PHSDSBC
Public Health and Social Development Sectoral Bargaining Council

ARBITRATION AWARD

Case No: **PSHS381-20/21**
Commissioner: **Mzondi Job Molapo**
Date of award: **27 January 2021**

In the matter between:

Bertha Hampu Maleka Applicant

and

Department of Health- North West Respondent

Details of the hearing and representation

1. The matter under case reference number PSHS381-20/21 was referred for an arbitration and scheduled as such for 2 and 30 November 2020 at the Respondent's Mahikeng offices. It was further virtually heard on 15 January 2021. The Applicant, Ms. Bertha Hampu Maleka was in attendance and represented by an Attorney, Mr. S. Moima, whilst the Respondent, Department of Health-North West was represented by a Senior Counsel, Advocate T.F Mathibedi on instructions of Thekiso of Thekiso Incorporated. The proceedings were digitally recorded for 2 and 30 November 2020 but by Council on the virtual sitting of 15 January 2021.

Preliminary Issues and rulings

2. The Respondent had on 2 November 2020 raised a point of law arguing the mootness of the dispute before me, thereby submitting that the Council did not have the jurisdiction to arbitrate the dispute. Evidence was presented by the Applicant party who refuted that submission that her dispute was moot. The Respondent indicated that they had

witnesses to call, and on the basis thereof, the matter was postponed to 30 November 2020. On 30 November 2020, the Applicant had indicated that it sought to re-open its case by calling her Attorney who represented her during her running disciplinary hearing. She did that after she initially indicated that she was no longer intending to call the same witness in order to demonstrate that she did not mandate him to agree to the extension of her alleged unfair labour practice dispute relating to her suspension.

3. A substantive application was made and opposed by the Respondent with the outcome thereof being the refusal of the Applicant's case in so far as the calling of such witness was concerned. A further ruling was made relating to the point of law raised by the Respondent. The ruling was in a nutshell to the effect that the dispute before me was a live dispute as evidence through the conduct of the Applicant since after the 60 days period of her suspension had lapsed was that she had never withdrawn the dispute from the Council's roll. The Council having jurisdiction to arbitrate any live dispute assumed jurisdiction and thereby allowed the parties to deal with the main dispute.

4. The parties agreed that in so far as the dates of what transpired since the date of suspension all facts were common cause and that the arbitrator was only required to determine whether the Applicant's suspension based on the available facts was unfair, whether she was entitled to the relieves sought, namely the lifting of the suspension and compensation. She took the stand in order to deal with the specific issues and she was cross examined. The matter was then finalised on 15 January 2021 during a virtual hearing after both parties made oral submissions.

Ruling relating to the re-opening of the Applicant's case and the Council's jurisdiction on the dispute.

5. Although the first issue before me was the point of law that was raised by the Respondent, I logically could only deal with after both parties had concluded their evidence in that regard. The Applicant had during cross examination on 2 November 2020 initially indicated as the record will show that she intended to call, her disciplinary hearing Attorney. The basis for calling the Attorney was simply to demonstrate that she did not mandate him to agree to the extension of her suspension when he attended her disciplinary hearing in her absence on 8 September 2020. When the sitting of 2

November adjourned, after advice from her unfair labour practice Attorney, she decided against the calling of the said witness Attorney.

6. What remained was for the parties to call any other witness on the same subject before the arbitrator could make a ruling on the mootness or not of the dispute, which if favoured the Respondent would have ended the matter as Council would not have had jurisdiction to arbitrate the dispute. Whilst if the point in *limine* was dismissed, Council would assume jurisdiction and arbitrate the dispute referred by the Applicant.

7. On 2 November 2020, Ms. Bertha Hampu Maleka testified under oaths briefly that she was issued with a precautionary suspension Notice on 8 May 2020. She stated that she reported for duty on 9 July 2020 after her 60 days suspension period had in terms of the SMS Handbook expired on 8 July 2020. She was returned by the Respondent's Administrator informing her that her suspension was only expiring on the date she reported and not on 9 July 2020 as she believed it had, The Administrator told her not to report further for duty until further notice. The Applicant immediately referred an unfair labour practice dispute to the Council for conciliation on 9 July 2020. The conciliation meeting was held on 29 September 2020, after which a certificate indicating that the dispute remained unresolved was issued. The respondent was represented during the conciliation meeting of 29 September 2020.

8. The point of law raised on 2 November 2020 was not raised at the time, challenging the Council's jurisdiction based on the submission by the Respondent that the Applicant had waived her right by agreeing through her Attorney to the extension of her suspension earlier on 8 September 2020 during a disciplinary hearing. The Applicant indicated that the limited mandate she gave her disciplinary hearing Attorney was to the effect that he must seek the postponement of the hearing on the basis that she was sick. She denied during cross examination that her Attorney phoned her on the day to obtain her mandate regarding the Respondent's request to have her consent to the extension of her suspension.

