



PHSDSBC
PUBLIC HEALTH AND
SOCIAL DEVELOPMENT
SECTORAL BARGAINING
COUNCIL

ARBITRATION

AWARD

Panelist/s: Advocate Ronnie Bracks

Case No.: PSHS208-10/11

Date of Award: 23 November 2010

In the ARBITRATION between:

PSA obo Louw A

(Employee)

and

Department of Health- Gauteng Province

(Respondent)

Employee Representative: PSA obo Louw A

Employee's address: P.O. Box 40404

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0007

Telephone: 012 303 6620

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Company/Employer representative: Department of Health- Gauteng Province

Company's address: Private Bag X85

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Telefax: 011 355 3358

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DETAILS OF HEARING AND REPRESENTATION

1. The Arbitration was scheduled for hearing on various dates culminating on 16th November 2010 at the offices of the Respondent in Pretoria at Tshwane District Hospital.
2. The Applicant was represented by Louise Malan, a PSA official. Nokuthula Madonsela represented the Respondent. The proceedings were recorded both manually and electronically.

ISSUE TO BE DECIDED

- 3 Whether or not the Applicant's precautionary transfer in terms of Clause 7.2(a) of the PSCBC Resolution 1 of 2003 was fair.

BACKGROUND TO THE ISSUE

- 4 The Applicant was precautionary transferred on the 25th November 2009 and she was required to provide reasons by the end of that day why she should not be transferred. In the absence of any reasons the Applicant was accordingly transferred. The provisions of the resolution provide that the Respondent must hold a hearing within 60 days of the transfer. No hearing was held until the 23rd July 2010 after the Applicant had referred the matter to conciliation on the 25th May 2010.
- 5 The Respondent alleges that the meeting on the 23rd July 2010 constituted a disciplinary hearing and that at the hearing the parties had agreed that an extension would be granted in order to conclude the investigation. It is further alleged by the Respondent that this was in line with the requirements of the resolution that the chairperson of the hearing must decide on any further postponements.

SURVEY OF EVIDENCE AND ARGUMENT

EVIDENCE

Documentary

- 6 A bundle of documents was submitted.

Employee's Evidence:

The Applicant, Andri Petra Louw, testified as follows:

- 7 On the 24th November 2009 she was called by her director Mrs. Ntshamai to attend an emergency meeting with staff the following day. The following day when the Applicant arrived Mrs. Ntshamai asked her whether she had spoken to the Human Resource Officer. She said she had not and the meeting was cancelled forthwith. A meeting was then called with Mr. Lekganyane and Jackie Maduma where she was handed a precautionary transfer letter (D30 & D31). She was told that she had until that afternoon to provide reasons as to why she should not be transferred. The letter stated that an investigation had been done in respect of misconduct which was the receiving of donations from

members of the public, keeping expired food and giving it to the children of Igugulethu Place of Safety and using the Department's name to open a bank account for donations.

- 8 The witness said that in terms of Resolution 1 of 2003 she could be transferred but a meeting must be held within 60 days at which the chairperson needs to determine any further extensions. On 11th December 2009 she was called by the investigating officer who informed the Applicant that she wanted to interview her on the 14th December. Although the Applicant had initially agreed, after contacting her representative and finding that the representative was not available on that date, she explained to the investigator that she could only come on the 15th December. The investigating officer queried the need for a representative and asked for the number of the representative but never contacted the representative. The representative then asked the Applicant to send a fax to the investigating officer that the meeting would not be taking place. The interview eventually took place on the 18th February 2010. No disciplinary hearing as provided by the Resolution was held within the 60 days nor was an extension obtained.
- 9 She was referred to E32 & E33 which was a charge of misconduct informing her to appear on the 23rd July 2010 for a disciplinary hearing. She received the notice on the day of the hearing. At the hearing she was represented; she explained who was present. No charge sheet was given to her and this was queried at the hearing. At the purported hearing the investigator gave feedback as to why the hearing could not take place. The union representative gave the 25th and 27th August as possible dates for the hearing. According to the witness the reason she said it could not have been a disciplinary hearing was that she had not received the charge sheet within the stipulated five days in terms of the Public Service Disciplinary Code and Procedures. Also, the document stated no specific charges; all it did was set out the rights of the Applicant. The Applicant then proceeded to explain in detail what had preceded the meeting of the 23rd July. At no time during the hearing was the precautionary suspension ever mentioned. They were however informed that the investigation was not yet completed and hence a disciplinary hearing could not take place. No extension was requested.
- 10 Under cross-examination the witness added nothing new to her evidence in chief but only elaborated on the details surrounding the evidence already presented.

