



**PHSDSBC**  
PUBLIC HEALTH AND SOCIAL DEVELOPMENT  
SECTORAL BARGAINING COUNCIL

# ARBITRATION AWARD

Case No: **PSHS737-16/17**

Commissioner: **Anna Maria Fourie**

Date of Award: **11 October 2017**

In the matter between

**PSA obo Coert Stephanus De Vries**

(Union/ Applicant)

and

**The Department of Health- Free State**

(Respondent)

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## **DETAILS OF HEARING AND REPRESENTATION**

[1] The Union referred an alleged unfair labour practice dispute on behalf of the Applicant to the Bargaining Council for arbitration. The dispute was initially set down for arbitration on 30 January 2017, on which date the arbitration could not be finalised. It was subsequently set down for 26 April 2017, but I was informed by the Council on 20 April 2017 that the arbitration had been postponed. The arbitration eventually sat for finalisation on 19 September 2017 at Bophelo House, Bloemfontein. On the said date, the Applicant was not present, but was represented by Mr Greeff from PSA. The Respondent was represented by Ms Mtshayi, Acting Deputy Director: Labour Relations of the Respondent.

[2] The matter was dealt with on written heads of argument. The parties were in agreement at the last date of the arbitration proceedings that the matter could be dealt with on written arguments only. The parties confirmed that there was no dispute about the facts of the matter. The Applicant had until 25 September 2017 to submit heads of argument. The Respondent was given until 2 October 2017 to respond and the Applicant had until 4 October 2017 to reply on the Respondent's response. Both parties duly complied with these deadlines for submission of their arguments.

### **ISSUE TO BE DECIDED**

[3] The dispute related to an alleged unfair labour practice relating to suspension in terms of section 186(2)(b) of the Labour Relations Act, No 66 of 1995, as amended ("the LRA"). It was the case of the Applicant that the Respondent unfairly suspended him without instituting bona fide disciplinary action until the Applicant finally resigned some ten months later.

[4] The Applicant sought an order of compensation.

[6] The Applicant was the Head of the Department Clinical Imaging Sciences at the Medical Faculty of the University of the Free State as well as at the Universitas Academic Hospital.

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

#### **ARGUMENT FOR THE APPLICANT**

[7] The Applicant was called for a disciplinary hearing which sat on 27 September 2017. The charge sheet did not contain any allegations. The Respondent was represented by Mr Yaw and the Presiding Officer was Advocate Moletsi. On the said date, the Respondent could not provide any clarity on the charges against the Applicant and the hearing could not proceed. To date of the Applicant's resignation in July 2017,

the disciplinary hearing did not proceed. Had the Respondent been serious about charging the Applicant, the hearing would have been concluded before the Applicant's resignation.

- [8] The Applicant was of the view that the Respondent never had a true intention to charge him and that the disciplinary hearing was merely convened in order for the Respondent to avoid being challenged for having committed an unfair labour practice against the Applicant. In terms of the Disciplinary Code applicable in the Department, a person had to be charged to appear at a disciplinary hearing within sixty days from the date on which he or she had been suspended.
- [9] The Applicant had been subjected to intimidation, victimisation and prejudicial treatment from the Respondent for years.

#### **ARGUMENT FOR THE EMPLOYER**

- [10] The Suspension of the Applicant was fair. The Applicant was suspended for alleged negligence after a patient he had to perform a procedure on died without him having performed the said procedure on the date scheduled for it. The appointment of an investigating officer was requested to investigate the incident immediately after the Applicant was suspended, which was indicative of the Respondent's intention to finalise the investigation. The Applicant was placed on precautionary suspension with effect from 28 July 2016 and a disciplinary hearing was scheduled for 27 September 2017. The hearing could not proceed on the said date as the Respondent requested a postponement in order to finalise the investigations. As an act of good faith, the Respondent, after having collected witness statements, even though the investigation had not been finalised, lifted the suspension of the Applicant on 1 November 2017.
- [11] The Respondent did not unfairly suspend the Applicant, but followed the procedures set out in Resolution 1 of 2003 to the letter. There was thus no unfair labour practice committed against the Applicant.

