PHSDSBC

PUBLIC HEALTH AND SOCIAL DEVELOPMENT SECTORAL BARGAINING COUNCIL

ARBITRATION AWARD

Arbitrator: **Mr. T. Ndzombane**

Case No.: **PSHS1277-16/17**

Date of award: **19 June 2017**

In the matter between:

NEHAWU OBO N.E RALARALA (Applicant)

and

DEPARTMENT OF SOCIAL DEVELOPMENT- WESTERN CAPE (Respondent)

DETAILS OF HEARING AND REPRESENTATION:

1. The arbitration hearing was scheduled for and heard on 29 May 2017, under the auspices of the Public Health & Social Development Sectoral Bargaining Council at Premier's Office in Cape Town. The applicant, Ms Ralarala, was represented by a Union Official, Mr Mbana. The respondent, Department of Social Development –Western Cape, was represented by its Assistant Director, Mr Bogehagen.

2. I proceeded with the matter in terms of Section 138(5) (b) (i) of the Labour Relations Act 66 of 1995, as amended ('the Act"). The proceedings were digitally recorded and typed notes were taken. The respondent submitted a bundle of documents which was accepted and admitted as it purports to be. Even though the parties agreed to submit their closing arguments on 6 June 2017 but the applicant only did so on 8 June 2017.

BACKGROUND

3. The applicant stated that she is employed by the respondent as Assistant Manager: Business Development under Partnership Directorate. She started working for the state as from 1988. Whereas she started working for this department in 2007 which she was later placated into this post in 2010. She challenges the sanction

which she believes was too harsh in the circumstances or I should make a determination if, she is guilty of all changes. If, she succeeds with her dispute she requested the sanction of two months suspension without salary be set aside.

4. The respondent stated that the applicant was charged with the following misconducts:

   i. *It is alleged that you are guilty of misconduct in that on or about 3 December 2014 you contravened the regulation c.4.12 of the Code of Conduct for the Public Service by contravening and/failing to comply with the prescripts of the Recruitment and Selection Policy Framework in that you were found to be in possession of confidential recruitment and selection documentation, the release that of which was not authorised and was not obtained in accordance with the provisions of the relevant prescripts.*

   ii. *It is alleged that you are guilty of misconduct in that on or about 27 April 2015 you failed to obey a lawful instruction from the Head of Department to provide his office with the details of how the confidential document came into your possession. Your refusal to carry out the instruction was serious, persistent and deliberate.*

   iii. *It is alleged that you are guilty of misconduct in that in a letter dated 29 April 2015 to the Head of Department, you made, inter alia, the following disparaging remarks to the Head of Department regarding his character and otherwise conducted yourself in a manner that was disrespectful to the Head of Department. The remarks made , inter alia, is : " or an arbitrary style of a system silence any voice for reporting irregularities, the same as the old apartheid regime, is your conduct not different from those kinds of administrative officials that were in the same position that you are in".*

5. The applicant was found guilty on all three charges and the sanction of a final written warning valid for six months and two months suspension without pay were meted out. The respondent views the charges in a very serious light and are considered to be dismissible.

ISSUE TO BE DECIDED

6. I am required to determine whether or not the respondent was involved in an act of unfair labour practice when it issued two months suspension without pay to the applicant on 6 December 2016.

SURVEY OF APPLICANT'S EVIDENCE AND ARGUMENTS

7. **Ms Nomvume Ralarala** stated that she is the applicant in this matter and she presented the following evidence under oath. She was placed to this in January 2010 and thereafter, she received an acting allowance. In 2013 the post was advertised which she had submitted her application and curriculum vitae. There were delays the outcome of the shortlisting and was not forthcoming. As a result of this she decided to write to the Head of Department to enquire about the process. The response was that the process not yet finalised.

8. At a later stage she was informed that she was not shortlisted because she did not submit her application. Even though she submitted both her curriculum vitae and the application the department indicated that it only received the curriculum vitae. She accepted the explanation. The department could not get a suitable person and the Head of Department suggested to that it should head hunt a candidate. However, the MEC was opposed to head hunting instead he proposed that the post should be re-advertised. As a result of this decision she continued to act on the post and she received the acting allowance.

9. In January 2014 the acting was stopped and the post was advertised. Although, the acting allowance was stopped she continued to do the same duties of the post. This time around she made sure that she submitted both Z83 application and her curriculum vitae.

10. On 1 December 2014 employees were complaining that there was a woman who was appointed as a Deputy Director on three year contract on Early Child Development. The bone of contention was that the post was not advertised and it was not part of organogram. Ms Julida Kruger was asked to act as a Director.

