



PHSDSBC

PUBLIC HEALTH AND SOCIAL DEVELOPMENT
SECTORAL BARGAINING COUNCIL

ARBITRATION AWARD

Case No: **PSHS1154-16/17**

Commissioner: **Thando Ndlebe**

Date of award: **20 October 2017**

In the matter between:

PSA obo ALBERTSE, M

(Union/ Applicant/ Employee)

and

DEPARTMENT OF HEALTH – FREE STATE

(Employer / Respondent)

DETAILS OF THE HEARING AND REPRESENTATION

[1] The matter was scheduled before me on 7 June 2017 and 2 October 2017 in Bloemfontein as an arbitration process. The Applicant was present and was represented by Mr. Clement Fandie, an official from the Public Servants Association. The Respondent was represented by Mr. J.L Molokoane, its Labour Relations Officer, in the proceedings. The arbitration proceedings were electronically recorded and notes can be found in the dispute file. The parties submitted bundles of documents as same were admitted as Applicant's **Bundle "A"** and Respondent's **Bundle "B"**.

BACKGROUND TO THE DISPUTE

[2] The Applicant, Ms. Mariana Albertse, joined the Public Service on 10 March 1987. The Applicant held the position of Deputy Director Organizational Development at the time of her dismissal on 3 February 2017. The Applicant was earning a monthly salary of R47 799.06 at the time of her dismissal.

ISSUES TO BE DECIDED

[3] The matter was set down for arbitration by the Council after the Applicant's trade union referred an unfair dismissal dispute. I am required to determine whether the Applicant was substantively dismissed by the Respondent and to make an appropriate determination. The relief sought by the Applicant was retrospective reinstatement.

SUMMARY OF EVIDENCE AND ARGUMENTS

THE RESPONDENT'S VERSION

Mr. Mzonakele Fikizolo

[4] He is appointed by the Respondent as a Deputy Director General, Strategic Management and Support Systems.

[5] The document with the heading "RECOMMENDATION ON STAFF AUDIT" and as found at page 6 of Bundle "B" looks like a submission to a relevant authority. The document is dated 26 August 2013 and he was still holding the position of Deputy Director General of Resources Management at that period.

[6] Paragraph 4 at the document found at page 6 of Bundle "B" reads as follows, "upgrades of posts to be approved and implemented as per document

OUTSTANDING UPGRADES, based on job evaluation results". The word "tentative" does not imply approval but means that the approval will be done subject to conditions being met. The documentation at page 37 of Bundle "A" is internal memorandum from the Applicant to the effect that the MEC of Health had approved job evaluations on 26 August 2013. The memorandum at pages 43 and 44 of Bundle "A" stated that the Head of Department had to grant approval for outstanding upgrades with effect from 1 April 2016.

Under cross-examination, Mr. Fikizolo responded as follows;

- [7] It is the MEC who has the authority to approve upgrades. The word tentative does not mean agreement. The other paragraphs at page 5 of Bundle "A" namely 1.3 and 6 are explicit. The word "tentative" at paragraph 4 in the same document cannot be equated to the contents of paragraph 3.
- [8] He was not present in the meeting between the Applicant and the MEC. The MEC never agreed to the upgrades. He was not aware of the upgrades that took place as contained at page 22 of Bundle "B". The Department of Public Service and Administration once called for an upgrade of Clerks. He could not comment on the upgrades that took place in 2016 as he left the Unit in 2015.
- [9] The Applicant at page 37 of Bundle "A" commented and stated that the MEC granted the approval for the upgrades.

Mr. Lucky David Mapena

- [10] He is appointed by the Respondent as a Labour Relations Officer.
- [11] The document at page 6 of Bundle "B" is an Arbitration Award that relates to a promotion dispute between Hamad and the Respondent. In the Award the Applicant

testified that the MEC had approved job upgrades on 26 August 2013. The MEC never approved the upgrades on 23 August 2013.

