



PHSDSBC

Public Health and Social Development
Sectoral Bargaining Council

ARBITRATION AWARD

Case No: **PSHS320-20/21**

Commissioner: **John Mashika**

Date of award: **5 April 2021**

In the matter between:

BABE` SEDILE MOSUWE

APPLICANT

and

DEPARTMENT OF HEALTH – NORTH-WEST PROVINCE

RESPONDENT

Details of the parties and representation

1. The matter was scheduled for an arbitration process on 1 April 2021 at the respondent's offices at the Brits Hospital. It was referred in terms of section 186(2) (b) of the Labour Relations Act 66 of 1995 (the LRA) relating to the alleged unfair suspension of the applicant.
2. The applicant in this matter is Ms. Babe` Sedile Mosuwe. She appeared in person in these proceedings and was represented by Advocate B.G Mashabane, who is briefed by Isaac Keke Mothibe Attorneys.
3. The respondent is Department of Health- North West. It is represented by Mr. J. Dlamini, its Assistant Director: Labour Relations.
4. The proceedings were manually and digitally recorded.

5. Both the applicant and the respondent submitted bundles of documents and they were marked and referred to as bundle A (17 pages) and bundle R (25 pages) respectively.

Issues to be decided

6. I must decide whether the suspension of the applicant was unfair; and if so, to consider whether to grant the applicant the requested 10 months compensation.

Background to the dispute

7. The applicant is employed as a Chief Executive Officer of the Brits Hospital. Her last working day with the respondent is 2 April 2021; hence the requested relief of compensation. She was suspended from work on 20 January 2020 after numerous complaints were received against her by the office of the Member of the Executive Council (MEC) for Health in the North-West Province from trade unions around October 2019.
8. The applicant earns a monthly salary of R61 677.35 (Sixty-One Thousand Six Hundred Seventy Seven Rand Thirty Five Cents). She reports to the Director: Bojanala District. She seeks compensation as relief for the alleged unfair suspension.
9. The respondent is a Provincial Department responsible for public health and related services in the North-West Province. It suspended the applicant for allegations of; i) Maladministration, 2) Leadership and Governance challenges, 3) Visitation restrictions at residences, 4) Irregular transfer of an employee, 5) Refusal to meet with trade unions, 6) Management victimization, 7) Appointment of managers without qualifications, 8) Working from home without authorisation, and 9) Study leave granted without following procedures.
10. It is common cause that the applicant's suspension was extended by the MEC on 24 April 2020 after a query was received from the applicant's representatives, the National Education, Health and Allied Workers' Union (Nehawu) about her continued suspension after 60 days has elapsed. This query was lodged because; as the applicant submitted, and this submission is not in dispute, item 2 (c) of the Senior Management Service Public

Service Handbook provides that a suspended employee must have a disciplinary hearing held against them within 60 days.

11. It is further common cause that to date the applicant is still under suspension having attended a number of disciplinary hearings since 26 November 2020. However as indicated above her last day of work was 2 April 2021 as she had resigned her position on a month's notice on 3 March 2021.

Survey of evidence and argument

Applicant's Evidence: Babe` Sedile Mosuwe

12. She testified under oath that her suspension was unfair as it was not in line with the SMS Handbook that provides that after 60 days only the Presiding Officer a disciplinary hearing can extend her suspension. In her case her suspension still endures and was also extended by the MEC after 60 days. Her suspension was precautionary as some allegations made against her were being investigated. On extension of her suspension she was informed that investigations are still underway as she had not availed herself during the investigation process and some documents were still being sought. These documents were her identity document and grade 12 certificate.

13. On 26 November 2020 a disciplinary hearing was convened. She raised the suspension issue with the Presiding Officer of the hearing but a ruling was rendered by the Presiding Officer that he does not have the authority to rule on the validity of the suspension (page 17 of bundle A). She was given an investigation report during the third sitting in February 2021 of the hearing. On 3 March 2021 she handed in her resignation letter with her last working day being 2 April 2021. The suspension has tarnished her image. She was also admitted to hospital and is still undergoing counseling due to the hardships caused by the suspension. She had lost some of her benefits and incurred legal costs asserting her rights.

14. In cross examination she stated that the report on page 16 of bundle R is the response she handed to the MEC after the meeting the MEC had with the hospital management.

On suspension the contents of the report were not considered. She did not suggest that she be suspended; she was only given a choice as to where to be during the investigation. She was offered a transfer to work at the provincial office but could not take this alternative due to the travel that was involved.

