

ARBITRATION AWARD

Case No: **PSHS177-19/20**

Commissioner: **Zuko Macingwane**

Date of award: **21 July 2020**

In the matter between:

LEHLOHONOLO WINSTON TAU AND 2 OTHERS

APPLICANT

and

DEPARTMENT OF HEALTH- FREE STATE

RESPONDENT

Details of the parties and representation

1. The matter was set down for arbitration on a number of days, there has been a number of postponements in this matter for various reasons. The postponement rulings were issued to that effect. The arbitration proceeded on 29 July 2019, 3 February 2020 and was finalized on 29 June 2020. In all occasions the arbitration was scheduled to commence at 10:00AM at the respondent's premises at Bongani Regional Hospital in Welkom. The applicants, Mr. Lehlohonolo Winston Tau, Ms. Sesi Noge and Mr. Sello Tihedi were present. Mr. Lehlohonolo Winston Tau represented the applicants.
2. The respondent, Department of Health-Free State was represented by Ms. Pule Makoa, its Assistant Labour Relations Officer.
3. The proceedings were digitally recorded. Both parties submitted their bundles of documents. The parties were given an opportunity to submit closing arguments in writing on or before 6 July 2020. The respondent asked for an extension in submission of closing arguments, such was granted. Both parties submitted their closing arguments. I applied for an extension on submission of the award and it was approved.

Issues to be decided

4. I am to determine whether or not the respondent committed an unfair labour practice as contemplated in section 186 (2) (b) of the Labour Relations Act 66 of 1995 as amended (the LRA) when it put the applicants on precautionary suspension. The applicants challenged both the procedure and substance.

Background and opening statements

5. At the time of the dispute, the applicants were employed by the Provincial Department of Health- Free State, the respondent at Bongani Regional Hospital as follows: Mr. Lehlohonolo Winston Tau was employed as the Deputy Director- Finance and Supply Chain, earning a basic salary of R45 828-56 as at 15 November 2019, Ms. Sesi Noge was employed the Chief Executive Officer (CEO), earning a basic salary of R61 677-35 as at 15 November 2019 and Mr. Sello Tihedi employed as the Clerk at Supply Chain- Acquisition earning a basic salary of R17 907-00 as at 15 November 2019. The applicants were put on precautionary suspension on 27 March 2019, their suspensions were with emoluments. In terms of suspension letters there were allegations of fraud and corruption.
6. The applicants referred an unfair labour practice dispute to the Council on 9 May 2019 stating that the employer acted against the terms of a collective agreement PSCBC Resolution 1 of 2003, disciplinary Code and Procedure in the Public Service (the Resolution). More specifically talking of clause 7.2.
7. The suspensions were uplifted on 10 May 2019. The said suspensions lasted for 44 days (a month and 13 days). The suspensions were within the 60 days as per the Resolution. All the applicants testified, while the respondent called one witness. The applicants abandoned their subpoena application regarding its 4th witness after the subpoenaed witness had not attended. The applicants were not willing to proceed with the contempt of court proceedings. The applicants sought a relief of 6 months compensation.

Survey of evidence

8. It is not the purpose or the intention of this award to provide a detailed transcription of all evidence placed before me at arbitration, even though all evidence was considered. I have however summarized the portions of evidence that are relevant to me in making a determination in this dispute.

Applicants' case

1st Witness: Mr. Lehlohonolo Winston Tau

9. Mr. Tau's evidence was that he received his suspension letter on 27 March 2019 as reflecting in annexure "A2" in the bundle of documents with an allegation of fraud and corruption. He raised the issue with Mr. Polelo, the then Director General, who was accompanied by Mr. Ncube from Bophelo House, the offices of the Free State Department of Health. He acknowledged receipt of the suspension letter. In his view, in the rules of the administration of justice a person must be provided an opportunity to make representations. He indicated that he should have been provided an opportunity why he should not be suspended.
10. He had issues with the basis of the allegation of fraud and corruption because the Resolution expresses conditions on when can an employee be suspended. So their suspension was not a fair suspension as per clause 7.2 of the Resolution. There are two conditions stated in the Resolution that the employer may suspend an employee on full pay or transfer the employee if the employee is alleged to have committed a serious offence; and 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. He indicated that he was told of the seriousness of the offence, hence the employer suspended him.
11. The suspension was unlawful because it did not comply with the Resolution. The decision to suspend him had a negative impact in his life, and the employer did not demonstrate on the second element in the Resolution and the suspension was premature.