9. In her substantive application to seek to have her case re-opened in order to call the Attorney as a witness after she herself had testified about the sequence of events since after her suspension, I could not find from her opposed application how she refusal to have her re-open the matter would prejudice her case. The Applicant was the *dominus*

*litis i*n the unfair labour practice dispute. I found that since she was informed not to return for duty by her employer, she immediately lodged a dispute in that regard. Beyond the disciplinary sitting of 8 September 2020, she was issued with a certificate of the non-resolution of her live dispute, which the Respondent did not argue its mootness and therefore the lack of jurisdiction by Council to even conciliate it.

10. The Labour Relations Act, under Section 191 provides for a procedure and timeframes within which the Applicant should follow after a certificate had been issued. It is common cause that the Applicant referred the same dispute which the Respondent submitted she waived her rights on in October 2020. Her conduct on this point glaringly corroborates her averment that she had never mandated her disciplinary hearing Attorney to agree to the extension her suspension beyond the 60 days which already expired on 8 July 2020. I did not find it being the Applicant's duty in refuting the alleged waiver agreement by calling her Attorney.

11. Since the agreement was raised by the Respondent and it was the Respondent's case and not the Applicant's that they were relying on the disputed agreement, they were (Respondent) the ones who should have called the Attorney to corroborate their case on the point of law they raised. The Applicant on 2 November 2020 attended the arbitration because she regarded her dispute as still being live and had at no stage withdrew it from the Council's roll. I find no logic that the Applicant would attend a conciliation meeting on 29 September 2020, almost three weeks after she had allegedly waived her right to her original dispute, then again when the matter is not resolved and the Respondent do not raise during conciliation, that it could suddenly be said she had waived her right. Anyway, even if it were to be proved that she had previously withdrawn her dispute, there is nothing in the Rules of Council suggesting that she could not have the dispute reinstated. There is nothing in the Rules suggesting that a withdrawn dispute renders the matter *res judicata*. However, it should be understood that the passages above to not suggest that the Applicant had at some stage withdrew her dispute.

12. I conclude therefore that the Applicant by her own conduct since referring the dispute to the Council never took any action which would have created an impression to Council that she had withdrawn her dispute. Council proceeded to set the matter down because there was nothing on its records that the dispute was no longer live. I ruled therefore that the application for the re-opening of her case was refused

13. Í further ruled that the Applicant's dispute remained live since she referred until currently and therefore that Council had jurisdiction to arbitrate the dispute in terms of Section 191 of the Labour Relations Act, 66 of 1995. I am a creature of statute thus I assume jurisdiction for the Council based on the processes the Applicant followed since after the lapse of her suspension on8 July 2020. Having said that I now shall deal with the merits of the dispute before me as referred by the Applicant.

Issue to be decided

14. I am required to determine whether the Respondent's conduct was fair or not relating to their refusal to lift the suspension and/or reinstate the Applicant after her suspension lapsed on 8 July 2020 without any hearing having been convened within 60 days and postponed to a later date by an appointed Presiding Officer.

Background to the issue

15. The Applicant was issued with a precautionary suspension notice on 8 May 2020. She stated that she reported for duty on 9 July 2020 after her 60 days suspension period had in terms of the SMS Handbook expired on 8 July 2020. She was returned by the Respondent's Administrator informing her that her suspension was only expiring on the date she reported and not on 9 July 2020 as she believed it had, The Administrator told her not to report further for duty until further notice. The Applicant immediately referred an unfair labour practice dispute to the Council for conciliation on 9 July 2020. The conciliation meeting was held on 29 September 2020, after which a certificate indicating that the dispute remained unresolved was issued. The respondent was represented during the conciliation meeting of 29 September 2020.

16. She immediately thereafter referred the matter for arbitration in October 2020, which matter was set down for 2 November 2020.

Evaluation of evidence and argument

Applicant's version (only the Applicant testified)

17. Ms. Bertha Hampu Maleka testified under oath that she was employed by the Respondent as its Chief Financial Officer and that she was currently earning a monthly gross remuneration of R114483.57. Her recorded evidence was that she was refused to resume her duties after her precautionary suspension lapsed on 8 July 2020 in terms of the SMS Handbook. When the precautionary suspension expired the Respondent had not convened a disciplinary hearing within the 60 days as provided wherein the Handbook only provided that any further postponement of the matter was the duty of the Chairperson of the hearing. When she reported for duty on 9 July 2020, she was refused to resume with her duties and that the administrator wrote her some letter in which the administrator's tone simply had shown that she was in complete disregard to the prescripts of the employer in regard to the dispute before me. She stated that her suspension was contrary to the provisions of the SMS Handbook and that it was therefore unfair.