15. She is also convinced that the suspension was with malicious intent as the extension was for an indefinite period. She was also suspended for allegations that were investigated in October 2019. Her suspension was after the trade unions had threatened to remove her if the MEC does not do so. Though on suspension she was informed that nine (9) issues are to be investigated; she was only charged on one issue (the study leave issue). Her being charged implied that the investigation was finalised.
16. Though she is paid her salary during the suspension period she lost out on her cellphone and travel allowances. She also contracted diabetes; a disease she never had before the suspension.

Respondent's evidence: Pule Mathews Monale

17. He testified under oath that he is the Chief Director for the Bojanala District. Page 13 of bundle R is the suspension letter that was issued to the applicant. This was after the respondent received various allegations from the trade unions against the applicant (page 1 of bundle R). These allegations were reported to the MEC; and later shared with the applicant. The applicant was then requested to respond to the allegations on behalf of the Brits Hospital management. On the basis of the seriousness of the allegations it was decided that an investigation be launched; and the applicant be placed on either a precautionary suspension or precautionary transfer. The applicant took the option of being at home during the suspension (page 20 of bundle R).
18. Though the applicant was hauled before a disciplinary hearing for one of the allegations that were being investigated; other allegations are still investigated and the investigation is currently at an advanced stage. The respondent had to ensure that all allegations are investigated as they affect the mood in the institution. It was not going to be proper to have her come back to work after 60 days of suspension as the process was not finalised

and there was going to be consequences. The respondent did not want to be seen as if it is protecting one of its own.

19. In cross examination he stated that to date the investigation is not finalised. It was decided to have her charged as part of the investigation was finalised. He is not aware if the applicant was informed that the reason behind the continued suspension was because the investigation still being conducted. In practice the 60 days period is not adhered to but there are always reasons for such deviations. In this case the applicant was informed of the reason for the deviation in the extension letter. It is unfortunate that the extension had affected her negatively.
20. After the 60 days they could not just transfer the applicant as consensus had to be reached before an employee can be transferred. The letter the applicant's trade union wrote to the MEC on 24 April 2020 enquiring about the suspension sought to have her return to her position as the CEO; and this was not an option for the respondent.

Analysis of submissions and argument

21. Precautionary suspension; as is the case with the suspension of the applicant herein is just but part of management exercising its powers to ensure good and proper administration while testing the veracity of allegations made against an employee. This kind of action by the employer is referred to as a "holding operation" in *Koka v Director-General: Provincial Administration North West Government* (1997) 7 BLLR 874 (LC).
22. Given the nature of this kind of suspension; it is expected that an employer not act capriciously or with any malicious intent when denying an employee the opportunity to perform his or her duties. Fair and open communication should be uppermost in ensuring that an employee understands why they are suspended or are in a prolonged suspension; especially where there are rules governing the duration of the suspension as is the case herein (*South African Post Office v Jansen van Vuuren NO and Others* [2008] 8 BLLR 798 (LC)).

23. Item 2(c) of the SMS Handbook does not necessarily state explicitly that suspension should not be for more than 60 days. What it does is to impress on the employer to have a disciplinary hearing held within 60 days; and if not, to have the suspension extended by a Presiding Officer of a disciplinary hearing; presumably on good reason.
24. It therefore stands to reason that a suspension that endures for more than 60 days may amount to an unfair labour practice.
25. In the case of the applicant, she was suspended pending the investigation of 9 items tabled in her suspension letter of 20 January 2020. A read into the allegations against the applicant show a level of seriousness. It is therefore reasonable to expect an investigation into the said allegations to take time. The flip side of this being that it is also to be expected that a prudent employer will ensure that such allegations are speedily investigated; especially given the view expressed by Mr. Monala that the mood of the Brits Hospital is affected by these issues.
26. That which is concerning; and it seems to be the main reason the applicant lodged this dispute, is the fact that the respondent did nothing in communicating the continued suspension after the lapse of 60 days; and also had the suspension endure for capricious reasons. It was only after a letter from the applicant's trade union was preferred on the respondent on 24 April 2020 that it extended the suspension. This was about 34 days after the 60 days lapse.
27. The respondent cited the fact that the investigation process was still ongoing due to her outstanding interviews with certain relevant individuals; and also that she had not yet submitted some documents. The applicant testified that she was at all times available; and that the documents sought were her identity document and grade 12 certificate. These documents; she states, are in the respondent's possession as they were submitted on employment.
28. The applicant further testified that she was hauled before a disciplinary hearing on 26 December 2020; 15 and 16 December 2020, February and March 2021. In her view

when charges were preferred on her the implication is that the investigation was finalised. This is so as she was also handed an investigation report in her third appearance at the disciplinary hearing.