12. The applicant testified that he was reinstated on 10 May 2019, but the indication was that the investigations were not finalised and also told that he would get feedback once the investigation was done.
13. He felt that he was prejudiced because psychologically, he had depression and he had to consult with the psychologist. The applicant attached proof to that effect. The therapy could not be finished as the psychologist felt that he cannot continue with the therapy until the investigation was finished, Mr Tau provided proof to that effect. The suspension also had an impact on his marriage and he was undergoing divorce because his wife felt that where there is smoke there is fire. This was caused by the irresponsible act of his employer.
14. They suffered prejudice because the employer should have transferred them to another office within the province. Although the suspension was for a short period, the impact it had had long term effects, such as his divorce and prejudice suffered.
15. The progress reports could not be provided to them by the employer regarding progress on the investigations. None of the letters demonstrate the reasons that they were going to jeopardize the investigation.
16. He could not understand the reason why he was suspended because he co-operated with the investigation. There were files for preliminary investigations which he provided to the employer as requested. He gave the investigators enough space. They (together with fellow applicants) never interfered with the investigation and he could not understand why he was suspended.
17. Upon receiving a suspension letter, he was informed that he could not access the premises of the employer except when he is admitted as a patient. During that time, he was residing at the accommodation provided for by the employer. Mr. Ndaba, the Labour Relations officer brought to his attention that Mr. Radile, his Supervisor had instructed him that he got a call from Mr Mncube, who accompanied Mr. Polelo that he should be forcefully removed from his flat. The applicant told them that he had an

agreement with the employer as per the lease agreement that they should revoke eviction procedures. He felt he had a right to protect his assets, as the accommodation was part of the fringe benefits, and yet suspension was with pay.

18. During cross-examination, the Mr. Tau confirmed that he regarded the allegations as of a serious nature. Mr Tau testified that as a manager, given the negative media attention or picture portrayed by the employer on expenses on officials and as confirmed in the Public Service Commission, (the Commission) he would not suspend the officials with full pay, but would transfer them to other offices where they could be well utilized and within the supply chain there are 5 components.
19. The applicant gave detail on those units, which according to his view, the respondent should have transferred him to. He confirmed that an official could have been transferred with less risk, but not without risk. He would still keep that employee even if such an employee would have access to information.
20. He stated that the purpose of the suspension is to allow for an investigation to unfold if the presence of the person would endanger the well-being or jeopardise any investigation. He conceded that it was indicated that the suspension was for the purpose of the investigation. He also admitted that the allegations were of a serious nature and he had access to the files. In asset management he would not have access to documents, he should have been placed at head office as an alternative since there is less risk in that area.
21. The applicant disputed the version of the respondent that the precautionary suspension was not unfair since he had power and authority and the DDG verbally communicated with him the reason for suspension, saying that being placed in other section does not necessarily mean Bongani regional hospital, the units are there at corporate office at the head office. It is a requirement in the Resolution that in the letter of suspension the reason for suspension must be demonstrated. There was no proof that he would jeopardise the investigation since the investigations have been underway since 2018.

