



ARBITRATION AWARD

Panellist/s: Advocate David Pietersen _____
Case No.: GPBC2261/2019 _____
Date of Award: 21 July 2020 _____

In the ARBITRATION between:

NEHAWU obo MGOLOMBANE, TSHOTLHEGO PAULUS
(Union / Applicant)

and

**THE NORTHERN CAPE DEPARTMENT OF
RAODS & PUBLIC WORKS**
(Respondent)

DETAILS OF THE HEARING AND REPRESENTATION

1. This is the default arbitration award in the matter between National Education, Health and Allied Workers Union (NEHAWU) representing Mr Tshotlhego Paulus Mgolombane, the applicant and the Northern Cape Provincial Department of Roads and Public Works as the respondent.
2. The arbitration was held under the auspices of the General Public Service Sector Bargaining Council (the Council) in terms of section 186(2)(a) of the Labour Relations Act 66 of 1995 as Amended (the Act) and the award is issued in terms of section 138(7) of the Act.

3. The default arbitration hearing took place on 21 July 2020 at the respondent's office in Kimberley. The proceedings were digitally recorded. The applicant was present and represented by Mr Ricardo Cronje, an Official from the trade union NEHAWU. The respondent was absent and not represented. The Council's file showed that the respondent's set down notice was sent to it via email on 10 June 2020. I am therefore satisfied that the respondent was properly notified.

ISSUE TO BE DECIDED

4. I am called upon to determine whether the dismissal of the applicant was substantively fair in relation to an alleged misconduct which he committed.

BACKGROUND

5. The applicant is employed as a Director by the respondent and has been in the position since 14 May 2007 in Kimberley. The applicant earns R77 218.84 per month. The dispute follows a situation on 01 October 2019 when the applicant became aware of developments leading to his staff no longer reporting to him and him being left without any work to do.
6. Following a grievance which the respondent refused to entertain, the applicant decided to lodge an unfair labour practice dispute with the Council on 13 November 2020. A certificate of non-resolution of the dispute was issued on 18 December 2019. The matter was initially set down for arbitration on 24 April 2020, but due to the Covid-19 pandemic and lockdown restrictions, the arbitration hearing could only take place on 21 July 2020.
7. The applicant believes that he did nothing wrong which could warrant a demotion. He wants his duties and responsibilities to be re-assigned to him plus compensation as a form of relief.

SURVEY OF EVIDENCE AND ARGUMENT

8. This section constitutes a brief summary of the evidence and arguments put forward by the applicant. It is not intended to be exhaustive, but I have taken all the submissions into consideration in arriving at my conclusion. As stated previously, the respondent was absent at the proceedings. I therefore have only the version of the applicant upon which I should base my decision on.

The Applicant's Case

9. Mr Tshotlhego Paulus Mqolombane, the applicant, was sworn-in and he testified as the only witness in his case. He testified on how he is responsible for the management of the Expanded Public Works Programme (EPWP) in the province.
10. The applicant stated that he had a meeting with his Chief Director on 01 October 2019. He stated that his supervisor raised two issues with him which was something about his sick leave utilisation and other responsibilities which he (the applicant) apparently did not comply with. He stated that subsequent to the meeting, the respondent decided to take away his responsibilities without any consultations or counselling.
11. The applicant testified that his staff and budget was taken away from him as well as his responsibilities to regularly interact with the respondent's stakeholders. He stated that his two deputy directors are currently doing his work. The applicant stated that he has no work to do and is only sitting in his office and earning a salary without providing any labour for it.
12. The applicant stated that the removal of his responsibilities and duties and his personnel constitutes a demotion. He stated that he feels prejudiced in that he is suffering from stress and feels useless. The applicant submitted that his reputation is damaged by the respondent's conduct who expect him to resign. He stated that he is stagnant and feels that he is stealing the state's money earning a salary without rendering any services in return for it.
13. In closing arguments, the applicant's representative submitted that the respondent has never showed an interest in the applicant's grievance and that the applicant's dignity is infringed by the respondent. He submitted that no procedures were ever followed by the respondent and that the applicant charged with any misconduct or poor work performance issues.

The Respondent's Case

14. As stated in paragraph 3 and 8 above, the respondent was absent, and I therefore must decide this case based on the version of the applicant alone.

