



GENERAL PUBLIC SERVICE
SECTOR BARGAINING COUNCIL



ARBITRATION AWARD

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Panellist: VNN Mathaba

Case Reference No.: GPBC2281/2019

Date of Award: 27 August 2020

In the arbitration between:

Mbuso Sikakane

Union/Employee party

and

COGTA KZN

Employer party

Employee Representative:
PRETORIUS MDLETSHE & PARTNERS ATTORNEYS

Union/Employee's address: **62 HULLET STREET**

KWADUKUZA

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Employer's Representative: COGTA KZN

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ARBITRATION AWARD

DETAILS OF HEARING AND REPRESENTATION

- 1) This is the award in the arbitration between Mbuso Sikakane, the applicant and COGTA KZN, the respondent.
- 2) The matter was heard on 01 July 2020 and postponed upon application by respondents and it proceeded again on the 22nd July 2020. On the same date it was agreed parties will send their written closing arguments by end of business day on the 29th July 2020. Both applicants and respondents sent their written closing arguments as agreed.
- 3) The arbitration hearing took place at the COGTA Offices King Cetshwayo in Richards Bay.
- 4) Both parties were present and Mr Dlamini an attorney from Pretorius Mdllethe & Partners Attorneys, represented applicant. Mr Funokwakhe Myeza an Assistant Labour Relations Manager at COGTA PMB, represented the respondent.
- 5) The arbitration was held under the auspices of the GPSSBC in terms of section 186 (2)(b) of the Labour Relations Act 66 of 1995 as amended (the act). The award is issued in terms of section 138(7) of the Act
- 6) The proceedings were digitally recorded

ISSUE TO BE DECIDED

- 7) I have to determine whether the following:
 - Whether the precautionary suspension effected on the applicant by the respondent on 11 July 2019 resulted into an unfair labour practice in terms of s186(2) (b) of the LRA
 - Whether the disciplinary hearing held by the respondent on the 11th September 2019 amounted to a disciplinary hearing in terms of s7 of the PSCBC Resolution 01 of 2003 (Public Service Disciplinary Code)

BACKGROUND AND COMMON CAUSE ISSUES TO THE DISPUTE

- 8) The parties agreed that these facts were common cause:
 - The applicant is employed as Deputy Director of COGTA at King Cetshwayo Richards bay
 - The applicant was put on precautionary suspension on 11 July 2019
 - On 11 September 2019 there was a disciplinary hearing held at COGTA where the applicant was present
 - The matter of precautionary suspension is regulated by s7.2(c) of the Resolution 1 of 2003

PRELIMINARY ISSUES

The respondent made an application for postponement. The postponement was not granted due to reasons cited in a detailed postponement ruling which was issued on 28 July 2020. The arbitration was adjourned for 1 hour to allow respondent to make the necessary arrangements to proceed. Arbitration proceeded as per set down notice.

SUMMARY OF EVIDENCE AND ARGUMENT

APPLICANT

- 9) The applicant relied on documentary evidence and Mr Dlamini applicant's attorney made presentations and submitted as follows:
- 10) The disciplinary hearing that was held by respondent on 11 September 2019 did not comply with s7.2(c) of Resolution 1 of 2003 since it was held after the 60 days which is a requirement stipulated in this section
- 11) The said hearing on the 11 September 2019 did not comply with the requirements of s7 of the Resolution 1 of 2003 , hence it was not a disciplinary hearing for purposes of this section
- 12) The said hearing on the 11 September 2019 did not address the extension of the precautionary suspension of the applicant , but rather addressed postponement of the pending disciplinary hearing against the applicant due to the investigation not being finalised (Bundle "C" hearing transcript)
- 13) Mr Dlamini submitted that the employer had a number of opportunities to resolve this matter considering the applicant has been in suspension for a year and the employer became aware of this legal action in January 2020 (6 months ago)
- 14) He submitted that the employer has displayed a " I don't care attitude" while the applicant continues to suffer damage to his reputation , paying hefty legal fees and psychological strain as he has been having a dark cloud over his head for a year now
- 15) The respondent is causing the department fruitless expenditure since there is someone acting in Mr Skakane's position being paid an acting allowance while the applicant is paid to seat at home for a year
- 16) He further submitted that they seek compensation for the applicant in terms of s194 (4) of the LRA since the applicant's reputation has been dented and the applicant has been disadvantaged in terms of pay progression due to being on precautionary suspension
- 17) He further submitted they seek legal costs as the respondent has been unprofessional by failing to prioritise this matter and deliberately delayed the arbitration by showing up unprepared and seeking unreasonable postponements
- 18) The applicant has not received his 2019/2020 EPMDS (pay progression and performance bonus) due to being placed on a lengthy precautionary suspension by the respondent