22. He allowed the investigator to gain access to the premises. When put to him that the email in Annexure C proved that he did not co-operate with the investigation, his response was that the email was a follow-up that the documents were to be returned after 3 days as promised, so it was his responsibility as the custodian to make a follow-up if time lapsed. He apologised if that was perceived as amounting to not giving enough space for the investigation.
23. He maintained that the suspension had an impact in his life and he could not access the residence of the employer. It is human nature when the employer believes there is a strong case that there may be disciplinary measures that would unfold. The investigator drafted a document that implicated him. There is someone who said the evidence or allegations have been fabricated against him to get rid of him and there was an affidavit deposed by his subordinates that the investigator fabricated this and corroborated with officials.
24. Mr. Kotsi, a fellow employee was forced to sign a statement implicating the applicant, hence he could see that the employer was acting unfairly against him. The investigator was compromised. The applicant lodged a grievance with the Commission. The other officials confessed to him after he had issued them with defamation of character proceedings.
25. The applicant disputed the version of the respondent that the things he suffered from were through his premeditation of a disciplinary hearing, not the precautionary suspension. He also disputed the version by the respondent that if one is put on paid suspension, such a suspension is not prejudicial, saying the suspension was unfair as it did not meet the requirements since their presence was not jeopardising the investigation. The respondent did not demonstrate interference when suspending them. Such should have been written, and not be conveyed through oral explanation.
26. He conceded that the reasons for suspension were given, but were not satisfactory, not relevant and not assisting. The applicant confirmed that he was aware of delegation of powers.

27. He also disputed the application of the Allan Long judgment submitted by the respondent to the effect that there is no requirement for the employer to afford an opportunity to make representations why s/he should not be suspended before effecting a suspension. He indicated that when he acknowledged receipt of the suspension letter, he requested clarity why a decision was made without him making representations, hence he felt that the suspension was unfair. They have been reinstated and such proves that there was no need for the suspensions.

2nd Witness: Mr. Sello Johannes Tihedi: Clerk- Supply Chain

28. Mr. Tihedi's testimony was that he did not understand why he received the notice to suspend and the intention to charge from the head office. The suspension was unfair because there were 2 Clerks in the demand section, but he is the only Clerk accused of committing a serious offence. If he had done something wrong it would have been picked up by Ms. Felicity Lilisi, his supervisor, as he would verify, but she was not aware of the suspensions.

29. His presence would not have jeopardised the investigations. It is the second time that he has been put to that situation, and during that time he was transferred / reshuffled to the warehouse and there were no documents there. Other than the demand section, he should have been transferred to other departments of the supply chain and not made to sit at home.

30. The suspension was also unfair because he was never given enough time to explain his side of the story. The issue of being explained the reasons for his suspension. The suspension dented his health, it affected him socially and it affected his applications to other institutions. The applicant presented a report of the psychologist and stated that the suspension affected his life. There was a report issued publicly which suggested that he is one of the employees who stole money from the hospital.

31. During cross-examination, Mr. Tihedi confirmed that he considered the allegations to be serious. His responsibility was to choose the suppliers according to what internal customers wanted. He stated that he was not given time to prepare.
32. He conceded that the HOD had a right to suspend him, but the information must be given to him correctly. He confirmed that he was the one working on files in question and it is rare for other Clerks to work on the same files as his. He was not expecting anyone to be suspended. He confirmed that the suspension was with full-pay, but even though he got his salary he suffered, it did not give him happiness. One should not implement precautionary suspension if one does not have proof.
33. He reiterated that the suspension was prejudicial, it dented and damaged his image, and his applications were never considered because no one wanted to hire a fraudster or a corrupt person. His family also suffered. He is still frustrated because he was never issued with the investigation report.
34. He admitted that the purpose of the precautionary suspension is to investigate and the investigation would be able to bring up and show that there was a plot. He maintained that the allegations have been made by plot. He maintained that the suspension was unfair, and if he was suspended together with his supervisor, then the suspension would have been fair. The employer should have started investigation with his managers before him.
35. He stated that he was not aware before that there is a constitutional court judgment that says there is no obligation on the employer to give an employee a chance to explain her/himself when it puts one on suspension. He understood that each case is treated based on its merits.
36. During re-examination, Mr. Tihedi confirmed that his suspension was procedurally unfair and not in line with clause 7.2 (a) of the Resolution as there is nowhere in his suspension it is stated that he would jeopardise the investigations. The issue of the suspension had a huge impact in the therapy because it affected his health until the

medical doctor referred him to a psychologist. He also confirmed that there was a media coverage on allegations proffered against him. He clarified that the employer was supposed to have placed him somewhere while they were running the investigation. Being at home put a lot of weight on him rather than being at work.