- [12] The word “tentative” does not mean approval. The upgrades that were implemented as a result of the Applicant’s actions were therefore irregular. The document that appears at page 26 of Bundle “B” relates to a recommendation for the implementation of outstanding OSD and non-OSD posts and it was approved on 6 December 2016 by the CEO of Treasury.

Under cross-examination, Mr. Mapena responded as follows;

- [13] It is the MEC who wrote the word “tentative” as appearing in the memo at page 22 of Bundle “B”. The MEC never approved upgrades on 26 August 2013. The staff audit implementation memo dated 1 October 2013 and found at page 37 to 44 of Bundle “A” was submitted by the Chief Director of Human Resources. The submission was later approved by Treasury. In the event the MEC approved the upgrades on 26 August 2013, he would have specified so.

THE APPLICANT’S VERSION

Ms. Mariana Albertse

- [14] It is the MEC of the Respondent who has the authority to approve upgrades. The job upgrades are part of the job evaluation process. The memo as appearing at page 5 of Bundle “A” entitled “Recommendation on Staff Audit” dated 26 August 2013 was signed by the then MEC of the Respondent. The word “tentative” means approval. She discussed the issue of the upgrades with the MEC of the Respondent and even discussed the issue after the signing off process.
- [15] The MEC explained to her that the word “tentative” meant that there was a condition in that in the event there were challenges he could alter the decision. The MEC did

not change the approval. The document appearing at page 43 of Bundle “A” entitled “Implementation of the Outstanding Upgrades and the Activation of Upgrade Functions on Persal System” was submitted by the Chief Director of Human Resources on 19 October 2016. The latter mentioned upgrades of 2016 were approved by the MEC of the Respondent.

- [16] There were upgrades that were implemented by the Respondent after the 2013 staff audit. There were also upgrades that were not implemented after 2013. The Treasury Department was also involved in 2016 upgrades process. The document as appearing at pages 43 to 71 of Bundle “A” is a list of outstanding upgrades which were approved by the MEC. She did not compile the latter mentioned document as it was compiled by her superiors. The details of Ms. Hamad and as appearing at page 49 of Bundle “A” relate to her dismissal by the Respondent. In the event the MEC did not approve the job evaluation, money would not have been paid by Treasury.
- [17] The document appearing at page 6 of Bundle “A” relates to job upgrades that were approved by the MEC and it was prepared by her then superior, namely Ms. Mabitle. She was later involved in the process by checking job contents, job descriptions, discrepancies. The process also involved job evaluations.
- [[18] Mr. Fikizolo and Mr. Mapena where not present in the meeting that she had with the MEC in respect of the memo dated 26 August 2017. The document found at page 38 of Bundle “A” is an email from Ms. Mabitle. The document at page 37 of Bundle “A” is a memo from the Applicant relating to the 2013 upgrades.
- [19] Pages 72 to 76 of Bundle “A” outline a list of organizational development work that was approved by the MEC. The Applicant continued to perform organizational development work including job evaluations, appointments and placements despite of her dismissal by the Head of Department. The Applicant continued to perform the latter mentioned functions after she appealed the Respondent’s decision to dismiss

her. The MEC approved more than one hundred and eighty organizational development processes after her dismissal by the Head of Department.

Under cross-examination, Ms Albertse responded as follows;

- [20] She was employed within the Public Service for approximately thirty (30) years. She started to perform Organizational Development functions as from 1990. She was appointed as the Deputy Director -Organizational Development in October 2002. She was trusted by the Respondent to advise it on Organizational Development issues.
- [21] The document appearing at page 94 of Bundle “B” relates to an Arbitration Award involving Ms. Hamad versus the Respondent. She was a witness of Ms. Hamad in the arbitration proceedings. The document appearing at page 103 of Bundle “B” is an email she sent to C.M.J Blom advising her that it was correct to upgrade Hamad to Level 5 in terms of the staff audit. What appears at page 104 of Bundle “B” is a memo from the Applicant to the Respondent’s Chief Financial Officer sensitizing the latter to obtain money from Treasury for the upgrades.
- [22] At page 97 of Bundle “B” she stated in the arbitration proceedings of Ms. Hamad that the upgrades were approved by the MEC on 26 August 2013. The approval date of the upgrades was 26 August 2013. The MEC told her that the term “tentative” meant that there was an approval but it was subject to conditions, for example, funds. In terms of the memo that was signed by the MEC dated 26 August 2013, all the items therein were agreed to by the MEC. The MEC told her that “tentative” meant “approval”. She was merely appointed by the Respondent as a Middle Manager and not a politician.