RESPONDENT

- 19) The respondent relied on documentary evidence and Mr Funokwakhe Myeza representing the respondent made presentations and submitted as follows:
- 20) Mr Myeza submitted that the GPSSBC does not have jurisdiction to hear the matter as it is a matter regarding interpretation of the PSCBC collective agreement Resolution 1 of 2003 , therefore GPSSBC can't deliberate on collective agreements of other bargaining councils
- 21) He submitted the matter must be dismissed for the afore mentioned reasons relating to jurisdiction
- 22) He submitted that the applicant should have made an application to amend the referral hence the matter is not properly placed before myself under GPSSBC
- 23) The employer is mandated by s7.2(c) of Resolution 1 of 2003 to effect precautionary suspension or transfer when faced with a serious matter which is complex and employer reasonably believes the presence of the suspected employee may jeopardise the investigation
- 24) Mr Myeza further submitted that the applicant was placed under precautionary suspension due to serious allegations levelled against him as set out in pages 13-14 of bundle A(13 charges)
- 25) The hearing of 11 September 2019 was a disciplinary hearing as envisaged in Resolution 1 of 2003 and the applicant was served with a notice of such on 02 September 2019 , which he signed for
- 26) He conceded that the notice served to the applicants may have errors due to the cut and paste culture when writing official documents in the department , but the crux and purpose was clear
- 27) The applicant is also to blame for the delayed disciplinary hearing as the employer has tried to hold the hearing sometime in December and the applicant was unavailable due to medical reasons and he submitted a Doctor's note
- 28) The applicant never made any objections in relation to the nature of the seating of the 11th September 2019
- 29) On the hearing of the 11th September 2019 the applicant agreed to provisional dates of the next disciplinary hearing , due to investigation not being finalised
- 30) By the 11th September 2019 the investigation was not finalised , hence the investigative interview between employer investigating officer and the applicant occurred on 11/10/2019
- 31) On 14/10/2019 employer reviewed the precautionary suspension of the applicant and decided to continue with applicant's suspension until the disciplinary hearing regarding charges levelled against him has been finalised
- 32) The applicant was informed of the review done regarding his suspension an decision taken and the new dates for the disciplinary hearing
- 33) The applicant has done numerous postponements preventing the disciplinary hearing to proceed
- 34) Mr Myeza cited the Highveld District Council v CCMA 2002 LAC case

- 35) He further submitted that whether it is outside the 60 days is not what is important , but rather that the applicant was informed well in advance about the seating
- 36) He submitted that there was no Unfair Labour Practice on the part of the employer
- 37) He further cited Lekabe v Minister of DOJ 2009 LC case par.17 and submitted by postponing the disciplinary hearing , it extended the precautionary suspension since the investigation was not finalised
- 38) He further cited Minister of Labour v GPSSBC & others 2006 LB par.11
- 39) He submitted the applicant is a senior official charged serious allegations including with threatening his sub-ordinates , hence the suspension will not be lifted until all allegations against him have been tested and ruled out
- 40) Performance bonus is not a right but a benefit depending on performance of the employee during that particular year cycle , it may or may not be received
- 41) Regarding pay progression , Mr Myeza submitted that the applicant is aware allow for such errors/disputes to be corrected upon return of the employee between himself and his supervisor , if not it can be challenged legally
- 42) The applicant is on suspension with full pay and he is not disadvantaged