3rd witness: Ms. Sesi Noge: Chief Executive Officer (CEO), she is covered by the SMS manual since she is a Director, not by the collective agreement.

37. Ms. Noge's evidence was that she was suspended on 27 March 2019. The suspension letter was issued by Mr. Polelo, who was the Director General: Clinical Cluster. She was reporting to him. She felt that the suspension was unfair because she was not told that the allegations were of a serious nature and it was not demonstrated in her suspension letter that she was posing danger.

38. The suspension was not according to guidelines. She also referred to the SMS handbook. The suspension was to dehumanise her, victimise her and showing her that she was nothing. Her image was tainted, and she is now withdrawn and does not participate in meetings. Ms. Sibaya, a nurse told her that Ms. Mankwe said she is nothing. The person who had suspended her was supposed to tell her the reasons for suspension.

39. She was denied access to the premises. She could not sleep and had insomnia. She was depressed and felt hopeless. She had to sit at home without knowing what tomorrow would hold. It impacted on her relationship and people from church came to pray for her without her having informed them. She suffered prejudice as the news were on media and people phoned her, she submitted an article published in the Welkom Express, a local newspaper, to that effect.

40. She could not recall any given time that she interfered with the investigation. They did not pose any danger. She was compromising herself by allowing people to enter the premises since she felt if she questioned them she would be tempering with the investigation. She felt that she was supposed to be compensated for the prejudice she suffered.

41. During cross-examination, Ms. Noge confirmed that corruption and fraud are serious allegations and for the employer to do the fact-finding exercise there must be an investigation. She submitted that the employer must have a belief and must demonstrate that it is because it believes so such should have been demonstrated. The seriousness of allegations was neither communicated verbally nor in writing. She maintained that she was prejudiced although she received the salary. She did not know how her presence would have jeopardised the investigation. The employer should have transferred her to an area where her competence would be fully utilised, even at the research department, or at a director post. There are investigations underway on other employees but they have not been suspended. The corruption talk discovered there was something going on but the head of the department did not suspend those employees.

42. Ms. Noge confirmed that the fact that the employer did not demonstrate the belief of them jeopardising the investigation does not take away the seriousness of the charges. She reiterated that the suspension also affected her emotionally, if the reasons for suspension were explained to her, she would have been able to communicate with people who were asking her about her suspension. At re-examination, Ms. Noge confirmed that Mr. Danie Pretorius, the Assistant Manager: Supply Chain and Felicity, the section Supervisor are under investigation but were not suspended.

Respondent's case

1st Witness: Mr. John Bonginkosi Mncube: Senior Labour Relations Officer

43. Mr. Mncube's testimony was that he recalls the day when they came as a delegation from the Department of Health Provincial office when the applicants were suspended. They were there to assist in issuing suspension letters at Bongani Regional Hospital. The applicants were given reasons as Mr Pokelo, the then Acting Deputy Director: Clinical Services. Mr. Mncube advised the applicants about the Allan Long judgment, which is a constitutional court judgment that says there is no obligation on an employer to give an employee an opportunity to make representations.

44. Mr Tau was very rigid and indicated that it was unfair that he was suspended. Mr Tau filled in at the bottom of the suspension letters as acknowledgment of receipt. The suspension letter was given to Mr Tau, although he had problems with reasons. The suspension was issued in good faith. When the delegation was sent by the HOD, they were complying with the Resolution. The charges were of a serious nature as they related to procurement as the amount was more than 2 million rand.
45. He believed that the employer followed and complied with the Resolution fully. The applicants were not prejudiced because they received their full salaries. Mr Ncube proffered that paragraph 7.2 of the Resolution says if the employer believes there are serious allegations the employer will suspend an employee. The applicants were given the opportunity to make representations.
46. During cross-examination, Mr. Mncube confirmed that Mr. Polelo explained the nature of the allegations and the employer demonstrated that it viewed the allegations brought forward against the applicants were of a serious nature. The presence of the applicant would have jeopardised the investigation because at the stage of the investigation there some files requested by the investigation.
47. He could not know about the interaction with Ms. Mankoa, because he was not there, but Ms. Mankoa told him that she was struggling to get those files. He was only speaking on what he was told by Ms. Mankoa and she also alluded to the fact that she had the belief that the applicants would jeopardise the investigation. Subsequent to that the applicants were suspended. He did not see that being put in writing. The employer believed that the employees would jeopardise the investigations and Mr. Polelo explained to the applicants that those were the reasons and their presence would jeopardise the investigations. Mr. Polelo had a dual role, the first one was to calm the applicants down and to talk to them give them reasons and the suspension letters. The applicants acknowledged receipt of the said suspension letters.
48. At re-examination, Mr. Mncube confirmed that paragraph 7.2 of the Resolution does not mean that what is contained there must be included in the suspension letter. The word "believe" in paragraph 7.2 of the said Resolution refers to the employer, it is the

