ARBITRATION AWARD

PHSDSBC
PUBLIC HEALTH AND SOCIAL DEVELOPMENT SECTORAL BARGAINING COUNCIL

Case No: **PSHS1162-16/17**
Commissioner: **Gerald Jacobs**
Date of award: **16 November 2017**

In the matter between:

NEHAWU obo Themba N and others (Union/ Applicant)

and

Department of Health- Northern Cape (Respondent)

Introduction

1. This is the award in the arbitration the National Education Health and Allied Workers Union (NEHAWU) on behalf of N Themba and others, the applicants and the Northern Cape Department of Health, the respondent.
2. The applicants are cited as Ms N Ntombi Themba and Ms Kealeboga Dikoko.
3. The arbitration was held under the auspices of the Public Health and Social Development Sectoral Bargaining Council (PHSDSBC) in terms of section 186(2) (b) of the Labour Relations Act, 1995 as amended (the "Act") and issued in terms of section 138(7) of the Act.
4. It was heard on 22 August 2017 and 3 November 2017 at Kimberley Hospital Complex. On the first scheduled day, 22 August 2017, Mr Mlawuli Mguye of the trade union NEHAWU represented the applicants. The respondent was represented by Mr Jack Pudikabekwa, its Labour Relations Practitioner. At the start of the proceeding, the parties brought it to my attention that it would not lead any oral evidence. They requested that I

determine the dispute on paper. It was then agreed, amongst others, that they provide the applicants' salary information, all correspondence between the parties before and after the suspension, as well as, the agreement that was concluded between the respondent and employees that were on suspension. The parties had until 29 August 2017 to submit all relevant documentation together with their respective written arguments. However, this was not done. The respondent representative also failed to file its written arguments. The matter was then re-scheduled on 3 November 2017 to allow the parties to provide all relevant documentation. Another Labour Relations Officer, Mr Junaid Tswaile represented the respondent and submitted its written arguments together with all relevant documentation.

Issue to be decided

5. The issue to be decided is whether the suspension of the applicants on full pay was unfair and amounted to an unfair labour practice in terms of s186(2)(b) of the Labour Relations Act 66 of 1995 ("the LRA").
6. The applicants sought maximum compensation.

Background to the dispute

7. It is common cause evidence that sometime in October 2016 there was a work stoppage by the employees of the respondent who are also members of the applicants' union. The respondent says the stoppage amounted to an unlawful strike while the applicants' union says the employees simply sought talks with the management. It is further common cause that the employees received their salaries during the strike. On 15 December 2016, the union and the management struck a deal in terms of which workers were to resume work. In terms of that agreement, however, there were some employees who performed their normal duties during the work stoppage and some did not. The respondent and the union agreed to freeze all the employees' salaries. It was agreed that all those employees' that cannot prove they performed their duties during the work stoppage would be identified and the salary already paid will be recovered. The exercise of identifying the employees who were suspected of engaging in the work stoppage was conducted after 15 December 2016 after all the workers had resumed their duties.
8. The allegation on which the two applicants were suspended was that they unfreeze all employees' salaries without authorisation. Ms Dikoko was notified of her suspension on 17 January 2017 and Ms Themba suspension was on 20 December 2016. Several conditions were attached to their suspensions. What was of importance was the fact that

their suspensions were with pay and it was to conduct investigations. It is necessary to mention that the disciplinary hearing was held on 13 February 2017, and the chairperson set the disciplinary hearing down for continuation on 20 to 21 February 2017.

9. Unhappy with their suspension, they referred with the assistance of their union an unfair suspension dispute to the Council. On 16 March 2017, the dispute was conciliated and a certificate of outcome issued, indicating that it remains unresolved.