ANALYSIS OF EVIDENCE AND ARGUMENTS

- [23] In my analysis, I have considered the evidence and arguments from both parties. I am only going to deal with substantive issues pertaining to the dismissal of the Applicant.
- [24] The Applicant was dismissed by the Respondent after she was found guilty of misconduct in terms of **Resolution 1 of 2003 Disciplinary Code and Procedure for the Public Service** in that on the 30th January 2015 she committed an act of dishonesty when she misrepresented facts in the arbitration hearing of Ms. C.S Hamad, when she mentioned that the MEC of Health approved a staff audit for the upgrading of the post of Ms. C.S Hamad from Level 2 to Level 5 on the staff establishment of Pelonomi Hospital.
- [25] During the arbitration proceedings the Applicant testified that it was unfair for the Respondent to dismiss her on 3 February 2017 as the staff audit in question was approved by the MEC on 26 August 2013. On the other hand, Mr. Fikizolo gave testimony to the effect that the MEC never approved the staff audit process. Mr. Mapena testified that he was the representative of the Respondent in the arbitration of Ms. C.S Hamad and he was present when the Applicant made the representation. The Applicant did not challenge the evidence of Mr. Mapena in so far as his presence in the arbitration proceedings was concerned.
- [26] The version of the Applicant was that the MEC approved the staff audit process that he signed on 26 August 2013. The latter mentioned is found at **page 5 of Bundle "A"** with the heading "RECOMMENDATION ON STAFF AUDIT" and with specific reference to paragraph 4 therein. At paragraph 4 it is provided that "upgrades of posts be approved and implemented, as per the OUTSTANDING UPGRADES, based on job evaluation results". The word "tentative" is hand written next to paragraph 4. The version of the Applicant was that tentative means approval.

- [27] Mr. Fikizolo testified that the word “tentative” does not mean approval and the MEC never intended to approve the staff audit process as envisaged at paragraph 4 in the memo dated 26 August 2017. Mr. Mapena also submitted that the word tentative was never meant to mean an agreement. The Applicant stated that the MEC continued to implement staff audit processes on and about 2016, thereby confirming that the staff audit process was in question was approved by the MEC on 23 August 2013.
- [28] The evidence of the Applicant that she was the only person present in the meeting with the MEC was not challenged by the Respondent. Mr. Fikizolo and Mr. Mapena also confirmed that they were not present when the Applicant discussed the recommendations of staff the staff audit on 26 August 2013. The Applicant also provided a list of organizational development work processes that were approved by the MEC from **page 72 to 77 of Bundle “A”**. The Applicant testified that the Applicant was involved in some of the work processes listed at **page 72 to 77 of Bundle “A”**. The Applicant also submitted that the MEC still approved approximately one hundred and eighty (180) processes such as job evaluations, placements and appointments after her dismissal by the Head of Department whilst waiting for her outcome of the appeal application with the Office of the MEC.
- [29] The following issues were therefore clear from the evidence of the Applicant; that the MEC approved the posts upgrades on 26 August 2013, that she was the only person with the MEC when the memo as appearing **page 5 of Bundle “A”** was signed off by the MEC, that the word “tentative” means approval or agreement, that the MEC continued to approve staff audit processes after she was dismissed by the Head of Department, that the Respondent still continued to trust her after her dismissal by the Head of Department and that she did not misrepresent herself in the arbitration of Ms. C.S Hamad.
- [30] The Arbitration Award in the matter between Ms. C S Hamad and the Respondent dated 9 February 2015 and appearing at from **page 16 to 14 of Bundle “B”**, the Applicant testified at paragraph 20 that “The Applicant (Ms. Hamad) was not an

isolated case and 763 others were approved by the MEC on 26 August 2013". It is worth mentioning the Ms. Hamad was not successful in her promotion dispute. ..