employer that must believe and it does not require the employer to give demonstration that their presence will jeopardise the investigation, it only says if the employer believes. The acknowledgment by Mr. Tau in Annexure “A” indicates that the applicant received the reasons for suspension.

49. The employer followed the procedure and the suspension was not unfair. The applicant clarified that Mr. Polelo was not the inherent author of the suspension letter but had delegated authority. So Mr. Polelo was not working mechanically. Mr. Mncube could not be sure if Mr. Polelo had authority to reverse the suspensions, he would have consulted and advised the HOD.

Analysis of evidence and argument

50. Section 186 (2)(b) of the Labour Relations Act number 66 of 1995 as amended (the LRA) defines unfair labour practice as an unfair act or omission that arises between an employer and an employee involving- the unfair suspension of an employee or any other unfair disciplinary action short of dismissal in respect of an employee.

51. *In Long v SAB (Pty) Ltd and others* (2019) 40 ILJ 965 (CC), the employee was placed on a suspension pending a disciplinary hearing. The suspension was to ensure the investigation was unhindered. In determining whether the suspension was permissible, the Court held that the fairness of a precautionary suspension is determined by first assessing, whether there is a fair reason for suspension and secondly, whether it prejudices the Employee. The court further held that where the suspension is precautionary and not a disciplinary action, the requirements relating to fair disciplinary action under the LRA finds no application. Therefore, there is no requirement to afford the Employee an opportunity to make representations before the precautionary suspension is effected.

52. Resolution 1 of 2003 (the Resolution) titled “Amendments to Resolution 2 of 1999: Disciplinary Code and Procedures for the Public Service” is the subject of contention in this matter. Clause 7.2 of the Resolution reads as follows: ***Precautionary suspensions*** a. *The employer may suspend an employee on full pay or transfer the employee if 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 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.

53. The second, fifth and sixth bullet points in Annexure B of the Public Service Precautionary Suspensions Guide of the Department of Public Service and Administration which deals with Principles provide as follows respectively: *The period of precautionary suspension must be reasonable and justifiable but should not exceed 60 calendar days. Employees must, without delay and throughout the process be informed of the process steps that the Department is initiating. If suspended, the employee is entitled to a speedy and effective finalisation of the disciplinary process. In the same document bullet points the first and third bullet provides as follows: If an employee is transferred or suspended 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; If it is decided that the transfer/suspension should be extended, the employee must be informed of the valid reasons for the further extension and given an opportunity to make representations.*

54. In this award I have considered the evidence placed before me and the closing arguments, while I do not refer to each of the arguments raised, these have been considered.

55. It is common cause that the applicants' suspension did not exceed the 60 days mentioned in the Resolution and the guidelines in precautionary suspensions, all the applicants admitted at cross-examination that the allegations were of a serious nature. The applicants also admitted that the suspension was with full pay and with all emoluments. The applicants conceded that the purpose of the suspension was for the respondent to investigate. There is nowhere the applicants denied that the purpose for the suspension was to investigate the allegations against them.

56. The applicants challenged both the procedure and the substance. I will firstly deal with the procedure and then the substance.

57. In the procedure the applicants' contention was that the respondent was unfair in that it suspended them without affording them an opportunity to make representations on why they should not be suspended, of which their view was that the respondent was obliged to afford them such an opportunity.