29. Her deduction is not misplaced and cannot be faulted. She was suspended pending an investigation; and on receipt of an investigation report it is only fair to believe that investigations are finalised; unless she was informed that this is not the case. Mr. Monala did not want to be drawn into the investigation issue lest he is seen as interfering. When asked whether the applicant was informed after being charged that investigations are still underway; he stated that he does not know whether this was done. This response was rather unfortunate as he had stated that he was testifying in these proceedings as the Accounting Officer, and I can only expect an Officer in his shoes to know these details. This is because the applicant is a senior manager in the district he manages; and he should be interested in her work affairs.

30. The respondent's contention that investigations are still under way was not supported by any concrete evidence. This concrete evidence would invariably have been provided by the Investigator of the allegations made against the applicant. The respondent did not call the said Investigator as a witness in these proceedings. Absent such a testimony at least a progress investigation report from the Investigator should have been presented to confirm the ongoing investigation. This will at least have given credence to the contention that the applicant's continued suspension is justified.

31. To the extent that I do not have any credible evidence before me that the investigation is still underway; I am inclined to agree with the applicant that the investigation against her was finalised hence she was charged and hauled before a disciplinary hearing.

32. This being the case there is no reason to keep her on suspension. The applicant is correct in stating that the continued suspension is unfair. In any event I do not see how the reasons contained in the MEC's extension letter can be construed as good reasons to have an extended suspension that still endure to this day. On being charged; the suspension should have been uplifted; or at least the applicant should have been issued

with an extension letter that her suspension is extended pending the finalization of a disciplinary hearing against her.

33. I noted the respondent's contention that the applicant chose to be on suspension than be transferred. This contention flies in the face of Mr. Monala's testimony that it was not the respondent's intention to have the applicant suspended as she is a senior manager and her services were sought. If this was the case; the respondent could have utilised her in any way they deem fit; especially after her desire on 24 April 2020 to render services.

34. To that end it is my considered view that the suspension of the applicant; especially after disciplinary charges were preferred on her was unfair.

Relief

35. The applicant requested to be compensated for the unfair suspension as she has resigned her position with the respondent. Section 194(4) of the LRA provides that the compensation awarded to an employee in respect of an unfair labour practice must be just and equitable in all the circumstances, but not more than the equivalent of 12 months remuneration.

36. The respondent argued that if I were to consider compensation, I should confine myself to three (3) months compensation as several courts and arbitration decision points to this. I was however not referred to any decision; whether from the courts or arbitration processes to support this contention. Section 194 (4) of the LRA grants me the powers to award compensation I deem fair and just. It is trite that I must exercise this discretion fairly taking into consideration all relevant factors in play in this matter.

37. The factors considered include the fact that the applicant was at all times earning a salary; that she lost out on certain benefits (cellphone and travelling allowance); that there does not seem to be any justifiable reason for the continued suspension after her being hauled before a disciplinary hearing. These factors were considered alongside my acceptance that the applicant had suffered emotional hardships and humiliation. The

Labour Court in the SAPO (see paragraph 22 above for a full citation) held in paragraph 39 that “*suspensions have a detrimental impact on the affected employee and may prejudice his or her reputation, advancement, job security and fulfillment*”.

38. I hold a view that 10 months compensation as requested by the applicant is excessive under the circumstances. As a consequence, I shall order the respondent to compensate the applicant an amount equal to two (2) months' salary. This amounts to R123 354.70 (One Hundred and Twenty-Three Thousand Three Hundred and Fifty-Four Rands Seventy Cents). I hold a view that this compensation is fair, just and equitable.

Award

39. The respondent, Department of Health- North West committed an unfair labour practice for the continuing suspension of the applicant, Babe` Sedile Mosuwe.

40. The respondent is ordered to compensate the applicant an amount of R123 354.70 (One Hundred and Twenty-Three Thousand Three Hundred and Fifty-Four Rands Seventy Cents) as computed in paragraph 38 above.

41. The above compensation must be paid to the applicant on or before 15 May 2021.

A handwritten signature in black ink, appearing to read 'John Mashika', is written over a large, empty oval shape that serves as a placeholder for a stamp or seal.

JOHN MASHIKA