[31] It is trite law in arbitration proceedings that the one who alleges has an onus to prove his or her claim on a balance of probabilities. The Applicant was adamant during the arbitration proceedings before me that the word "tentative" meant "approval". I am not satisfied that that the staff audit process in question as per paragraph 4 of memo dated 26 August 2013 was approved by the MEC. The Applicant submitted that the Respondent expected her to call the MEC to testify in support of her case. Why did the Applicant not call the MEC to testify in support of her case in the arbitration proceedings before me? The Applicant in her closing arguments submitted that "evidence submitted by the Applicant in support of its case on **Bundle "A" at page 5** which was supported by the testimony of the Applicant in that following the MEC having indicated the word "tentative" and at the bottom of the page "agreed and supported as indicated above" dated 26.08.2013 with is signature, she approached the MEC for clarification on the use of the word tentative and the MEC indicated that it means he approves but he may change his mind depending on the financial circumstances".

[32] In the matter of *Bargaining Council for the Furniture Manufacturing Industry, Kwa-Zulu Natal v UKD Marketing CC & Others [2013] 34 ILJ 96 [LAC]* it was held that an adverse inference will be drawn against a party for failing to testify only if the evidence of the party calls for a reply. It is a prerequisite to the application of the rule that an adverse inference should be drawn from a party's failure to call a witness that the witness/es that the evidence that party faces must have been of such a nature that, at the time the other party closed its case, there was sufficient evidence to enable the Court to say, having regard to the absence of an explanation, that the other party's version was more probable than not". It is therefore my finding that the Applicant could have called the MEC in question as her witness or should have subpoenaed him to the proceedings.

- [33] I do not agree with the Applicant's contention that word "tentative" means "approval". The Applicant's version that the words "agreed and supported as indicated above" meant that the MEC agreed to the "upgrade of posts . . . based on job evaluation results" does not make sense. At page 939 of the South African Oxford Dictionary the word "tentative" is described as "done without confidence". Moreover, in the Dictionary.com "tentative" is described as meaning "unsure, uncertain and not definite".
- [34] Finally, the Applicant was basically dismissed for "dishonesty" and or "misrepresentation". In the matter of Maponya v SALBC & Others [2015] 140 [LC] allegations relating to irregular conclusion of contracts, concluding irregular appointments, making irregular payments and misrepresentation in respect payment of loans, was held to be serious in nature warranting dismissal under the circumstances.
- [35] The Applicant had long service with Respondent. The Organizational Development function is normally located within the Human Resources Department in most government institutions. No evidence was presented by the Applicant to the effect that she was not working within the Human Resources Directorate or Chief Directorate. I am therefore satisfied that the Applicant was aware of the implications of "misrepresenting herself in her role of an Organizational Development Middle Manager", **(my emphasis)**. The Applicant was therefore aware of the rule in respect of dishonesty and or misrepresentation, that the rule was valid and reasonable and that she broke the rule and that dismissal was an appropriate sanction in the circumstances. I therefore find that the dismissal of the Applicant by the Respondent was substantively fair in line with Item 7 in Schedule 8 of the Code of Good Practice – Dismissal in the Labour Relations Act 66 of 1995 (as amended).

AWARD

[36] The dismissal of the Applicant by the Respondent was substantively fair.

[37] The Applicant's claim of unfair dismissal is hereby dismissed.

A handwritten signature in black ink, appearing to read 'Ndlebe', is enclosed in a thin black rectangular border.

Thando Ndlebe

Commissioner: PHSDSBC