PHSDSBC

PUBLIC HEALTH AND SOCIAL DEVELOPMENT SECTORAL BARGAINING COUNCIL

ARBITRATION AWARD

Case No: **PSHS1163-16/17**

Commissioner: **Arne Sjolund**

Date of award: **29 May 2017**

In the matter between:

POPCRU OBO MODIKOE (APPLICANT)

and

DEPARTMENT OF CORRECTIONAL SERVICES- NORTH WEST (RESPONDENT)

DETAILS OF HEARING AND REPRESENTATION

1. This matter was set down for an arbitration hearing on 3 April 2017 but could not be finalized due to the respondent's witness not being available. The parties agreed that the PHSDSBC could set the matter down on 18 May 2017 to be finalized. On 18 May 2017, the matter was set down for arbitration as agreed by the parties where the respondent made an application for postponement. Postponement was refused and I will further deal with this issue in my award. The matter was heard and finalized on 18 May 2017 at the Department of Correctional Services offices situated at the corner of Nelson Mandela & Thabo Mbeki drive in Rustenburg.

2. Ms Modikoe (hereinafter referred to as "the applicant") was represented by Adv Dire appointed by the POPCRU. Ms Sinthumule employed as a Senior Admin (Investigations) appeared on behalf of the Department of Correctional Services – North West (hereinafter

referred to as "the respondent"). Ms Sinthumule stated that she was not mandated to represent the respondent in this matter but would sit in during the arbitration.

3. As stated above *supra* par. (1), at the start of the arbitration hearing an application was made for the matter to be postponed. Ms Sinthumule in her application stated that Ms Moloto who dealt with the matter was off sick and that she (Ms Sinthumule) was not mandated to deal with the matter. She submitted that she had merely brought Ms Moloto's medical certificate and attended to inform the arbitration hearing that the matter must be postponed. The application for postponement was opposed where the applicant's representative submitted that the matter had been excessively delayed due to the respondent and that the applicant had already suffered severe prejudice due to the delay. In the matter of *Masstores (Pty) Ltd t/a Builders Warehouse v CCMA & others [2006] 6 BLLR 577 (LC)* Cele JL held that as follows, "however, once the applicant had lodged an application for the proceedings to be postponed it behove of the [commissioner] to have acted in compliance with the duties of a commissioner. He had then to listen to the merits and demerits of the application from both parties; he had to apply his mind to the issues at hand and had to consider among others; whether it was in the interest of justice and fairness that the postponement be granted or refused, what prejudice was likely to be suffered by either party should the postponement be granted or refused, whether such prejudice could be cured by an appropriate order, and/or whether the application was bona fide or a mere tactical maneuver. The caveat to the application of these general principles is that, as held in the LC matter, *Carephone Pty Ltd v Marcus NO & others [1998] 11BLLR 1093 (LAC)*, the statutory requirements for the functioning of the CCMA 'are less congenial to the granting of postponements than is the case in a court of law'. In this regard, Froneman DJP stated: "there are at least three reasons why the approach to applications for postponements in arbitration proceedings under the auspices of the Commission under the LRA is not necessarily on a par with that in courts of law. The first is that arbitration proceedings must be structured to deal with a dispute fairly and quickly. Secondly, it must be done with "the minimum of legal formalities", and thirdly, the possibility of making costs orders to counter prejudice in good faith postponement applications is severely restricted". Another important principle emerging from *Carephone* is that, in line with the fact that the grant of a postponement is an indulgence and involves the exercise of a discretion on the part of a commissioner, the refusal of a postponement is reviewable only if the discretion was not judicially exercised. Parties should not assume that a postponement will be granted and should come prepared to proceed should the postponement be refused. The principles set out above have been applied by the courts

fairly and consistently over many years. Postponement is an area which highlights the tension between expeditious dispute resolution and a fair hearing. Adv Dire submitted that the matter had already been excessively delayed. From the case file, it was clear that this dispute had been taking a long time to come to a finality. It was also evident that it was not due to the conduct of the applicant. When I questioned Ms Sinthumule if there was not anyone else that could represent the respondent she stated that there was not. I find this highly unlikely and it would appear that the respondent assumed that postponement would be granted. I also probed into the respondent's readiness to proceed and asked Ms Sinthumule where the respondent's witnesses were, she was unaware of where the witnesses were or who they were. This suggested that the respondent had no intention to proceed with the matter and that their witnesses were not arranged. It should be noted that at least one of the respondent witnesses were not available at the first sitting. In the matter of *National Airlines (Pty) Ltd v Mudau & others [2003] 3 BLLR 279 (LC)* the Court found that postponement was fairly refused on the grounds that witnesses were not available where the employer ought to have anticipated in advance of the arbitration that a witness would be required to give evidence on its behalf. The applicant also failed to comply with the CCMA rules where they knew or should have known that they had to make an application for postponement prior to the arbitration taking place. In line with the *Carephone* matter I considered that fact that this matter has already been delayed and it would not be fair or in the interest of justice to grant a postponement. In conclusion, the prejudice that the applicant would suffers should postponement have been granted outweighs the prejudice the respondent would suffer. Ms Sinthumule was granted to opportunities to consult and arrange for someone to come and represent the respondent but after more than one hour submitted that she would not to partake in the arbitration hearing but would remain present.

4. Bundles of documents were submitted into evidence by the applicant marked bundle (A; B; and C).

5. The matter was finalized on 18 May 2017 where the applicant party proceeded with their closing arguments. The respondent opted not to submit closing arguments.

ISSUE TO BE DECIDED

6. This matter is brought in terms of section 186 (2) (b) of the Labour Relations Act 66 of 1995, as amended (LRA) – i.e. *unfair disciplinary action*.