11. The recruitment process and policy requires a post to be advertised and it should exist on the department's structure. On 1 December 2014 the Head of Department introduced this woman to other employees.
12. On 2 December 2014 there was a letter written by NEHAWU complaining about a number of issues including this Early Development Childhood post. On 3 December 2014 she found a submission on her table and she does not know who put it there. She perused the document and found that the EDC post was not advertised and was not part of the structure. Moreover, the submission was signed on 3 December 2014 although the appointment was done on 1 December 2014. According to her this appointment was irregular because the post was not advertised and it did not form part and parcel of the organogram. The funds that were allocated into her post were transferred to this post.

13. On 5 December 2014 she was informed that the shortlisting was not approved by the Head of Department and the MEC. There was no written communication in this regard. She asked Ms Dreyer to assist her to

write a complaint to the Premier in order this matter to be investigated. The people that she complained about were the Head of Department and MEC. It is unfair that there were no interviews, the post is still in existence and she still performs the functions and duties of the post. On 9 December 2014 she wrote the letter and she was guided by her director. She sent the complaint with attachments (submission).

14. She thought somebody who was sympathetic to her situation had brought the submission to her desk. According to the submission she scored the highest score for shortlisting. It pained her that the interview was not conducted.

15. She took her annual leave and she came back on 16 January 2015. Upon her return she was informed that she was being investigated. Subsequent to that she was charged for being in possession of confidential documents. At first she thought she was called to be given a feedback regarding her complaint. It turned up that she was investigated; she felt that it was unfair to be investigated by the Head of Department who was implicated in her complaint.

16. She did not want to co-operate with the investigation as she felt she was a victim. According to her the department has powers to transfer the funds from one post to another. She and her director were not consulted when a decision to transfer funds was made. There was no transparency in the appointment this deputy director. The head of department lied that during the investigation she admitted that she knew the person who brought the submission to her desk. At the disciplinary hearing the transcript proved that she never said that she knew the person who gave her the submission instead she refused to co –operate.

17. She was of the opinion that there was no need to be charged until she received the feedback from the Premier. During the investigation she indicated that she was waiting for the feedback. She felt that she had been disadvantaged by decision to transfer the funds. When she received an instruction to provide the information as to how she got the submission she was very angry and felt let down by the system when she uttered those words towards the head of department. Subsequent to that she was admitted from the hospital for depression. There was no feedback received from the Premier until March 2016. She has a fairly good relationship with the head of the department as they have travelled together and assisted each other with transportation.

SURVEY OF RESPONDENT'S EVIDENCE AND ARGUMENTS

18. **Ms Ramula Patel st**ated that she is employed by the respondent. She was appointed to preside over the disciplinary hearing of the applicant. At the beginning of the hearing the applicant raised a point *in limine* that the charges be withdrawn on the premise that the investigating officer inferred she was aware of the person who left the submission on her desk although the transcript showed that she had not made this

assertion. The accusations were levelled against both the investigation officer and the heard of the department.

19. She considered the matter and found that Mr Macdonald relied on the investigator's report when he made the assertions which were done on the strength of the report. She took a decision not to discharge the matter instead she proceeded with the hearing as scheduled. After the findings were made with respect to the charges she had to consider the mitigating and aggravating factors. She imposed a final written warning and two months suspension without pay as she took into account that the applicant's long service and that she had a clean disciplinary record. She then used her long service as an aggravating factor because should have known better.

20. The issue to maintain confidential information is important. The head of department felt that he needed to protect the department. The applicant consistently refused to disclose the information as to who gave her the submission. She agrees with the head of department that the applicant was aggrieved and he had no issue with her for sending a compliant. The utterances by the applicant implied that the head of department is racist.

21. During the disciplinary hearing there was no discrimination allegations led by the applicant. The department is entitled to stop the funds and transfer tem where they are needed. The applicant only disclosed that she found the submission on top of her desk when her representative asked just to disclose as to how she received the information. There was a breakdown of trust between the parties. The charges warranted a dismissal but the fact that the head of department agreed that she was aggrieved she decided to impose these sanctions.

22. **Mr Robert Macdonald** stated that he is employed as the Head of the Department and he presented the following evidence under oath. The applicant lodged a complaint about what she perceived irregularities in the recruitment process of an employee to the Premier. To substantiate her case she attached this submission. The premier's office referred the matter to him for the investigation as to how she had managed to get submission because it was not released to employees. An investigator from forensic services was appointed and was tasked to investigate the matter.