18. The remedy she sought was that her extended suspension be found to be unfair, lifted and that she be awarded compensation. On the issue of compensation, she stated that she suffered indignity, pain and suffering as a result of the unfair suspension to the point where she finds it hard to explain to her family whether she was still employed or not. Some colleagues are no longer taking her calls because they start to believe that she had been involved in the theft of state money. Under cross examination she reiterated the same grounds she raised as the basis for her remedy for compensation even when the Respondent stated that she could not prove her psychological pain and suffering by way of medical reports. The issues that were raised with her during cross examination are comprehensively covered in the record and I need not repeat them herein.

Analysis of evidence and argument

19. Section 23(1) of the Constitution of the Republic of South Africa provides that everyone has the right to fair labour practices. This right is specifically entrenched under Section 186(2) which is defined as *any unfair act or omission that arises between an employer and an employee involving-(b) unfair suspension of an employee…*

20. There are few important considerations to this matter. Firstly, the Applicant was issued with a precautionary suspension on 8 May 2020. She was not issued with a notice to attend a disciplinary hearing within the 60 days that are prescribed by the SMS Hand book, The SMS Handbook constitutes part of her employment contract and she had correctly expected to be issued with a Notice to attend a disciplinary hearing convened within the 60 days after her precautionary suspension. She had expected that if the Respondent wanted to have her suspension further extended, they should have at least charged her and asked for the postponement or at least agreed with her at that first hearing that the Chairperson of the hearing postpones it.

21. Only the Chairperson of the hearing, is empowered in terms of the SMS Handbook to postpone the matter beyond the 60 days only if the first hearing is convened within that period. In other words what the Respondent sought to achieve on 8 September 2020 should have been done within the 60 days before 8 July 2020. Anything done after that becomes *ultra vires* the Chaperon's or the Respondent's powers and renders any such extension of the suspension unfair.

22. It is trite that the use of the word *must* in any piece of legislation whether primary of subordinate as it is specifically used in the SMS Handbook in regard to the suspension of senior employees in the Public Service, should be interpreted to mean that the empowered functionary cannot exercise a discretion but must act accordingly. What was required of the Respondent was that within sixty days of the date of suspension, a disciplinary hearing be convened and its chair was the only one who had the power to either postpone it further or sanction a further period of suspension. However, the latter never happened. The matter relating to suspensions is specifically dealt with under clause 2.7, item 2 of the SMS Handbook which also prescribes the same period of sixty days.

23. Any such conduct by the Respondent to further suspend an employee contrary to the provisions of Chapter 7 in this regard is *ultra vires* the SMS Handbook and is therefore unfair towards the employee. Employers need to bear in mind that employment policies in their nature form part of their employees' employment contracts. The employees expect way in advance that their employer will treat them in a particular way under certain circumstances. The Applicant in this case had expected that his employer will conduct itself in terms of the peremptory provisions of the SMS Handbook as aforementioned.

24. It is thus this conduct that makes the Respondent guilty of misconduct in the form of an unfair labour practice relating to the unfair suspension of the Applicant for more than 60 days without convening a hearing before the period expired.

25. I accordingly find that the Respondent committed an unfair conduct by not allowing the Applicant to resume her duties or by failing to lift his suspension after the expiry of the sixty days after the 8 May 2020 notice. I find that the suspension was substantively unfair.

Procedural Fairness

26. The employer is only allowed to convene a disciplinary hearing within sixty days of date of suspension and not the power to extend a suspension for any reason unless such hearing was convened and postponed by the presiding officer thereof before the 60 days expired. Only the Chair of the convened hearing within the prescribed period had the power to extend the further sitting of the matter, whilst the employee remains on suspension. The SMS Handbook does not suggest that the hearing should be completed within 60 days but emphasises on its convening within that period. It is therefore clear that the Respondent by following this strange process of making the Applicant or his Attorney to agree of a further extension of the suspension way beyond a suspension which had lapsed on 8 July 2020, and was its fairness was already challenged before 8 September 2020 is simply superfluous. The Respondent made itself guilty of a flawed process.

27. I accordingly find that the suspension was procedurally unfair.

Remedy

28. Applicant did not challenge the unfairness of her initial precautionary suspension that lapsed on 8 July 2020. The Applicant instead waited until the expiry of the sixty- day period provided for in the SMS Handbook. This brings me to the consideration of her two remedies, namely the lifting thereof and the compensation, which is the gist of the Applicant's contention.