ANALYSIS OF ARGUMENTS

- 43) The point of departure in this matter must be found in the definition of Unfair Labour Practice in **s186(2)(b) of the LRA** which provides as follows: “Any unfair act or omission that arises between an employer and employee involving: *The unfair suspension of an employee or any other unfair disciplinary action short of a dismissal in respect of an employee*
- 44) Read together with **s7.2(c) of Public Service Disciplinary Code Resolution 1 of 2003** which states as follows: *If an employee is suspended or transferred as a precautionary measure, the employer must hold a disciplinary hearing within a month or 60 days, depending on the complexity of the matter and the length of the investigation. The chair of the hearing must then decide on any further postponement.*
- 45) The principles of **s7.2(c) of the Resolution** are further clarified in details in the **DPSA Public Service Precautionary Suspensions Guide Annexure B of 2015** which provides as follows :

3. PRINCIPLES

- The employer must have valid and fair reason for imposing a precautionary suspension against an employee, based on fair labour relations principles.
- **The period of precautionary suspension must be reasonable and justifiable but should not exceed 60 calendar days.**
- Precautionary suspensions must be reviewed on a regular basis.
- There must be a clear balance between the interests of the employee in continuing his or her daily work and the disciplinary and operational requirements of the employer.

- Employees must, without delay and throughout the process be informed of the process steps that the Department is initiating.
- If suspended, the employee is entitled to a speedy and effective finalisation of the disciplinary process.
- **The employee must return to work should the hearing not be concluded within 60 calendar days; however this does not prohibit/ preclude the employer from continuing with the disciplinary process nor does it render the employee immune from the allegations preferred against him/ her.**
- Precautionary suspension in terms of the framework does not constitute a judgement, and must be on full pay.
- Disregard of the peremptory provisions of a statute is fatal to the validity of the proceedings affected

46) It was not in dispute that the applicant was placed on precautionary suspension on **11 July 2019**

47) The respondent in their own closing arguments submitted that the disciplinary hearing relating to the applicants suspension was held on day **61** which was the **11th Septembers 2019**

48) Counting the days as per **s7.2(c) of Resolution 1 of 2003 read together with DPSA Public Service Precautionary Suspensions Guide Annexure B of 2015 s3 bullet no.2**, it is clear that 60 days refers to calendar days

49) Counting from 12 July 2019 a day after the applicant was served with suspension letter to 11 September 2019 when the hearing was held, it was on **day 62** that the hearing took place

50) This prescript further provides in bullet no.7 that the employee must return to work should the 60days lapse without the disciplinary hearing being held, this means suspension automatically expires when 60 days lapses

51) This was confirmed by the court in the case of **Lekabe v Minister of DOJ 2009 LC case par.17**

52) These two prescripts are very clear and detailed as to how a precautionary suspension should be handled step by step

53) It is mind-bottling to try and comprehend why the employer failed to use such clear and progressive prescripts to handle this matter

54) I agree with the applicant that the respondent had resources and time to resolve this matter amicably, yet they dragged it unnecessarily causing the applicant humiliation and financial implications in legal costs

55) It is concerning that the respondent submits that the 60 days period is not important but rather that the applicant is informed well in advance about the processes to unfold

56) This proves that the respondent chose to blatantly disregard such a crucial and relevant part of the policy in dealing with this matter

57) The parties had an opportunity to present preliminary issues which both parties did and they were dealt with and the arbitration proceeded