58. I am mindful of the *Long v SAB* judgment cited in paragraph 50 above and also submitted by the respondent as part of its bundle of documents and in its closing arguments. This was necessitated by the contention raised in arguments raised and as part of evidence led by the applicants that the employees were not afforded an opportunity to make representations before effecting a preliminary / precautionary suspension, as mentioned above. In the *Long v SAB* judgment, the Constitutional Court confirmed the Labour Court's decision where it held that where a suspension is precautionary and with full salary there is no requirement that an employee be given an opportunity to make representations. It is my considered view that this decision finds application in this matter and it is the binding authority. The respondent was not compelled to afford the employees an opportunity to make representations on why they should not be suspended. There is nowhere in the Resolution where it states that the employees must not be suspended without making representations, the content clause 7.2 of the Resolution is crystal clear.

59. In the substance, the contentious issue was whether the respondent believed the presence of the applicants at the workplace might jeopardise the investigations into the alleged misconduct or endanger the well-being or safety of any person and thereby causing the respondent to suspend them. Whether the applicants suffered any prejudice because of the suspension.

60. It is the applicants' submission that their presence never posed any threat to the investigation and they were not going to jeopardise the investigation. They never frustrated the investigator/ investigation because they co-operated with the investigation and gave them the files they required. It is my considered view that it is

not the arena or sphere of the applicants to conclude or perceive their presence at the workplace as not jeopardising the investigation. That call and responsibility is entrusted and vested on the employer as per paragraph 7.2 (a) of the Resolution.

61. The wording of the Resolution affords the employer with the discretion to suspend an employee/s on full pay or transfer the employee if the employee is alleged to have committed a serious offence; and 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. The “belief” contained in the Resolution necessitates a subjective test as opposed to an objective test. There is nowhere mentioned in the Resolution that the employer must justify on why it believes that the presence of the employee might jeopardise the investigation.

62. Mr. Mncube, the sole witness of the respondent testified on the seriousness of the allegations, the seriousness of such allegations was confirmed by all applicants at cross-examination. Mr. Mncube did testify and shed light on the challenges experienced by Ms. Mankoa, the investigating officer, although such did not require close scrutiny from the applicants because the wording of the Resolution does not require a justification for believing that the employees might jeopardise the investigation. The onus was on the applicants to prove that the suspensions were in conflict with clause 7.2 of the Resolution, but they failed to discharge the onus. It is my considered view that the suspension of the applicants was within the prescripts of clause 7.2 of the Resolution.

63. The suspension was precautionary, implemented on full pay, the applicants admitted that the allegations were of a serious nature, the employer believed that the presence of the employees at the workplace might jeopardise the investigation, the applicants were aware that the suspension was for the investigations to continue or unfold. The suspensions were not in excess of 60 days.

64. It is my finding that the applicants failed to discharge the onus to prove the unfairness of the suspensions and existence of an unfair labour practice. I could not find the direct

link between the precautionary suspensions and the alleged prejudice suffered by the applicants. The purpose of the precautionary suspension is to investigate, of which I cannot interfere with the discretion of the employer, unless it is exercised in a capricious manner, of which on submissions made by the parties and evidence led, I could not find any bad faith.

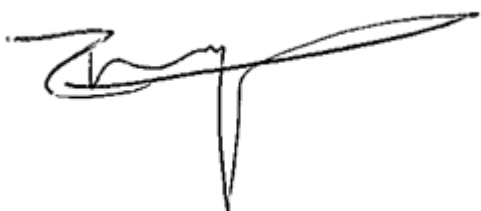
65. It is my considered view that the applicants failed to prove that the respondent committed the unfair act against them.

66. It follows that the applicants failed to discharge the onus to prove that the respondent unfairly suspended them. Therefore, the respondent did not commit an unfair labour practice.

Award

67. The act committed by the Department of Health-Free State, the respondent to Mr. Lehlohonolo Winston Tau, Mr. Johannes Sello Tihedi and Ms. Sesi Noge, the applicants did not amount to an unfair labour practice.

68. Based on the above reasons, I therefore dismiss the applicants' claim.



Zuko Macingwane