ANALYSIS OF EVIDENCE AND ARGUMENT

15. The applicant led evidence that his duties and responsibilities including the budget and personnel which he is responsible for were removed. This he stated was done without any formal procedures or

consultations having taken place. He submitted that the respondent did this without providing him with any reasons. The applicant believes that he is demoted and that the respondent wants him to resign.

16. The respondent did not attend the arbitration hearing. I have no evidence before me to disprove the claims made by the applicant. The applicant's representative also handed in two subpoenas which were issued against two senior managers of the respondent. This, to some extent proves the seriousness of the applicant's case which leaves me with little doubt regarding the accuracy of the applicant's case.

17. It is my view that should the respondent be dissatisfied with the work and/or behaviour of the applicant; proper procedures may be followed to address same. I have no evidence before me to show what the respondent did to resolve its issues with the applicant. The mere fact that all duties and responsibilities were taken away from the applicant without any just cause, leaves me with little choice but to find that the applicant is demoted by the respondent.

18. Section 186 of the LRA provides the following:

186 *Meaning of dismissal and unfair labour practice*

(2) *'Unfair labour practice' means any unfair act or omission that arises between an employer and an employee involving-*

(a) *unfair conduct by the employer relating to promotion, demotion, probation (excluding disputes about dismissals for a reason relating to probation) or training of an employee or relating to the provision of benefits to an employee.*

19. The conduct of the respondent is unwarranted and without justifiable reasons.

20. Section 185 of the LRA provides the following:

185 *Right not to be unfairly dismissed or subjected to unfair labour practice*

Every employee has the right not to be-

(b) *Unfairly dismissed; and*

(c) *Subjected to unfair labour practice*

21. The evidence of the applicant and my finding that he has been demoted, brings me to a conclusion that the applicant's right to fair labour practices has been infringed by the respondent.

RELIEF

22. The applicant requested that his duties and responsibilities be reinstated and that he be awarded compensation as a form of relief. In determining the legality of the applicant's claims, I shall now turn to the law for guidance.

23. Section 193 of the Labour Relations Act 66 of 1995 as Amended (the LRA) provides the following:

193 Remedies for unfair dismissal and unfair labour practice

- (1) *If the Labour Court or an arbitrator appointed in terms of this Act finds that a dismissal is unfair, the Court or the arbitrator may-*
- (a) *order the employer to reinstate the employee from any date not earlier than the date of dismissal;*
 - (b) *order the employer to re-employ the employee, either in the work in which the employee was employed before the dismissal or in other reasonably suitable work on any terms and from any date not earlier than the date of dismissal; or*
 - (c) *order the employer to pay compensation to the employee.*
- (2)
- (3)
- (4) *An arbitrator appointed in terms of this Act may determine any unfair labour practice dispute referred to the arbitrator, on terms that the arbitrator deems reasonable, which may include ordering reinstatement, re-employment or compensation.*

24. The first request of the applicant about the reinstatement of his responsibilities and duties, can be accommodated under subsection 193(4) of the Act. I deem it to be in the interest of fairness to have the applicant's duties, responsibilities, personnel and budget to be reinstated to him and that he shall manage same as it was the case before 01 October 2019.

25. As regards his second request of compensation, subsection 193(1) and (4) is very clear that it may be awarded in cases of unfair labour practices. I shall as a result order that the respondent must pay compensation equal to three month's salaries of the applicant. This shall be the amount of R77 218.84 x three months = R231 656.52.

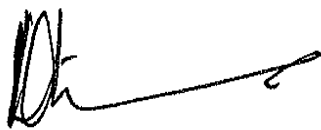
26. I hereby make the following award:

AWARD

27. The respondent, Northern Cape Department of Roads and Public Works, committed an act of unfair labour practice: demotion in relation to the applicant, Mr Tshotlhego Paulus Mgolombane.

28. The respondent is ordered to reinstate the functions, duties, responsibilities, personnel and departmental budget to the post of the applicant (Director: EPWP) by no later than **06 September 2020**.
29. The respondent is further ordered to pay compensation to the applicant in the amount of **R231 656.52** for the unfair labour practice which he had to endure.
30. The payment in paragraph 29 must be made to the applicant bank account by no later than **15 September 2020**.

This is done and dated on **25 August 2020** at **Warrenton**.



Adv. David Pietersen

GPSSBC Panellist