- 58) It is only after the applicant rested their case that the respondent made an application regarding jurisdiction , submitting for the matter to be dismissed and requesting that I make a ruling on that application before proceeding with matter
- 59) This to me appeared to be a delay tactic by the respondent and a way of frustrating the process as the respondent was fully aware of the arbitration process and had an opportunity to raise the issue as a point in limine and they didn't.
- 60) I rejected to rule on the matter as a preliminary issue , nevertheless I accepted it as part of the respondent's argument and would decide on it as part of the arbitration award and ruled as follows:
- 61) I reject that the matter is not correctly placed before the GPSSBC , I find it frivolous and absurd that the respondents would make a contention that Resolution 1 of 2003 is a PSCBC collective agreement and only applies to the PSCBC and cannot be interpreted or implemented by other councils
- 62) The matter at hand is ULP in terms of s186 (2)b of the LRA not interpretation of implementation of collective agreement , furthermore Resolution 1 of 2003 is a Public Service Disciplinary Code applicable to all Public Service , PSCBC is the mother / coordinating body of all Public Service bargaining councils including the GPSSBC.
- 63) PSCBC is the policy making body for all Public Service Departments and has four (4) affiliating Bargaining Councils which represent those departments as follows (GPSSBC , PHSDBC , SSSBC and ELRC)
- 64) The second matter that I have to determine is regarding the nature of the disciplinary hearing held on the 11th September 2019 is defined in **s7.1 (a-c) in Resolution 1 of 2003**
- 65) Applicant contended that this hearing was not a disciplinary hearing in terms of s7 of the resolution as it did not contain any charges and it was not a disciplinary hearing relating to precautionary suspension of the applicant
- 66) I do not agree with the applicants that the hearing of the 11th September 2019 did not amount to a disciplinary hearing as envisaged in **s7.1 (a-c) of Resolution 1 of 2003**
- 67) The notice of enquiry which the applicant received on **02 September 2019** complied with all the requirements of a disciplinary hearing in that it contained : purpose of the seating , date and venue , rights of the officer charged and was served 5 days before the hearing
- 68) The notice further explains that the investigation is not finalised , hence it is justified that charges had not been drawn
- 69) Nevertheless whether the disciplinary hearing of the 11th September 2019 complied with s7.1 of the Resolution is not relevant in this matter as it was held after the 60 days had lapsed , hence the precautionary suspension had also expired

FINDING

- 70) After carefully considering all relevant aspects in this case from both the applicant and the respondent , I find as follows

- 71) The respondent has violated the **Public Service Disciplinary Code(Res.1 of 2003) as well as DPSA Annexure B Guidelines for Precautionary Suspension of 2015** , by keeping the applicant on precautionary suspension past **60 days** which lapsed on **09 September 2019**
- 72) The respondent failed to hold a disciplinary hearing for purposes of **s7.2(c) of Resolution 1 of 2003**
- 73) The hearing of the **11th September 2019** was not a disciplinary hearing for extension of precautionary suspension of the applicant as per **s7.2(c) of Resolution 1 of 2003**
- 74) Placing the applicant on precautionary suspension was justified considering seriousness of the allegations , nevertheless insisting that the applicant remain on precautionary suspension for 12 months is unlawful and grossly unfair on the applicant
- 75) The alleged threats to subordinates by the applicant does not justify using a lengthy precautionary suspension to alienate the employee from the workplace , after all s7.2(c) of the Resolution affords the respondent an option to transfer the employee on same conditions if needs be (pending a disciplinary hearing)
- 76) The respondent had ample time and resources to resolve this matter even after conciliation , but chose to drag it unreasonably causing the applicant humiliation and hefty legal costs
- 77) I find the respondent acted in an arbitrary and careless manner by insisting to keep the applicant on precautionary suspension and blatantly disregarding relevant policies and prescripts that govern the Public Service

AWARD

I find that the respondent (COGTA KZN) by keeping Mr Mbuso Sikakane (applicant) on precautionary suspension for 12 months and failing to comply with s7.2(c) of Resolution 1 of 2003 , committed an Unfair Labour Practice as contemplated in s186(2) (b) of the LRA

I therefore make the following order:

The precautionary suspension of the applicant must be uplifted and Mr Mbuso Sikakane must return to work and be reinstated as of 12 September 2019 with all the necessary EPMDS benefits. The applicant must report back to work at COGTA King Cetshwayo Richards Bay with immediate effect or within 7 days from the date of receiving this award.

I further order the respondent to pay compensation to the applicant in terms of s194 (4) of the LRA, equivalent to 01 month of the applicants salary to the amount of R81 577.00 by the 30th September 2020.

I make no order for costs.

GPSSBC Panellist Vuyiswa Mathaba

Signature



Date : 27 August 2020

Richards Bay KZN