ARBITRATION AWARD

PHSDSBC
PUBLIC HEALTH AND SOCIAL DEVELOPMENT SECTORAL BARGAINING COUNCIL

Case No: **PSHS284-18/19**
Commissioner: **Kelvin Kayster**
Date of award: **05 September 2018**

In the matter between:

NEHAWU obo Ntulini H. & 9 Others (Union/ Applicant)

and

Department of Social Development- Eastern Cape (Respondent)

DETAILS OF HEARING AND REPRESENTATION:

1. The arbitration hearing in this dispute took place on 14 August 2018 at the Respondent's premises in Port Elizabeth. The matter was referred to the PHSDSBC as an unfair labour practice dispute relating to disciplinary action short of dismissal.

2. The Applicants were represented by Mr. Mlatsha of NEHAWU.

3. The Respondent is the Department of Social Development- Eastern Cape, and was represented by Mr. Jacobs.

4. The parties agreed that the background of the dispute is common cause. They accordingly concluded an agreed statement of case, and further agreed to exchange and submit written closing arguments by 28 August 2018.

BACKGROUND:

5. The background to the dispute is outlined in the attached agreed statement of case. However, for the sake of this arbitration award I shall summarize it here. The Applicants were found guilty at a disciplinary hearing. They appealed against the sanction on 25 August 2017. The appeal outcome was communicated to them on 09 May 2018. The Applicants argued that the Respondent committed an unfair labour practice on the following grounds:

    - The delay with the outcome of the appeal is a violation of the provisions of the disciplinary code;
    - The appeal authority (MEC) failed to provide reasons for dismissing the appeal; and
    - The sanction was ambiguous and not provided for in the disciplinary code.

SUMMARY OF ARGUMENTS:

6. The parties handed up bundles of documents, which were accepted as what it purports to be. Here follow brief summaries of the parties' respective cases. Submissions not expressly mentioned were also considered in reaching my findings.

Applicant:

7. The Applicants argued that the Respondent's failure to provide reasons for dismissing their appeal makes it difficult to assess whether the consideration thereof was reasonable and rational. Giving of reasons is a fundamental requirement of administrative justice and procedural fairness.

8. Furthermore, the delay of 153 days is a direct violation of clause 8.8 of PSCBC Resolution 1 of 2003 (Disciplinary Code and Procedure for the public service, hereafter called the Code).

9. The Applicants further submitted that the sanction was ambiguous. It was therefore suspicious that the MEC concluded that the sanction should be upheld. The sanction of a final written warning and one month's suspension without pay in lieu of dismissal, does not exist in the Public Service and does not appear in the list of sanctions that are in the PSCBC Resolution 1 of 2003. The Applicants were unfairly granted an election whether to accept it in writing, or that it would be unilaterally implemented. In conclusion the Applicants requested that the outcome of the appeal be set aside.

Respondent:

10. The Respondent argued that it did not have an appeals committee in place at the time, and appeals were therefore handled by the MEC. He conceded that the delay was excessive, but submitted that it could only be done when the MEC had time to attend to it.

11. The Respondent submitted that the outcome of appeal dated 09 May 2018 clearly stated that the reasons for appeal were inadequate and there was no good reason to reconsider the sanction. He therefore argued that a fair reason was given for the MEC's decision to dismiss the appeal.

12. The Respondent disputed that the sanction was ambiguous. He argued that clause 7.4 of the Code allows a combination of sanctions, and the Applicant's sanction fell within the bounds of what is allowed in the Code. The Respondent therefore concluded that the disciplinary action, and in particular the appeal, was fair.

ANALYSIS:

13. The matter was referred to the PHSDSBC as an unfair labour practice dispute related to disciplinary action short of dismissal. The Applicants mainly take issue with the manner in which their appeal was handled.

14. It is common cause that the Applicants were found guilty of insubordination and dereliction of duties when they participated in unprotected strike action. They were given a "combination of sanctions of final written warning and one-month suspension without pay in lieu of dismissal." It is further common cause that the Applicants lodged an appeal on or about 25 August 2017. The MEC replied on the appeal on 09 May 2018.

15. The Applicants' argued that the delay by the MEC to consider the appeal "undermines the provisions" of the Code. Clause 8.8 of the Code provides that Departments must finalise appeals within 30 days. It is common cause that in this instance the delay in finalizing the appeal was in excess of 150 days. It is a clear violation of the Code, and renders the appeal process procedurally unfair. The Respondent argued that the MEC was the only one to handle appeals when the MEC had time to attend to it. This explanation does not hold water. The delay was excessive. On the other hand, the Applicants failed to show how they were prejudiced by the delay. I accept that all parties have an interest in the expeditious finalization of disciplinary matters. I was however not shown that the Applicants were prejudiced by loss of income or otherwise resulting from the delay. This procedural defect therefore does in my view not attract any relief.

16. The Applicants also submitted that the appeal authority failed to submit reasons for dismissing their appeal. Conversely, the Respondent pointed out that the appeal authority explained that the reasons provided in the appeal are inadequate and does not contain good reason to reconsider the sanction. The Code places no obligation on the appeal authority to provide full reasons for its decision. Clause 8.6(c) gives the appeal authority the power to confirm the outcome of the disciplinary hearing. That is exactly what the appeal authority did. The reasons for the findings and the sanction are articulated in the outcome of the disciplinary hearing. The appeal authority merely confirmed those findings and reasons, with the explanation that the appeal did not have good enough reasons to reconsider the sanction. I accordingly find that the failure of the appeal authority to explain her decision in detail did not render the appeal outcome to be unfair.

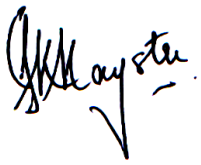
17. The Applicants' third challenge is that the sanction was ambiguous and not provided for in the Code. The Applicants were given a combination of sanctions of final written warning and one month's suspension without pay in lieu of dismissal. I do not agree with the Applicants that the sanction is ambiguous. They were given an option to accept a final written warning and suspension without pay for a month. Clause 7.4(a)(vi) expressly allows for those sanctions to be combined. Only in the event that they do not accept that combination of sanctions, may they be dismissed. It is not ambiguous.

18. I accordingly find that the Applicants failed to show why they should be granted the requested relief of having the appeal set aside.

AWARD:

19. The Respondent's handling of the Applicants' appeal did not constitute an unfair labour practice.

20. The Applicant's claim of unfair labour practice is dismissed.



Signature: _____

Panelist: ***Kelvin Kayster***