PHSDSBC

PUBLIC HEALTH AND SOCIAL DEVELOPMENT SECTORAL BARGAINING COUNCIL

ARBITRATION AWARD

Case No: **PSHS428-19/20**

Commissioner: **Zuko Macingwane**

Date of award: **12 July 2020**

In the matter between:

PSA obo XOLANI MFANTA APPLICANT

and

DEPARTMENT OF HEALTH- FREE STATE RESPONDENT

Details of the parties and representation

1. The matter was set down for arbitration on 26 June 2020 and scheduled to commence at 10:00AM at the Respondent's premises at Penelomi Hospital in Bloemfontein. The applicant, Mr. Xolani Mfanta was present and represented by Mr. Janjie Jack, the union official of the Public Servants Association (PSA).

2. The respondent, Department of Health -Free State was represented by Mr. Setlhake. G Litheko, its Assistant Director: Labour Relations.

3. The proceedings were digitally recorded. Both parties submitted their bundles of documents, the applicant's bundle was marked "A" while the respondent's bundles were marked "B1", and "B2". The parties were given an opportunity to submit closing arguments in writing on or before 3 July 2020. Both parties submitted their closing arguments.

Issues to be decided

4. I am to determine whether or not the respondent committed an unfair labour practice as contemplated in section 186 (2) (b) of the Labour Relations Act 66 of 2015.

Background and opening statements

5. At the time of the dispute, Mr. Xolani Mfanta, the applicant was employed by the Provincial Department of Health Free State, the respondent as the Head of the Supply Chain at Pelenomi Hospital, earning a basic salary of R55 428-98 per month. He was employed on 6 February 2006. The applicant was put on precautionary suspension on 29 April 2019 and was paid during the whole period of suspension.

6. The applicant referred an unfair labour practice dispute to the Council on 5 July 2019 stating that the employer acted against the terms of a collective agreement PSCBC Resolution 1 of 2003, disciplinary Code and Procedure in the Public Service. More specifically talking of clause 7.2, in particular 7.2 (c).

7. The suspension was uplifted on 4 November 2019. The said suspension was 4 months and 5 days in excess of the 60 days contemplated in the Resolution. The 60 days lapsed on 29 June 2019. The respondent should have held a disciplinary hearing and if there was a further postponement, the chairperson should have pronounced, but that was not done. The charges were received by the applicant on 30 January 2020 as reflecting in bundle “A”.

Survey of evidence

8. It is not the purpose or the intention of this award to provide a detailed transcription of all evidence placed before me at arbitration, even though all evidence was considered. I have however summarized the portions of evidence that are relevant to me in making a determination in this dispute.

Applicant's case

9. Mr Mfanta's evidence was that after the suspension was effected he thought the respondent would speedily convene a disciplinary hearing since the allegation was said to be serious, but the respondent prolonged. The suspension disturbed him psychologically and mentally, he had to explain to his wife and the society the reason for suspension because it could not be understood. It affected his family life to an extent that it nearly ruined his marriage. His reputation and self-esteem took a knock because everyone knew about his suspension at Penelomi. Getting a salary was not meaning anything while he had uncertainty about the future. Being idle was an issue.

10. He opposed the version of the respondent that he frustrated the investigation because it was difficult to get hold of him. He never changed his residence and the letters were delivered by the vehicle of the respondent. He was never questioned about fraud allegations and was never aware of the fraud allegations, he only saw them on the charge sheet. The respondent never issued him with the outcome of the investigation. His understanding of the DPSA document produced by the respondent is that it speaks to particularly those officials mentioned, it does not refer to him.

11. During cross-examination, the Mr. Mfanta confirmed that he did not go to any hospital to seek assistance for the mental illness that he claimed to have suffered due to the prolonged suspension because it was only affecting his system and was not warranting medical expenses. He had a headache that was not severe. There were arguments which threatened his marriage. He concluded that the said suffering was linked to the suspension because at the time the only thing worrying him, and keeping him thinking was the suspension. He stated that because of the suspension and the allegation, his reputation was affected as such allegations found expression in the society and people looked at him differently. Mr Mfanta confirmed that during the period of his employment there were employees he was aware of who were suspended for varying reasons, including misconduct among other reasons.

12. Mr. Mfanta expressly conceded at cross-examination that he neither suffered monetary loss nor monetary prejudice due to the mental and psychological illness. He did not incur expenses related to that. There is no salary adjustment or increment which he was supposed to get that he did not receive during the period of suspension. He could

not quantify any monetary value that he lost because of the period of suspension. He admitted that the onus was on him to prove the prejudice and to quantify the loss. He also confirmed that he did not corroborate or substantiate on prejudice on monetary value suffered.

13. Mr Mfanta explained that he attended the investigation on the date set as required by the investigator and submitted a written statement on the following day.

14. During Re-examination, Mr. Mfanta confirmed that he received the letter from the Chief Executive Officer giving him the permission to access the premises of the respondent for investigation purposes, such happened within the 6 months period into suspension. He was never interviewed or called for the investigations in the period beyond the 60 days. He only received the charge sheet on 30 January 2020 while the suspension was uplifted in November 2019. Such charges or documents had no effect in his prolonged suspension and they do not justify it because they were issued way after the period of suspension. The applicant explained that when he said he did not suffer monetary value he meant that he had been receiving his salary every month and he did not consult any doctors, but he suffered prejudice. So the compensation he was seeking for was for the prejudice he suffered for 5 months.

15. The applicant clarified that he was no longer pursuing the argument that his suspension affected his career progression.

Respodent's case

16. The respondent opted not to lead evidence.

Analysis of evidence and argument

17. Section 186 (2)(b) of the Labour Relations Act 66 of 1995 (the LRA) as amended defines unfair labour practice as an unfair act or omission that arises between an employer and an employee involving- the unfair suspension of an employee or any other unfair disciplinary action short of dismissal in respect of an employee.

18. In *SAPO Ltd v Jansen Van Vuuren NO and others* (2008) 8 BLLR 798 (LC), it was held that a suspension, even whilst investigations are underway, amounts to an unfair labour practice, if the period of suspension exceeds the period stipulated in a disciplinary code, collective agreement, regulations, or contract of employment (See also Minister of Labour v GPSBC (2007) 5 BLLR 461 (LC).

19. Resolution 1 of 2003 (the Resolution) titled "Amendments to Resolution 2 of 1999: Disciplinary Code and Procedures for the Public Service" is the subject of contention in this matter. Clause 7.2 of the Resolution reads as follows: ***Precautionary suspensions*** *a. The employer may suspend an employee on full pay or transfer the employee if i. the employee is alleged to have committed a serious offence; and ii. The employer believes that the presence of an employee at the workplace might jeopardise any investigation into the alleged misconduct or endanger the well-being or safety of any person or state property. (b) A suspension of this kind is a precautionary measure that does not constitute a judgement, and must be on full pay. (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.*

20. The second, fifth and sixth bullet points in Annexure B of the Public Service Precautionary Suspensions Guide of the Department of Public Service and Administration which deals with Principles provide as follows respectively: *The period of precautionary suspension must be reasonable and justifiable but should not exceed 60 calendar days. Employees must, without delay and throughout the process be informed of the process steps that the Department is initiating. If suspended, the employee is entitled to a speedy and effective finalisation of the disciplinary process. In the same document bullet points the first and third bullet provides as follows: If an employee is transferred or suspended 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; If it is decided that the transfer/ suspension should be extended, the employee must be informed of the valid reasons for the further extension and given an opportunity to make representations.*

21. At the outset it must be stated that I am indebted to the parties for submitting very useful heads of argument, while I do not refer to each of the arguments raised, these have been considered.

22. I am mindful of the fact that the respondent opted not to lead evidence. It is important to mention that I sensitised and cautioned the respondent on record of the effect of not presenting viva voce evidence. The respondent maintained that it will not give evidence.

23. It is common cause that the employer must hold a disciplinary hearing within a month or 60 days and it is only the chairperson that is vested with the power to decide on any further postponement if an employee is suspended. In this matter the chairperson did not pronounce on the postponement while the suspension continued beyond the 60 days. The respondent acknowledged in the opening statements, that there was a wrong on the part of the employer by exceeding 60 days, but submitted that there was justification.

24. The issues in dispute are whether the applicant frustrated the investigation and thereby causing a delay and prolonged suspension as alleged by the respondent. Whether the applicant suffered any prejudice because of the suspension and whether there is a link between the applicant's illness, suffering and challenges in the society with the prolonged suspension. Whether the respondent's act of allowing the suspension prolong beyond 60 days or the non-compliance with clause 7.2 of the Resolution by the respondent warrants compensation or not.

25. It is the applicant's submission that he neither frustrated the investigation nor the investigator and he co-operated with the investigation because he attended the investigation meeting and arrived on time. The applicant further stated that he submitted his statement on the following day. The respondent did not lead evidence on this issue, it neither called the investigating officer nor the Chief Executive Officer (CEO) to rebut this version. In absence of a contrary version, I am inclined to accept the version of the applicant in this regard. It therefore follows that it is my considered view that the applicant did not frustrate the investigation.

26. There is no evidence presented before me to prove the justification for the prolonged suspension other than averments made by the respondent in its opening statement that it was due to the complexity and the nature of the charges, and added investigations related to fraud. The respondent could not rebut the version of the applicant that he only learnt about the issue of fraud in the charge sheet which was issued a long time after the suspension had been uplifted. It is my finding that the respondent failed to justify the reason for suspension to exceed the 60 days and or for prolonged suspension. The respondent further failed to comply with the DPSA document which required it to continuously inform the applicant of the steps and progress in the investigation.

27. It is by the applicant's own admission and confirmation during cross examination as reflecting in paragraph 12 above that he did not suffer financial loss due to the mental and psychological illness and therefore did not incur expenses related to that. He could not directly link his illness with the suspension despite being afforded that opportunity at cross-examination.

28. The applicant also conceded that there is no salary adjustment or increment which he was supposed to get that he did not receive during the period of suspension. The applicant could not quantify any monetary value that he lost because of the period of suspension. He conceded that he did not suffer any prejudice regarding the monitory value and agreed that the onus was on him to prove the prejudice and to quantify the loss. He could not demonstrate any financial prejudice. I therefore find that the applicant failed to prove the financial prejudice that he suffered because of the prolonged suspension, he did not provide any concrete reasons.

29. The only issue he maintained was that he suffered prejudice because of the prolonged suspension as his dignity and reputation were affected since the news of his suspension found expression in the society and had to respond to questions in the society and from his family. He could not justify on how his career progression was affected in the period beyond the 60 days of suspension. In Muller and Other v Chairman of the Ministers' Council House of Representatives and Others *1991 (12) ILJ 76 (C),* it was held that the implications of being barred from going to work and pursuing one's chosen career, and of being seen by the community around one to be so barred, are not so immediately realized by the outside observer and appear, with

respect, perhaps to have been underestimated. There are indeed substantial social and personal implications. These considerations weigh as heavily in South Africa as they do in other countries. I have noted the argument of the applicant in this regard and I am persuaded. It is my considered view that based on the above submissions that there was an element of prejudice suffered by the applicant to a certain limited extent.

30. I am mindful of the *Allan Long* judgment submitted by the respondent in its closing arguments where the contentious issue was that the employee was not afforded an opportunity to make representations before effecting a preliminary suspension. In that matter, he Constitutional Court confirmed the Labour Court's decision where it held that where a suspension is precautionary and with full salary there is no requirement that an employee be given an opportunity to make representations. However, in my view, and for the reasons below, this ration in the judgment in *Allan Long* supra is entirely distinguishable on the facts of the issues before me, it cannot apply. In the matter before me, the contentious issue is the prolonged suspension by the employer beyond the 60 days prescribed in the Resolution without the postponement by the chairperson. The said protracted suspension flying in the face of the objectives of the Resolution.

31. The respondent conceded that it erred by continuing with the suspension beyond the 60 days, the justification it provided for the prolonged suspension was neither supported by evidence nor documents, and therefore it amounts to no justification. Therefore, I am not convinced by its averments, which do not even account for the delay. The said time frame in the Resolution is peremptory and binding.

32. I am now to decide whether the infraction by the respondent of exceeding the prescribed 60 days in the Resolution warrants that I order compensation or not. The courts have pronounced that the purpose of clause 2.7.(2) (c) of the Resolution is to address the problem of protracted suspensions which demoralises and unfairly prejudice the suspended employee, the intention of the said resolution was to curb the power of employers in the public service from using protracted suspensions to marginalise employees who have fallen out of favour and the resultant detrimental impact, reputation, advancement of job security and fulfilment that would arise from the prolonged suspension. The above was expressly noted in *SAPO v Jansen* cited in paragraph 18 above. I have taken note of the submissions and argument of the

applicant in this regard. I cannot be convinced otherwise when I consider that with 60 days having expired and the employer having taken no further steps at the date of referral of this matter and without basis why suspension was so prolonged, I see no reason why compensation should not be ordered.

33. It is my considered view that on a balance of probabilities the respondent committed the unfair act against the applicant by so doing as mentioned above, such constituted an unfair labour practice.

34. It follows that the applicant discharged the onus to prove that the respondent unfairly suspended him, and therefore the respondent committed an unfair labour practice as contemplated in section 186 (2) (b) of the LRA.

Remedy

35. The remedies that may be afforded to the applicant in unfair labour practice disputes are set out in section 193 (4) of the LRA, which provides that an arbitrator appointed in terms of this 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. The applicant made it clear that he seeks compensation.

36. In determining the appropriate relief I have had regard to several factors, in line with the courts' pronouncements, including but not limited to the following: - there is a serious need to address the wrong occasioned by the infringement of the right and to deter future violations and there must be fairness to all who might be affected by the nature of the relief and the infringement. I have considered the applicant's remuneration at the time of suspension, the prejudice suffered by the applicant and its limited extent, the nature of the unfair labour practice, the procedural flaw and the extent of the unfairness of the act. I have considered also the fact that the applicant earned an income during the period of the prolonged suspension. There was no patrimonial loss suffered by the applicant, while I am also mindful of the fact that the absence of loss to an employee does not prevent an award of compensation. The aim is neither to punish the loser nor to enrich the victor, but to express the displeasure at

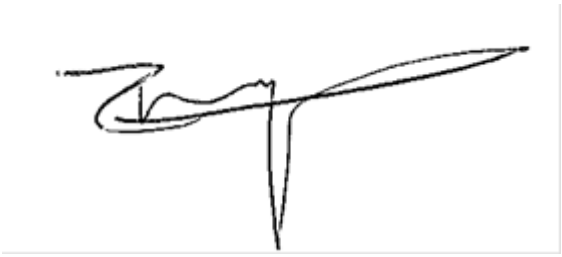
the infraction. The courts have held that compensation is just a solatium (as explained to be for injured feelings as distinct from financial loss or physical suffering).

Award

37. The act committed by the Department of Health- Free State, the respondent to Mr. Xolani Mfanta, the applicant amounted to an unfair labour practice.

38. Department of Health- Free State, the respondent must pay Mr. Xolani Mfanta, the applicant *compensation equal to one months' wage of* R55 428-98.

39. Mr. Xolani Mfanta, the applicant must be paid amount of R55 428-98 (Fifty-five thousand four hundred and twenty-eight rands ninety-eight cents), less statutory deductions, by no later than 31 July 2020, after which date interest will accrue.



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Zuko Macingwane