Submissions received

10. The contentions advanced by the applicants in support of the relief they sought was essentially summarized in their written arguments. It was argued in writing that there were purportedly some grievous irregularities committed in the suspension of the applicants. The launch pad for the attack of the unfair suspensions consists of a number of grounds.
11. It was argued on behalf of the applicants that the conduct of the respondent was not consistent with the Promotion of Administrative Justice Act 30 of 200, section 3(2)(b)(i) & (ii) which provide that adequate notice of the nature and purpose of the proposed administration action (precautionary suspension) and a reasonable opportunity to make representation.
12. The second ground on which applicant attacked the legality of his suspension was that precautionary suspension defined in clause 7.2.7(2) of the Public Service Disciplinary Code and Procedure, PSCBC Resolution 1 of 2003 as a measure through which the employer may suspend the employee on full pay if the employee is alleged to have committed a serious offence and the employer believes that the presence of such employee at the workplace might jeopardise any investigation into alleged misconduct or endanger the well-being or safety of any person or state property. The precautionary suspension was unfair because the applicants were not given an opportunity by the employer to give reasons why the suspension would not have been necessary.
13. The third ground of attack was that the information the employer required was under the control of the systems controller. This prejudice the applicants in that they were not allowed to perform their responsibilities which denied them an opportunity to receive a performance bonus and or pay progression. Mr Mguye for the applicants sought to rely on the judgment in *MEC for Education, North West Provincial Government v Errol Randal Gradwell (case JA 58/10 Labour Appeal Court*) in which this Court held at paragraph 45 that *"The right to a hearing prior to a precautionary suspension arises therefore not from the Constitution, PAJA or as an implied term of the contract of employment, but is a right*

located with the provisions of the LRA, the correlative of the duty on employers not to subject employees to unfair labour practices. That being the case, the right is a statutory right for which statutory remedies have been provided together with statutory mechanisms for resolving disputes in regard to those rights".

14. Mr Mguye contended further that although the respondent has a right to suspend its employees, the Labour Court in *Mogothle v Premier of the North West Province and Another* (2009) 4 BLLR 331 (LC) place three requirements on the respondent that must be met before it decides to suspend and held *"first that the employer has a justifiable reason to believe, prima facie at least, that the employee has engaged in serious misconduct; secondly, that there is some objectively justifiable reason to deny the employee access to the workplace based on the integrity of any pending investigation into the alleged misconduct or some other relevant factor that would place the investigation or the interest of the affected parties in jeopardy; and thirdly, that the employee is given the opportunity to state a case before the employer makes a final decision to suspend the employee".*
15. Mr Pudikabekwa on the other hand contend in his papers that in terms of the Public Service Disciplinary Code and Procedure, Resolution 1 of 2003 precautionary suspension is a measure through which the employer may suspend the employee on full pay if the employee is alleged to have committed a serious offence, and the employer believes that the presence of such 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. There were allegations of serious misconduct and the applicants' continued presence might have jeopardised the investigations. The respondent considered the suspension purely on the basis that it needed to give investigation a chance to take place without any perceived jeopardy on the part of any individual. He states further that the Disciplinary Code and Procedure of the Department (PSCBC Resolution 1 of 2003) is silent on the requirement of a hearing to provide the applicants with an opportunity to state their case prior to the precautionary suspension being instituted. He seeks to justify why there exists no right to be heard prior to suspension by referring to the Labour Court case Koka v Diector General: Provincial Administration North West Government (1997) 18 ILJ 1018 (LC), Manamela v Department of Cooperative Governance, Human Settlement and Traditional Affairs , Limpopo Province and Another (J 1886/2013) [2013] ZALCJHB 225 (reported 5 September 2013), where in this case the Court held that it is not bound by the Labour Court decision in *Mogothle v Premier of the North West Province* and all judgements

following it in so far as the judgement of Mogotle seeks to rely on and is regarded as authority for general right of fairness implied into employment contract of employment as a basis for concluding that an employee is entitled to be heard before suspension and is entitled to the reasons for suspension.

