



PHSDSBC

Public Health and Social Development
Sectoral Bargaining Council

ARBITRATION AWARD

Commissioner: **KM Moodley**

Case No: **PSHS238-20/21**

Date of award: **21 September 2020**

In the matter between:

NEHAWU obo Petros Bekizenzo Mathonsi and 1 Other

Applicant

and

Department of Health- KwaZulu Natal

Respondent

Details of the hearing and representation

1. The arbitration was held at the boardroom, Department of Health, in Stanger on 7 September 2020. The Applicant was represented by Mr. T. Gabela of trade union Nehawu and the Respondent, Department of Health- KwaZulu Natal, was represented by its official Ms. PP Maphumulu. The proceedings were mechanically recorded and all witnesses testified under oath. I am satisfied that the parties have been correctly cited and that the PHSDSBC has jurisdiction to hear this matter.
2. The parties tabled a common bundle of documents, i.e. Bundle A. The contents of the bundle were accepted by both parties as being what they purported to be. No Points In Limine were raised by either of the parties.
3. No objection was raised to me as the Commissioner presiding over the arbitration.

Issue to be decided

4. The issue to be decided is whether or not the suspension of Applicants, Mr. Petros Bhekizenzo Mathonsi and Mr. Siyabonga Jerome Dlamini, was procedurally and substantively unfair and if so, what the remedy should be.

5. The Applicant sought the upliftment of the suspension, with immediate effect, and payment of compensation equivalent to three months compensation.

Issues in dispute

6. The issue in dispute is whether or not the suspension of Applicants, Mr. Petros Bhekizenzo Mathonsi and Mr. Siyabonga Jerome Dlamini was procedurally and substantively fair.

Background to the dispute

7. The Respondent alleged that as a result of a serious allegation of assaulting the Acting CEO of General Justice Gizenga Mpanza Hospital, and as a result of the Applicants' participation in an allegedly unlawful industrial action, the Applicants were duly suspended by the Respondent on 18 May 2020.
8. A disciplinary inquiry was subsequently set down for, and held on 6 August 2020.
9. As the disciplinary inquiry was held outside the 60-day period as per the Disciplinary Code and Procedures of the Respondent, the Applicants deemed the suspension to be unfair and sought to have the suspension uplifted.
10. They then lodged a dispute with the Council for adjudication.

Survey of evidence and arguments

11. As the proceedings were mechanically recorded, reference will only be made to that evidence which bears relevance to my findings.

Applicant: Witness: 1: Petros Bhekizenzo Mathonsi (Applicant 1)

12. Mathonzi is employed as a Finance Clerk by the Department of Health – KwaZulu Natal, at General Justice Gizenga Mpanza (Stanger) Hospital. He is employed for 32 years, and has no disciplinary record.
13. On 18 May 2020, he was issued with a letter of precautionary suspension by the Respondent. Subsequently he received a notice dated 23 July 2020, inviting him to attend a disciplinary hearing to be held on 9 August 2020;
14. He testified that as the period of suspension ran beyond the 60-day period before he was subjected to a disciplinary hearing, his suspension was unfair. He suffered prejudice as he could not benefit from the Employee Performance Management

System. As he did not perform any duties since 18 May 2020, he will not qualify for a 1.5% pay progression.

15. He also stated that his presence at work does not pose any threat to any employees and to state any property and therefore the suspension should be uplifted.

Witness 2: Siyabonga Jerome Dlamini: (Applicant 2)

16. Dlamini is employed as a Hospital Orderly, by the Department of Health – KwaZulu Natal, at General Justice Gizenga Mpanza (Stanger) Hospital. He is employed for 32 years, and has no disciplinary record.

17. On 18 May 2020, he was issued with a letter of precautionary suspension by the Respondent. He subsequently received a notice dated 23 July 2020, advising him to attend a disciplinary hearing to be held on 9 August 2020;

18. He testified that as the suspension ran beyond the 60-day period before he was subjected to a disciplinary hearing, his suspension was unfair. He also suffered prejudice as he could not benefit from the Employee Performance Management System. As he did not perform any duties since 18 May 2020, he does not qualify for a 1.5% pay progression.

19. He also stated that his presence at work does not pose any threat to any employees and to state any property, and therefore his suspension should be uplifted.

Respondent: Witness 1: Sikhumbuzo Nene: HR Officer -Umlazi hospital)

20. Sikhumbuzo Nene was appointed as the investigating officer in this matter. He testified that as Stanger was the epicenter of the Covid pandemic he was asked to assist in this matter. . As this was also a criminal matter, he had to interview several people including members of the public. Therefore, the investigation took long to complete.