## **REPLY BY APPLICANT**

[12] No charges were levelled against the Applicant. On the day of the disciplinary hearing, the Respondent's representative indicated that the charges were not ready for presentation which was the reason for the postponement of the hearing. The suspension of the Applicant in fact constituted punishment which did not comply with the disciplinary code of the Respondent in as far as it relates to suspension.

## **ANALYSIS OF EVIDENCE AND ARGUMENT**

[13] It was not in dispute that the Applicant was placed on precautionary suspension with effect from 28 July 2016. It was further not in dispute that he was notified to attend a disciplinary hearing on 27 September 2016 and that the hearing was postponed on the said date. It was further not in dispute that his suspension had been uplifted by the Respondent on 1 November 2016, despite the fact that the disciplinary investigation had not been concluded at the time. It was furthermore not in dispute that the Applicant's disciplinary hearing, to date, did not continue.

[14] The parties seem to be in dispute regarding the question whether or not there were charges levelled against the Applicant. The documentation submitted by the Respondent, which were not challenged by the Applicant in as far as authenticity is concerned served to assist in this regard. I accepted, given the fact that the representatives, both seasoned, agreed on the arbitration to be determined on heads of arguments only, that I could rely on the said documents to determine this factual dispute. Both parties duly complied with the deadlines for submission of the arguments and both parties had ample opportunity to respond to the arguments submitted by the other.

[15] In summary, the common cause facts are as follows:

[15.1] The Applicant was served with a notice of precautionary suspension during July 2016.

[15.2] The suspension of the Applicant was effective from 28 July 2016.

[15.3] The Applicant was notified to attend a disciplinary hearing on 27 September 2016.

[15.4] The disciplinary hearing did not proceed on the 27<sup>th</sup> of September 2016 as the Respondent needed to further investigate the alleged misconduct. The hearing was thus postponed.

[15.5] The Respondent served the Applicant with a letter, dated 1 November 2016, in terms of which his precautionary suspension was uplifted.

[16] It was the Applicant's case that no charges were levelled against him and that his suspension thus constituted an unfair labour practice. On the other hand, the Respondent's case was that there was a valid reason to suspend the Applicant and that the Respondent had complied with the relevant provisions, namely clauses 7.2(a) and 7.2(c) of Resolution 1 of 2003: Disciplinary Code and Procedures for the Public Service.

[17] Clause 7.2(a) reads as follows:

**“Precautionary suspension**

- a. 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 wellbeing or safety of any person or state property.”

[18] The argument of the Respondent was that there was indeed a suspicion of serious misconduct on the part of the Applicant and when given an opportunity to respond to his proposed suspension, the Applicant submitted a statement of a witness, which indicated to the Respondent that the Applicant's presence would compromise and jeopardise the investigation.

[19] The letter of suspension had the following heading:

“REQUEST FOR YOUR WRITTEN STATEMENT ON THE ALLEGATIONS OF MISCONDUCT: SERIOUS NEGLIGENCE AND DERELICTION OF DUTY”

It identified the alleged elements of misconduct as follows:

- “1. It is alleged that you performed vascular explorations of patient L Sesoi on 13/6/2016 and you then decided to perform an endovascular coiling and place a stent in consultation with the Neurosurgeon; but you failed to initiate the process to request the procurement of the stent and coil.
2. It is alleged that you failed to timeously, persistently and persuasively escalate this matter to your manager despite you knowing that the open surgery was not an option and that the only option left was the stent and coil.
3. It is also alleged that you have derelicted your duty as Head of Clinical Department, since you have allegedly failed to treat this case with the urgency that it required.
4. It is alleged that you have failed to manage your department as a cost centre by not instructing or delegating your staff to follow upon the request further for an entire month.”

[20] It is apparent from the said extract of the suspension notification that allegations of misconduct were indeed put in writing and that all the allegations against the Applicant related to patient L Sesoi. Furthermore, the Applicant was invited to provide a version in response to the allegations as well as his proposed suspension. The Respondent only annexed a copy of a Letter of Request for Procedure, dated 12 July 2016 and signed by one S Kotzé, which relates to the allegations against the Applicant. The Respondent did not elaborate on any further submissions made by the Applicant at the time. However, the same Letter of Request, formed an annexure to the affidavit submitted into evidence by the Applicant with his heads of argument. In the said affidavit, the Applicant gave an elaborate account of his version of the events relating to patient L Sesoi. The said letter was annexed to his affidavit in substantiation of his account of events.