23. There was a breach of confidential clause by those people who were part of the shortlisting who provided input on the submission to release it without permission. The forensic investigator told him that the applicant refused to give the information. Subsequent to that he requested the applicant to provide details as to how she received the submission but she still refused. During the course of communication she made these

unfortunate comments towards him. A disciplinary process ensured in addressing various issues and the aggression showed to the management. The department has a history of documents being leaked relating to recruitment process. In the past it paid a claim of R800 000. The issue is regarded in a serious light.

24. The members of the panel signed a confidentiality clause. This is a damaging process that needs to be stopped. The actual documentation was made after the decision to transfer the funds hence the submission was signed on 3 December 2014. They did not regard the stopping of interview process as serious because there were no people having contacted for the interview. The applicant was aware of the submission because she had accessed to the document. The leak was designed to damage the department. The applicant also failed to co-operate with the investigation. The employee should put the interest of the employer first instead she had put her own interest as she wanted to be appointed and that was self-serving. He is not an expert on the sanction and he cannot comment to it as to whether it was fair or not.

25. **I will refer to cross-examination and closing arguments where necessary in my analysis.**

ANALYSIS OF EVIDENCE AND ARGUMENT

26. One of the primary objects of the Labour Relations Act is to give effect to and regulate the fundamental rights conferred by section 23 of the Constitution including the right to fair labour practice. In **NEHAWU V University of Cape Town & Others (2003) ILJ 95 (CC)** the court held that *"the focus of s 23(1) is, broadly speaking, the relationship between the worker and the employer and the continuation of that relationship on terms that are fair to both. In giving content to that right it is important to bear in mind the tension between the interests of the workers and the interest of the employers which is inherent in labour relation. Care must therefore be taken to accommodate, where possible, these interests so as to arrive at the balance required by the concept of fair labour practices. It is in this context that the LRA must be construed"*.

27. Section 186 (2) (b) of the Labour Relations Act No. 66 of 1995 as amended ("LRA"), states that "*unfair labour practice means an unfair act or omission that arises between an employer and an employee involving unfair conduct by the employer relating the unfair suspension of an employee or any other unfair disciplinary action short of dismissal in respect of an employer*".

28. It is trite law that an employee has a duty to prove that an employer has embarked on act of unfair conducts relating to unfair labour practice. The issue that I need to determine is whether the sanction of two months suspension over a final written warning is fair. The answer this will it will be determined by the nature of the charges. In this case the presiding officer did not confer a sanction to each charge instead she gave combined sanctions to all charges. Even though this approach presents difficulties I have to weigh the

seriousness of each charge to determine whether in conclusion the presiding officer was correct in meting out those charges.

29. It appears that the respondent is of the view that the charges itself are very serious in nature and, generally, an employee who is found guilty of them may be dismissed.

30. I turn to charge 1 which the presiding officer found the applicant guilty of. There is no evidence that shows the applicant directly or indirectly solicited this submission she found on her desk. For the applicant to be found guilty of this charge surely the respondent should be able to demonstrate that she intentionally or participated in sourcing the document irregularly or unlawful.

31. It appears to me that this charge was conceived on the strength of the investigator's report which suggested that the applicant admitted knowing the person who had put the document on her desk and she was not willing to disclose for fear that person would be dismissed. Apparently, this report was found to be inaccurate as the applicant never said she knew the person who left this submission on her desk. A transcript exonerated her as it shows that she refused to co- operate with the investigation on the basis that she was waiting for a response from the Premier about her complaint.

32. It appears to me the mere fact that the submission was found on her desk for that alone she was found guilty without the department adducing any evidence for her wrong doing. Under cross-examination Mr Macdonald admitted that if, the applicant had informed him that she found the document on her desk she would not have been charged. Moreover, he did not have any problem that the applicant used the document to support her complaint.

33. At the disciplinary hearing the applicant did provide this information that she found the document on her desk. Both Mr Macdonald and the presiding officer appear to have accepted the explanation given by her that she found the document on her desk. There is no other evidence that is contrary to the one presented by the applicant. Interestingly, the presiding officer still found her guilty on this charge.

34. The applicant's evidence shows that she was not aware that this document was confidential as it was not marked confidential. It is common cause that at that stage the document was not released by the respondent. It is debatable whether indeed the document is confidential or but what is clear to me is that the document was not yet made public by the respondent. The respondent's evidence spears to suggest that the leakage has a potential to expose the respondent to civil litigation.