29. Section 193(4) of the Labour Relations Act, 66 of 1995 provides that *an arbitrator appointed in terms of the Act may determine any unfair labour practice dispute referred to the arbitrator on terms that the arbitrator deems reasonable, which may include ordering reinstatement, re-employment or compensation. '*

30. Firstly, the Applicant sought to have her suspension lifted and sought compensation. Having found that her continued suspension was unfair, I have no doubt that her required remedy of ordering the lifting of the suspension and reinstating her was justified.

31. If compensation is awarded Section 194(4) requires that it be just and equitable in all the circumstances but must not exceed twelve months remuneration. The Applicant sought 12 months compensation.

32. There is no medical evidence presented to me showing a causal nexus between the protracted suspension and her personal psychological condition and therefore cannot use that submission as a consideration for compensation. However, the Applicant had demonstrated that there was no reason for the Administrator to disregard the employment prescripts governing her suspension. Clearly her extended period of suspension was accompanied by malice as it is evident from the letter the Administrator wrote her when she challenged the extended suspension. The Administrator's conduct clearly violated her employment rights and her dignity as a senior manager. What was supposed to have been a precautionary suspension until 8 July 2020 lost its meaning when there was no hearing within the sixty days.

33. The Notice of suspension provided that the precautionary suspension was not a judgement buy simply precautionary. But when the Applicant drew the Administrator's

attention to the fact that the refusal to lift it and have her reinstated was unfair, it then became judgemental and punitive against her. That is when the Administrator became personal than relying on the legal prescripts. The conduct of the Administrator when one reads the tone of the response letter, I find that it was very malicious. I have not yet found precedent where as arbitrator I could order personal costs. I am aware that the labour court and high courts had previously made such orders against officials who behave the way the Administrator behaved in this matter. Whilst it is true that the prolonged suspension did not affect her remuneration, the same cannot be said about the unnecessary delay in lifting the suspension and easing her life. It is for the latter reason that I concur with the Applicant that compensation under the circumstances be awarded.

34. I consider as just and equitable taking into account the total disregard of the employment prescripts and contemptuous conduct of the Respondent through tits Administrator's letter in the bundles that there was no legal justification to refuse the Applicant reinstatement other than concluding that the intention was to injure her dignity. Her dignity, injury to her persona, emotions and employment rights commenced on 9 July 2020 when she was unjustifiably refused to resume her work and it continued despite her displeasure until date of the arbitration award on 25 January 2021. This makes that period six months of continued unjustified injury. I concur with all the case laws cited by her representative in this regard. I ordinarily would have awarded her six months compensation given the period of deliberate pain and suffering the Respondent inflicted on her. But so far despite the fact that the empowering Act, (LRA) allows me the discretion to determine the matter in any manner befitting and also allows me to award to a maximum of 12 months if I find it to be just and equitable. I was mindful of the fact that the Labour Appeal Court so far ordered a solatium of up to three months compensation. Since we are called upon to follow the principle of stare decisis, I will limit the amount of compensation to the current jurisprudence created by a higher court in regard to the compensation. I also took into account the fact that the Applicant received her full salary during the extended unjustified period of suspension. I order compensation equivalent three months of the Applicant's salary.

35. Ms. Bertha Hampu Maleka testified under oath that she was employed by the Respondent as its Chief Financial Officer and that she was currently earning a monthly gross remuneration of R114483.57.

36. The total compensation calculated by three months totals to Three Hundred and Forty-three Thousand Four Hundred and Fifty Rand and seventy-one Cents (R343 450,71).

Costs

37. The Respondent prayed for a cost order to follow the result of the application to have the Applicant's case re-opened after she had closed her case initially. In considering the ordering costs, I was guided by the trite law principle that militates against costs orders where there exists a continued employment relationship between the parties. In fact, the overall outcome of the main case should have been the main consideration in applying costs follow the result. Had the Applicant asked for a cost order especially given the conduct of the Respondent that led to her acquiring the services of a legal practitioner to challenge the obvious, one would have been tempted to grant it but for the above enunciated principle by our courts. I am not amenable to granting any costs order under the circumstances.

Award

38. I make the following award:

39. The Respondent's conduct relating to the suspension of the Applicant beyond 60 days without convening a disciplinary hearing within the latter period is unfair.

40. The Applicant's precautionary and extended suspension are lifted with immediate effect.

41. The Respondent must allow the Applicant to resume with her normal duties as the Chief Financial Officer on 8 February 2021 or soon after she becomes aware of the award.

42. The Respondent must pay the Applicant compensation equivalent to three (3) months of her monthly gross remuneration of R114483.57, i.e. Three Hundred and Forty-Three Thousand Four Hundred and Fifty Rand and Seventy-One Cents (R343 450,71), less statutory deductions.

43. The Respondent must pay the above compensation by not later than 16 February 2021, failing which the applicable interest rate shall accrue.

44. No cost order is made.

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