cannot be relied upon to justify the ongoing alternative placement – particularly since it appears to have been unilaterally imposed.



47. The respondent in fact informed the applicant that his alternative placement would no longer be due to a precautionary suspension but inexplicably directed the applicant to liaise with the relevant management at Pollsmoor Management Area ‘... for interim placement whilst [the respondent] is pursuing ...’ a final decision of alternative placement. This approach is entirely baseless and results in unfairness to the applicant.
48. In light of the second alternative placement the respondent contended that the cause of action relating to a precautionary suspension no longer exists and since the applicant was issued a final written warning which has since expired the applicant has no basis in fact and, or in law to pursue a claim of unfair labour practice relating to the unfair suspension or any other unfair disciplinary action short of dismissal.
49. As such, the respondent persisted, the applicant must be required to launch a fresh dispute relating to his second alternative placement which came into effect as from about 10 February 2021. The second alternative placement is thus unrelated to a precautionary suspension and unrelated to any disciplinary action short of dismissal, so the respondent persisted. I disagree.
50. This argument by the respondent is no more than dilatory in nature. In my view, it seeks to negate the effective and expeditious resolution of labour disputes and ultimately has the potential to undermine the Constitutional Right to fair labour practices. The contention that the second alternative placement is not properly before the GPSSBC and thus cannot be arbitrated is rejected.
51. The further contention of the respondent that the disciplinary action in respect of the misconduct perpetrated by the applicant resulted only in a written warning and that the second alternative placement cannot be construed as disciplinary action short of dismissal also falls to be rejected.
52. The second alternative placement did not happen in a vacuum. It is in my view self-evident that it came about as a result of the misconduct perpetrated by the applicant. It is described by the respondent as a ‘second decision’ to be considered and finalised. The first decision having been the imposition of a final written warning.

53. The applicant also recorded in his email on 04 December 2020, shortly after the discussion pertaining to the findings and the outcome of the investigation into his misconduct that the decision of the Regional Commissioner to impose a final written warning and alternative placement 'is rejected with the contempt it deserves'.
54. There can thus be no doubt that the respondent sought to implement both a final written warning as well as an alternative placement albeit that in a somewhat convoluted way the respondent informed the applicant on the one hand that such a consideration '... is still work in progress ...' while on the other hand and paradoxically the respondent directed the applicant to liaise with the relevant management at Pollsmoor Management Area for his alternative placement whilst a final decision was being considered.
55. The approach of the respondent vis-à-vis the alternative placement of the applicant is untenable. In order to avoid confusion, I note that an alternative placement in the context of an alternative to a precautionary suspension is entirely permissible and such a decision fall squarely within the discretionary purview of the respondent. If justified the respondent is entitled to impose such an alternative placement.
56. It seems to me that the respondent labours under the impression that it has an unfettered discretion to implement an alternative placement. This is overly high-handed, intolerable and cannot be condoned.
57. An alternative placement which is unrelated to an alternative to a precautionary suspension cannot under any circumstances be unilaterally imposed. It also does not fall within the discretionary purview of the respondent to unilaterally impose an alternative placement as part of a disciplinary sanction. There is no authority in law and, or policy for this proposition.
58. The respondent cannot gainsay that a second alternative placement was imposed - to do so would be disingenuous in the extreme. It matters not that the second alternative placement is an interim placement while the respondent is in the process of finalising its decision of alternative placement. It also does not matter that the salary of the applicant remains intact.

59. In terms of his contract of employment, the applicant was appointed in the Regional Commissioner's Office as a Regional PERSAL Manager. It is trite law that contractual provisions cannot be changed unilaterally and therefore without the all-important agreement of the applicant the second alternative placement is impermissible and amounts to an unfair labour practice.
60. I have held hereinabove that the sanction of a final written warning issued to the applicant was both procedurally and substantively fair and therefore does not constitute an unfair labour practice. I have also recorded hereinabove that the temporary alternative placement instead of a precautionary suspension is not impugned by the applicant. However, to the extent necessary and to ensure certainty and finality in this matter I confirm that this temporary alternative placement is unimpeachable. I have further also held that the second alternative which commenced once the applicant was informed that the investigation into his misconduct had been completed and which subsist to the present day as discussed hereinabove is impermissible and amounts to an unfair labour practice.
61. In terms of the statutory remedies provided for in an unfair labour practice dispute, the LRA at section 193(4) authorises an arbitrator to determine the dispute on terms that the arbitrator deems reasonable, which may include ordering reinstatement, re-employment or compensation.
62. The relief sought by the applicant is an order that his alternative placement to the Pollsmoor Management Area be set aside with a concomitant order that he return to his role as Regional PERSAL Manager in the office of the Regional Commissioner. There is no factual and, or legal basis before me to negate the relief sought.
63. The applicant also sought an order of compensation as a solatium for the unfair conduct that he has had to endure. In the circumstances of this matter and given the facts and legal issues at play, I am of the view that an order of compensation would not be just and equitable. An order of compensation is not in the interest of justice and only serves to enrichment the applicant.

**AWARD:**

64. The respondent, the Department of Correctional Services – Western Cape, committed an unfair labour practice, as contemplated by section 186(2)(b) of the LRA relating to the alternative placement of the applicant, Patrick Boetie Khohlani.

65. The alternative placement of the applicant is hereby uplifted and set aside.

66. The respondent, the Department of Correctional Services – Western Cape, is ordered forthwith but not later than 01 September 2021 to restore the full contractual terms and conditions of employment of the applicant, that is his appointment as a Regional PERSAL Manager in the Regional Commissioner's Office.

A handwritten signature in black ink, appearing to read 'M Reza Slamang', with a stylized flourish at the end.

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**M Reza Slamang**  
**GPSSBC Arbitrator**