35. I find it very strange as to how this document would have exposed the respondent to litigation because this document can be sourced by the applicant through a subpoena or through section 16 of the Labour Rations Act

36. Or the respondent could use it to justify its decision. This is so in this case that the document is included. In my view the mere fact that a document was placed on her desk by a mysterious person that alone cannot make the applicant guilty of misconduct. Having considered the evidence before me I find no evidence that she directly or indirect involved herself or participated in soliciting the document in question. By implication she cannot be guilty of this charge.

37. I turn to charge 2 which relates to failure to obey a lawful instruction. Evidence shows that the applicant did not comply with this instruction which was a lawful and reasonable instruction. I must that the instruction was intended to get the culprit who has released the document without permission. As per the evidence of Mr Macdonald the panellists sign a confidential clause when they involve themselves with the recruitment hence it was important to know who had breached that confidentiality clause.

38. The difficulty about this instruction is the fact that it was done once and was never been repeated to the applicant. Moreover, there was no indication that if, she failed to comply with it that might lead to the department to take disciplinary actions against her. It stands to reason therefore that there is no way that she persisted in refusing to comply with the instruction because the request was only made once. The applicant's refusal was under the mistaken impression that she was being victimised because she had laid a complaint against both the MEC and HOD.

39. The mere fact that the instruction was not repeated and it did not caution her of the implication of non-compliance that itself makes the misconduct not that extremely serious. It is trite law that an instruction that is repeated and was not complied with that makes the instruction very serious. I am convinced that she should have been given a written warning for her indiscretion in this regard.

40. I then turn to charge 3 states that the remarks made , inter alia, is : *" or an arbitrary style of a system silence any voice for reporting irregularities, the same as the old apartheid regime, is your conduct not different from those kinds of administrative officials that were in the same position that you are in".* It is clear that the applicant made observation and came to some conclusions. In doing so she ought to have relied on the facts rather than to made wide and insinuating statements that she could not back up. The first part of her statement appears to her honest observation what was triggered she reported the recruitment irregularities and she felt being side-line to get the post she occupies on permanent basis.

41. In my view this observation does not appear to be disrespectful or disparaging toward the HOD. The second and the last part of the statement are overboard and do not appear to be based on facts. The applicant's own evidence shows that she has good relationship with the HOD. Her defence is that she was angry. To me one cannot intend to hurt others because she is not happy and angry about something. These types of insinuations cast doubt to the character of a person whether indirectly to infer that they may be prolonging the system that existed before 2014.

42. It is not clear whether the applicant had apologised for using these strong and inappropriate words towards her superior. I have taken into consideration the fact that Advocate Fritz's letter dated 11 December 2014 did not address allegations regarding the recruitment process as to how why the normal recruitment and selection process was not followed in employing the deputy director. This issue was part and parcel of the applicant's complaint that the process was not transparent and was not competitive as required. This lays credence to the allegations that the process was irregular and unlawful. Moreover, it is noted that the person who was appointed as a Coloured person. Interestingly, Mr Macdonald had requested for a head hunt when the appropriate was not found in the first interviews.

43. I also note that advocate Fritz had dealt with the appeal of this matter whilst the complaint was lodged about him. The applicant has a clean disciplinary record with a long service these should have worked in her favour as opposed against her. Moreover, it appears that there was a concerted effort to make sure that she is not appointed permanently to this post. Having considered the above I find this charge alone could not have led to dismissal instead the applicant should have been given a final written warning for her indiscretions in this regard.

44. It is not clear that a Director who assisted the applicant to draft her complaint was ever been questioned about her role and let alone being disciplined for her participation.

45. Having considered the evidence before me I find on balance of probabilities that the applicant has proved that the respondent was involved in an act of unfair labour practice when it punished her with the additional sanction of two months suspension without salary in the circumstances. This follows that the two month's suspension without pay issued against the applicant is hereby set aside and is replaced by a written warning for charge 2 and a final written warning for charge 3.

AWARD

46. I find that the respondent was involved in unfair labour practice when it issued two months suspension without pay to the applicant. I find that the applicant was not guilty of charge 1.

47. I therefore hereby set aside the two months suspension without pay and it is replaced with a written warning for charge 2 and final written warning for charge 3.

48. The respondent is also ordered to pay the applicant the two months' salary for her suspension without pay by no later than 30 June 2017.

49. I also order the applicant to personally and unequivocally make a written apology to Mr Macdonald by no later than 30 June 2017 for casting doubt to his reputation.

Arbitrator: Thuthuzela Ndzombane