Employer's Evidence

The Respondent called one witness who after being sworn in testified as follows:

Thabo Johannes Maila, Assistant Director, testified that:

- 11 He explained his functions in detail. According to him an internal audit was done last year at Igugulethu. He confirmed the Applicant's evidence regarding the nature of the charges. The Chief Director had notified the employees that there should be no donations. There had never been any complaints about the precautionary transfer because the employees tended to do the same work at the place to which they were transferred. The Applicant continued to do the work of a Social Worker. She was informed that the transfer was necessary in order that the investigation could take place as her presence could jeopardize the investigation.
- 12 Under cross-examination it transpired that most of the information the witness had was hearsay. He could not say whether or not the transfer was suspended.

ANALYSIS OF EVIDENCE AND ARGUMENT

- 1 “Unfair labour practice” means any unfair act or omission that arises between an employer and an employee involving –
 - i. unfair conduct by the employer relating to the promotion, demotion, probation (excluding disputes about dismissals for a reason relating to probation) or training of an employee or relating to the provision of benefits to an employee;
 - ii. *unfair suspension of an employee or any other unfair disciplinary action short of dismissal in respect of an employee;*
 - iii. a failure or refusal by an employer to reinstate or re-employ a former employee in terms of any agreement; and
 - iv. an occupational detriment, other than dismissal, in contravention of the Protected Disclosures Act, 2000 (Act No. 26 of 2000), on account of the employee having made a protected disclosure defined in that Act.

- 2 It is evident that the Applicant was precautionary transferred as from the 25th November 2009 to the present date. This is a period of almost 12 months. There is no evidence to indicate that the transfer was extended. Although the Respondent contended that this was done on 23rd July 2010, I was not presented with any evidence to support this. The Applicant’s complaint is that the precautionary transfer was unfair because she was only given until the end of that day to provide reasons as to why she should not be transferred. This gave her no time to consult with her representative. The Respondent’s contention was that by signing the letter the Applicant had accepted the transfer.

- 3 I have considered this evidence and in the absence of any evidence to the contrary I am of the view that the Respondent’s request was unreasonable - she should have been given more time to consult with her representative. In addition the Applicant’s signature appeared next to the words: “acknowledge receipt.” This cannot support the contention that she accepted the transfer.

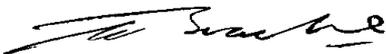
- 4 A further point raised by the Applicant was that the Respondent’s code stipulated in clause 7.2 (c) that *“If an employee is suspended or transferred as a precautionary measure, the employer must hold a disciplinary hearing within a month or 60 days, depending on the complexity of the matter and the length of the investigation. The chair of the hearing must then decide on any further postponement”*. It is therefore my view that in the absence of any further notice extending the transfer it is an unfair labour practice.

- 5 I have considered the submission and am guided by what the court found in *Minister of Labour v General Public Service Sectoral Bargaining Council and others* 2006 27 ILJ 2650 (LC) in that the indefinite suspension of an employee on charges of misconduct was an unfair labour practice. In that case also the collective agreement provided that a suspension pending an enquiry should not last longer than 60 days. Francis J held: *“It is clear from clause 7.2 (c) of the resolution that after an employee has been suspended a disciplinary hearing must be held within a month or 60 days. If the matter is complex, the disciplinary hearing must be held within 60 days and the chairperson of the hearing must then decide on any further postponements. The suspension can therefore not exceed more than 60 days without a disciplinary hearing being held. Facts can be placed before the chairperson to grant a further postponement due to the complexities of the matter.”*

- 6 The only evidence the Respondent presented regarding an attempt to conduct a hearing was to contend that the meeting held on the 23rd July was a disciplinary hearing. This meeting was almost 6 months outside the 60-day period. There is no plausible reason for this. The Respondent further failed to present me with any explanation as to what had caused the delay.
- 7 In light of the above I find the Applicant has discharged the onus of proving that her transfer was unfair.

AWARD

- 1 The Respondent (***Department of Health- Gauteng Province***) is ordered to uplift the precautionary transfer of the Applicant (***Andri Petra Louw***) with immediate effect.
- 2 No order as to cost is made.


Adv. RONNIE BRACKS

| **PSHSBC Panelist**