21. He testified that the Applicants were suspended on 18 May 2020. Although the notices to appear at a disciplinary inquiry were written out on 23 July 2020, it was only signed by the shop steward on 29 July 2020 as the Applicants refused to sign for it.

22. He testified that due to the complexity of this case and the seriousness of the allegations against the Applicants, (i.e. of assaulting the CEO of the hospital) his investigations required more time to be completed.

Respondent: Witness 2: Rosemary Pamela Ngcobo (Chief Director-Hospital Management)

23. Ngcobo testified that as Chief Director-Hospital Management she was the immediate supervisor of the CEO of the hospital when she signed the letters of suspension dated 18 May 2020.

24. Because of the outbreak of the Covid 19 virus at the hospital the MEC was thinking of closing the hospital. She regarded the allegations of attempted assault of the CEO of the hospital by the Applicants as being serious as "...management were shaken up as a result of this incident.

Analysis of evidence and argument:

25. Clause 7.2.c of the Disciplinary Code and Procedures for the Public Service, PSCBC Resolution 1 of 2003, provides as follows:

7.2 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."

26. It was not in dispute that the letter of suspension dated 15 May 2020 was served on the Applicants on 18 May 2020.

27. It was also not in dispute that the notice to attend a disciplinary inquiry dated 23 July 2020 was received by the shop steward on behalf of the Applicants on 29 July 2020.

28. However, the first sitting of the disciplinary inquiry was on 6 August 2020.

29. Therefore, the disciplinary inquiry was held 18 days late (i.e. from 18 May 2020 to 6 August 2020 = 78 days)

30. The Respondent was therefore in breach of the 60-day requirement of Clause 7.2.c of the Disciplinary Code and Procedures for the Public Service, PSCBC Resolution 1 of 2003.

31. However, the Respondent advanced the following reasons as to why the 60-day requirement could not be complied with:

- a) The complexity of the case as it concerned attempted assault of the CEO of the hospital.
- b) The length of the investigation as it involved interviewing several witnesses including members of the public.
- c) The matter included the possibility of criminal charges being laid.
- d) The hospital was at the epicentre of the Covid-19 pandemic and hospital staff were stretched to the limit.
- e) The Respondent had to appoint an external investigator for this matter as resources were stretched at the hospital.
- f) Ngcobo, the immediate supervisor of the hospital, was otherwise engaged in trying to prevent the hospital from being shut down because of the spread of the virus.

32. I find that the reasons advanced by the Respondent are all valid, and accept them.

33. The Applicants argued that they did not perceive themselves as being a threat to other employees and to state property. I disagree with this contention as the allegations against the Applicants, i.e. that of attempted assault and engaging in unlawful industrial action, are very serious allegations. It placed a huge responsibility upon the Respondent to ensure the safety and security of its employees and state property.

34. The suspension of the Applicants would also ensure that the investigating officers work could be carried out unimpeded.

35. The Applicants also argued that they were unfairly prejudiced as they did not qualify for the Respondents EPMDS benefit scheme because of their suspension. This is not true. Clause 9 of HRM Circular No 34 of 2018 provides that employees placed on precautionary suspension shall be deemed to have performed satisfactorily for that period. Therefore, they will not be prejudiced as they are protected in this regard.

36. In addition, according to the letters of suspension of the Applicants they are suspended "...with full emoluments "

37. From this it can be seen that the Applicants did not suffer any prejudice in respect of the EPMDS benefit, and their emoluments

38. The Applicants also argued that their dignity and integrity has been adversely affected by the suspension. I cannot accept this argument for the following reasons:

- a) The charges against the Applicants are of such a serious nature as to warrant a suspension of the Applicants. The impact on the dignity of the Applicants is to be expected as it is a natural consequence of this action.
- b) The Respondents right to institute disciplinary action should not be compromised.

Conclusion:

39. Although the Respondent did not comply with Clause 7.2.c of the Disciplinary Code and Procedures for the Public Service, PSCBC Resolution 1 of 2003, I find that the Applicants suffered no prejudice by their suspension outside the 60-day period.

40. Under the circumstances I dismiss the Applicants' claim.

Award

41. I find that the the Respondent, Department of Health- KwaZulu Natal, did not comply with Clause 7.2.c of the Disciplinary Code and Procedures for the Public Service, PSCBC Resolution 1 of 2003.

42. I find that although the Applicants, Mr Petros Bhekizenzo Mathonsi and Mr Siyabonga Jerome Dlamini, were suspended outside of the 60-day period of the disciplinary code, they suffered no prejudice by their suspension outside the 60-day period. Therefore, the respondent's conduct did not constitute an unfair labour practice.

43. The Applicants' claim is dismissed.

44. I make no order as to costs.



COMMISSIONER: KM MOODLEY