[21] The Respondent did not explain why the conclusion was made that the Applicant's presence would compromise the investigation merely because of the said letter being submitted by him after he was invited to respond in writing to his proposed suspension. It is also not apparent from the documentation itself that the conclusion could have been justified. It is not part of my powers to speculate as to what could

have possibly led the Respondent to the said conclusion in the absence of any explanation from the Respondent in that regard. I can thus not accept the Respondent's argument that the suspension was based on a conclusion that the Applicant's presence might have compromised the investigation into his alleged misconduct.

[22] The Respondent's argument relating to the seriousness of the alleged offence was that the Department was exposed to possible litigation due to medical malpractice leading to the death of a patient. Furthermore, the Respondent had to consider the wellbeing of other patients, if indeed the allegations proved to be true. One could not argue with this reasoning. Indeed, an allegation of negligently causing the death of a patient, is very serious. One could understand if an employer, under such circumstances, suspend an employee pending an investigation into the allegations. The questions that remains is whether the Respondent can justify the delay in finalising the said investigation.

[23] I accept the argument of the Respondent that they had an obligation to thoroughly investigate the allegations of misconduct against the Applicant. However, the Respondent failed to give any explanation as to why such thorough investigation could not be finalised by the date on which the disciplinary hearing was postponed nor by the time that the Respondent uplifted the suspension on 1 November 2016. Again, I cannot be expected to speculate as to what could have possibly been the reasons for the Respondent's failure to finalise the investigation to date.

[24] Clause 7.2(c) of the Disciplinary Code read as follows:

“c. 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.”

[25] The Respondent's argument was that the Respondent's representative requested a postponement of the hearing as the investigations were not complete at the time that the hearing was convened on 27 September 2017. However, the mere fact

that the Disciplinary Code provides for a further postponement of the sixty day period, does not mean that an Employer can postpone a hearing without just cause. It would be absurd to interpret the clause to mean that an Employer can postpone a hearing indefinitely without any proper cause. Had the investigation not been finalised on the said date, one would indeed expect the Employer to explain why the investigation was not finalised at the time. No particulars were provided to me to consider whether the decision to postpone was based on sound reasons. The Respondent certainly did not provide any explanation during the arbitration proceedings for the delay in finalising the internal investigation into the Applicant's alleged misconduct.

- [26] I can simply not reconcile the Respondent's argument that the Applicant's alleged negligence exposed them to possible liability due to medical malpractice with their inexplicable delay in investigating the alleged negligence on the part of the Applicant. The mere fact that there was a possibility of the Respondent being held liable for medical malpractice justifies a conclusion that there should have been a sense of urgency in finalising the investigation in order to enable the Respondent to respond to any possible claim against them resulting from the death of the patient in question.
- [27] The time lapse from the date of suspension until the date on which the disciplinary hearing was postponed is sixty one days, which in fact does not comply with the time limitation provided for in terms of clause 7.2(c) of the Disciplinary Code. As such, already, the suspension was unfair. Furthermore, as I mentioned before, no reasonable explanation was provided by the Respondent for the failure to finalise the investigation in time.
- [28] Based on the evidence and arguments presented to me, I concluded on a balance of probabilities that the Respondent committed an unfair labour practice against the Applicant. Considering the request of the Applicant, as well as the seniority of his position and the obvious reputational injury he suffered as a result of the prolonged debacle, I find that four months' compensation would be reasonable.

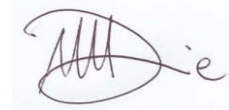


## AWARD

[29] The Respondent committed an unfair labour practice towards the Applicant. The Respondent is ordered to compensate the applicant in an amount equivalent to four (4) months' of the applicant's remuneration, less applicable statutory deductions, by no later than 30 November 2017.

[30] I made no order as to costs.

Signature:

A handwritten signature in black ink, appearing to read 'AMF' followed by a flourish and the letter 'e'. The signature is written on a light blue rectangular background.

Commissioner: Anna Maria Fourie