Analysis

16. The main issue that arises for determination is whether the respondent is legally entitled to suspend the applicants without giving them an opportunity to be heard in terms of natural law otherwise known as audi alteram partem rule.
17. Mr Mguye argued that the respondent conduct was not in line with PAJA. This implies that the suspension was an administrative act. Significantly, however, Mr Mguye gave no authorities for this proposition, and only say that in terms of that section an employee must be given a reasonable opportunity to make representation. This argument is not sustainable in the light of the decision of the Labour Court Judgement in *SAPU & another v National Commissioner of the South African Police Service & another (2006)* 1 BLLR 42 (LC) where it was held that suspensions are employment or labour relations matters, and not administrative acts. This view is also supported by the Constitutional Court in *Chirwa v Transnet and Others (2008)* 2 BLLR 97 (CC)
18. Resolution 1 of 2003 as amended provides in clause 7.2 under the heading "***Precautionary suspension****"* as follows;
    a) *"The employer may suspend an employee on full pay or transfer the employee if*
        i. *the employee is allegedly 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*
    b) *A suspension of this kind is a precautionary measure that does not constitute a judgement and must be on full pay.*
    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."*
19. The question whether the respondent could suspend the applicants pending an investigation is clearly answered by this clause, for as employees of the respondent the

applicants was governed by the resolution. On the issue of whether the suspension was unfair because the applicants were not afforded a hearing**.** It's clear that the respondent concedes that the applicants were not afforded a hearing prior to suspension; they merely seek to justify why they could not give him a hearing. Mr Pudikabekwa submissions on why the hearing was not given or why it was deemed not necessary are that the resolution does not require the respondent to hold a hearing prior to the suspension. He also relied on case law to justify his contention that there is no general right to be heard prior to suspension if the suspension is a precautionary measure and not discipline. However, in the case of *MEC for Education: North West Provincial Government v Errol Randal Gradwell (2012)* 8 BLLR 747 (LAC) the Court held that the approach of the Labour Courts has not been entirely consistent, "*and various formulations of the applicable standard have been expressed. In most cases the Labour Court has held the view that the audi alteram partem rule applies in precautionary suspension cases, notwithstanding the mitigation of the detrimental consequences by the payment of full pay, because the prejudice an employee may suffer as a result of suspension is not limited to financial loss but may extend to issues of integrity, dignity, reputation and standing in the community. There is nevertheless a noticeable lack of clarity in the case law about the basis upon which the audi alteram partem rule applies"*. The Court held further that every employee in terms of section 185(b) of the LRA has the right not to be subjected to unfair labour practices. Section 186(2) of the LRA defines an unfair labour practice to mean *inter alia* any unfair act or omission that arises between an employer and an employee involving the unfair suspension of an employee. The opportunity to make representation to show why a precautionary suspension should not be implemented is sufficient compliance with the requirement of fair procedural fairness.

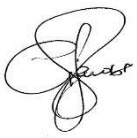
20. From the above case, it becomes apparent that Section 186(2) (b) suggest that an unfair labour practice arises between an employer and employee will be deemed unfair if there is an unfair act or omission by an employer relating to the issue of suspension of the employee concern. Section 23(1) of the Constitution of the Republic of South Africa, Act, 1996, entrenches the right of every person to fair labour practices. As I see it, the rules of natural justice are not excluded in suspension cases merely because it is not stated in the resolution, unless specifically prevented by for instance, a statute, collective agreement or the employer's own in-house rules (see *SAPO Ltd Jansen Van Vuuren NO & others (2008)* 8 BLLR 798 (LC). The basic principle is that employees of public bodies like the respondent who are empowered to make decisions affecting other employees should exercise their functions in a fair manner that is in line with section 185 of the LRA

and Section 23(1) of the Constitution. Therefore the respondent's decision not to afford the applicants a hearing has merit, however, no suggestion was made that the absence of the hearing had caused them irreparable harm because the performance bonus and or pay progression would be rectified after they had been found not guilty at the conclusion of the disciplinary enquiry. The applicants unhappiness was merely because they were not afforded a hearing and it is untenable to suggest that they suffered any prejudice as a result.

21. In light of the above, I conclude that the matter stands to be dismissed.

Award

22. In the circumstances, I find the suspension of the applicants on full pay did not amount to an unfair labour practice in terms of s186(2)(b) of the Labour Relations Act 66 of 1995 ("the LRA").
23. The case is dismissed.

Signature: 

Gerald Jacobs

Commissioner: