



PHSDSBC

PUBLIC HEALTH AND SOCIAL DEVELOPMENT
SECTORAL BARGAINING COUNCIL

ARBITRATION AWARD

Commissioner: **Charles Oakes**

Case No: **PSHS1222-16/17**

Date of Award: **08 May 2017**

In the matter between:

Sama obo Daniels,L

(Applicant)

and

Department of Health- Kwazulu Natal

(Respondent)

DETAILS OF HEARING AND REPRESENTATION

1. The hearing took place at the Osindisweni Hospital, Durban on the 25 April 2017.
2. The Applicant was represented by Miss P. Gwala , an official of the South African Medical Association.
The respondent was represented by Mr D. Gabela, from the Respondent's Labour Relations Department.

ISSUES TO BE DECIDED

3. I have to decide whether the Respondent has committed an Unfair Labour Practice.

SURVEY OF EVIDENCE

4. On the 12 January 2017, the Applicant was placed on precautionary suspension.
5. The disciplinary hearing commenced on the 17 March 2017.
6. Out of this arises the present dispute. According to the Applicant's representative, the Respondent has not complied with clause 7.2 (c) of Resolution 1 of 2003, which requires of the Respondent to hold a disciplinary hearing within a month or 60 days. The Respondent, she argued exceeded the 60-day period stipulated in Clause 7.2 (c) of Resolution 1 of 2003.
7. Clause 7.2 (c) states the following:

"7.2 precautionary suspension

The employer may suspend an employee on full pay or transfer the employee if

- I. the employee is alleged to have committed a serious offence; and*
 - II. the employer believes that the presence of an employee at the workplace might jeopardise any investigation into the alleged misconduct, or endanger the well-being or safety of any person or state property.*
 - a. A suspension of this kind is a precautionary measure that does not constitute a judgement, and must be on full pay.*
 - b. If an employee is suspended or transferred as a precautionary measure, the employer must hold a disciplinary enquiry within a month or 60 days, depending on the complexity of matter and the length of the investigation. The chair of the hearing must then decide any further postponement."*
8. In *Mashiane v Department of Public Works (J1773/12) [2012] ZALCJHB 69 (18 July 2012)* the court stated the following:

"I am satisfied that the provision regarding a 60 day time limit within which a disciplinary enquiry must be held was intended to be peremptory and the discretion to extend the enquiry beyond that date rests with the chairperson. It seems to be reasonably incidental to the exercise of that discretion that he must consider the extension of the precautionary suspension, since the purpose of the provision is to prevent lengthy suspensions without disciplinary steps being brought to a conclusion. The chairperson will need to consider after 60 days whether the reasons for the suspension remain valid depending on the progress of the enquiry."

9. The court in *Lekabe v Minister: Department of Justice & Constitutional Development* (2009) 30 ILJ 2444 (LC) stated the following regarding suspensions such as those envisaged in clause 7 (2) of Resolution 1 of 2003:

“Turning to the specific issue in the present instance, in my view it could never have been the intention of the parties that clause 2.7(2)(c) of the SMS Handbook should take away the right of an employer to discipline an employee on the expiry of the 60 (sixty) days from the date of suspension. In essence the case of the Applicant in the present instance is that the right of the Respondent to proceed with the disciplinary hearing prescribed on the on the expiry of the 60 (sixty) days from the date of his suspension.

10. *In my view clause 2.7(2)(c) deals with suspension and not the disciplinary action. There is nothing in this clause that says an employer would lose the right to discipline an employee on the expiry of the 60 (sixty) days from the date of the suspension. I have not been able to find even a basis for implying the interpretation sought by the Applicant or the one given by the Court in Lavejoy Malambo. At best, as I see it, the suspension falls away after the 60 (sixty) days unless the chairperson of the disciplinary hearing extends that period.*
11. *The purpose of clause 2.7(2)(c), as I see it, is to address the problem of protracted suspensions which demoralizes and unfairly prejudice the suspended employee. It would appear that the mischief which the parties sought to address with the provisions of clause 7.2 was to deal with what Andre Van Niekerk J in Mosweu Paul Magotlhe v The Member of the Executive Council for Agriculture Conservation and the Environmental and Another soon to be reported case number J2622/08, regarded as the tendency by certain employers to:*
12. *“... regard suspicion as a legitimate measure of first resort to the most groundless suspicion of misconduct, or worst still, to view suspicion as a convenient mechanism to marginalise an employee who has fallen from the favour.”*
13. *Thus the right of the employee in the event that the employer does not uplift the suspension on the expiry of the 60 (sixty) days is to file an unfair labour practice claim or bring an application to have an order directing the employer to uplift the suspension. I need to emphasize that in my view it could never have been the intention of parties that the right to discipline by an employer would fall away on the expiring of the 60 (sixty) days.”*
14. Arising out of the above is the following:
- The 60 days within which a hearing must be held is peremptory.
 - The chairperson of the disciplinary hearing can extend the 60 day period.
 - The expiry of the 60 days does not preclude the employer from holding a disciplinary hearing, as the suspension has nothing to do with the dismissal of an employee.

- A failure to hold a disciplinary hearing within 60 days entitles an employee to the right to file an unfair labour practice to have the suspension uplifted.

15. This brings me to a consideration of whether the Respondent has in failing to adhere to clause 7(2) (c) of Resolution 1 of 2003 committed an unfair labour practice.

16. Section 186 (2) (b) states the following:

“Unfair labour practice” means any unfair act or omission that arises between an employer and an employee involving -

(b) unfair suspension of an employee or any other unfair disciplinary action short of dismissal in respect of an employee”

17. An unfair labour practice arises out of an unfair act or omission committed by an employer.

18. In the present matter, the Respondent's failure to hold a disciplinary hearing within 60 days of the Applicant's suspension impacts on the fairness of the suspension. As stated above the holding of a disciplinary hearing within 60 days of the suspension is peremptory.

19. The use of the word 'must' in clause 7(2) (c) of Resolution 1 of 2003 makes it peremptory.

20. In line with this I am satisfied that the Respondent has acted unfairly by persisting with the suspension beyond the 60-day period.

21. Hence, I find as follows:

AWARD

22. The suspension of the Applicant, L.Daniels is found to be unfair and the Respondent, Department of Health- KwaZulu Natal is ordered to uplift the suspension.
23. The Respondent, Department of Health- Kwazulu Natal is ordered to reinstate the terms and conditions of employment governing the employment of the Applicant and to pay him any remuneration due to him as a result of the suspension and afford him other benefits of employment with retrospective effect from the 12 January 2017 as if his employment was never suspended.
24. The Applicant is to tender his services to the Respondent on 15 May 2017.

C. Oakes

**C.OAKES
COMMISSIONER**