7. I am tasked to determine whether the respondent committed an unfair labour practice by issuing the applicant with a warning valid for six months and should I find in favour of the applicant, order the appropriate relief.

BACKGROUND TO THE ISSUE

8. The applicant was employed by the respondent on 1 May 1999 and received a written warning valid for six months after being charged for misconduct. The applicant is appointed as a Senior Social Worker level 8 with the respondent. The applicant submitted that she was not guilty on the charges brought against her and is seeking for the warning to be set aside.

9. The allegations brought against the applicant relates to the applicant violating clause (K) of the respondent disciplinary code and procedure Resolution 1 of 2006 where it is alleged that she refused to carry out a lawful instruction by not assisting the Losperfontein Correctional Centre with their Lifers report backlog, and failed to attend meeting dealing with this issue. The respondent described the misconduct as "gross".

SURVEY OF EVIDENCE AND ARGUMENT

10. It is not the purpose or the intention of this award to provide a detailed transcription of all the evidence that was placed before me even though all evidence and arguments were considered. I have summarised the evidence that I found to be the most relevant to make a determination in this dispute.

Applicant's Case:

11. The applicant testified that on 15 December 2015 Ms Muller came to her office and inquired if she would be willing to assist with a Lifers report backlog at Losperfontein Correctional Centre. She informed Ms Muller that she would decide when she came back from leave as she was about to go on leave. When she returned from leave she realized that she had lots of work and could not assist at Losperfontein. The applicant then called Ms Muller and

informed her that she had too much work of her own and would not be able to assist. On 13 May 2016 Mr Motaung informed her that he was investigating the matter where it was alleged that she refused to help at Losperfontein. On 17 May 2016 Mr Motaung took a statement from the applicant regarding the issue and at the time he had a letter appointing him to investigate the matter dated 17 February 2016. On 2 September 2016, the applicant received a notice to attend a hearing scheduled for 14 September 2016. The hearing was then postponed to 17 October 2016 due to the Mr Motaung, the initiator having another hearing. The hearing was then again postponed to 25 October 2016 due to the initiator being sick. On 25 October 2016, the initiator failed to show up for the hearing and the hearing was again postponed. On 7 November 2016, a new date for the hearing was communicated to the representative of the applicant for the hearing to take place on 16 November 2016. The applicant testified that the matter was eventually finalized on during November 2016, almost one year after the alleged offence. She testified that she received no instruction to go and work at Losperfontein and no letter was sent to her instructing her. At her workplace, she is the only Social Worker and had about 480 cases to deal with. The applicant testified that she never refused to attend the meeting as alleged. One of the meetings did not take place as she was informed that Mr Buthelezi was in Losperfontein and the other meeting did not take place as she wrote an email informing the respondent that she could not attend.

Respondent's case:

12. Ms Sinthumule opted not to ask the applicant questiones or dispute her version. She also opted not to place the respondent's case on record.

ANALYSIS OF EVIDENCE AND HEADS OF ARGUMENT

13. The applicant submitted that the matter took a long time to come to a finality. I will therefore fist deal with the procedural fairness in this matter. Section 7.3.2 of the respondent's disciplinary code states that a formal disciplinary hearing should be finalized within 60 days from the date of finalization of the investigation. The applicant's alleged refusal took place on 15 December 2015. From the evidence, it would appear that Mr Motaung was appointed to investigate this matter on 17 February 2016 almost two months later. The applicant was then charged on 2 September 2016 and the hearing was scheduled for 14 September 2016 about seven months later. The hearing was then postponed due the respondent a couple of times. Although the applicant testimony remained undisputed it was backed up by documentary evidence. I am the view that the responded failed to comply with their own

disciplinary code and the applicant was not only unfairly treated in terms of the procedural fairness in this matter but was grossly unfairly prejudiced due to the respondent not finalizing the investigation and holding the hearing at least within a reasonable time. In the matter of the matter *of riekert v CCMA & others (206) 27 ILJ 1706 (LC)* the Court held that where no explanation was provided for the delay in holding a hearing would be deemed unfair. It is unlikely that any reason would justify the excessive delay in this very simple matter. It is trite law that a hearing must be convened as soon as possible after the incident which led to the disciplinary action so that facts are still fresh in the minds of the parties and their witnesses.

14. The respondent charged the applicant for misconduct where it is alleged that she refused an instruction to assist at Losperfontein and failed to attend consultative meeting related to the need for assistance at Losperfontein. The applicant submitted that's she was not guilty on the charges brought against her. The applicant testified that she never refused and testified that she was requested to help but stated that she would decide after she returned form leave. When she returned from leave she had too much work of her own and informed that she would not be able to assist. It is the respondent case that the misconduct was gross in nature and would relate to insubordination. In *Wasteman Group v South African Municipal Workers' Union [2012] 8 BLLR 778 (LAC)* the Court considered the difference between insubordination and gross insubordination and held that the difference is a question of degree. It was held that there is a difference between an employee that when an employee that deliberately refused to obey and instruction, expressly defying an instruction and challenging the authority of the employer, especially in the presence of other employees. No evidence was placed before me that the applicant was given a lawful instruction ant that she refused or defied such instruction. The applicant also submitted that she provided reasons for not being able to assist and for not attending the meetings. The respondent in their charge brought against the applicant stipulates that the applicant refused to assist, which appears contradictory when using the word instructed. I therefore find the applicant not guilty on the charges brought against her.

15. The applicant disposed of the onus to prove that the respondent committed an unfair labour practice and is therefore entitled to relief. Accordingly, I order as follow:

AWARD

16. The respondent's conduct constitutes an unfair labour practice.

17. The six-month written warning issued against the applicant by the respondent is hereby set aside and is of no force and effect and should be expunged from her disciplinary record with immediate effect.

18. No order as to cost is made.

Arne Sjolund

Commissioner