ARBITRATION AWARD

PHSDSBC
PUBLIC HEALTH AND SOCIAL DEVELOPMENT SECTORAL BARGAINING COUNCIL

Commissioner: **Minette van der Merwe**
Case No: **PSHS552-16/17**
Date of Ruling: **29 June 2017**

In the matter between:

PSA obo TR Rametse (Union / Applicant)

and

Department of Social Development – Free State (Respondent)

DETAILS OF HEARING AND REPRESENTATION:

[1] The arbitration was held on **12 June 2017** at the Respondent's offices in Bloemfontein.

[2] The Applicant was present and represented by Mr Clement Fandie, an Official from the Public Servants Association (PSA). The Respondent was presented and represented by Adv Keketso Nthlare, a Labour Relations Officer from the provincial office of the Respondent.

[3] No interpretation was required. The proceedings were not recorded as no evidence was led.

BACKGROUND TO THE DISPUTE:

[4] The matter was scheduled for Arbitration in terms of section 186(2)(b) of the Labour Relations Act (Act 66/1995) (hereinafter referred to as the ”LRA”), related to unfair disciplinary action short of dismissal.

[5] The following was agreed by parties:

[5.1] The parties agreed to argue the merits of the dispute on heads of arguments only, as no witnesses were going to be called to testify and no oral evidence were going to be led.
[5.2] The Applicant would submit heads of arguments no later than 16 June 2017.
[5.3] The Respondent would submit heads of arguments in reply no later than 23 June 2017.
[5.4] The Applicant may supplement its heads of arguments by no later than 28 June 2017.
[5.5] Heads of arguments had to be submitted via e-mail to myself as well as the Bargaining Council.

[6] Parties complied with the agreement as per paragraph [5] above. The Respondent also submitted bundles “A” and “B” on 12 June 2017 in support of its written heads of arguments. The Applicant submitted bundle “C” with its heads of arguments.

ISSUE TO BE DECIDED:

[7] I was called upon to determine the following:
[7.1] Whether the warning issued to the Applicant warranted a formal or informal procedure, in terms of the Respondent’s disciplinary code, and whether the Respondent complied with its own disciplinary code
[7.2] Whether there was sufficient evidence to issue a final written warning to the applicant.
[7.3] Whether the Applicant’s version was considered before the final written warning was issued
[7.4] Whether the PHSDSBC has the jurisdiction to pronounce over this dispute as it was common cause that the warning in question has long since lapsed
[7.5] Whether the deductions made from the Applicant’s salary towards the damaged incurred by the Respondent fell within the jurisdiction of the PHSDSBC.
[7.6] Whether the final written warning issued to the Applicant was fair, and if so, whether the Respondent committed an unfair labour practice in terms of section 186(2)(b).

[8] The Applicants sought the warning to be removed from his file completely, and an order that

SURVEY OF EVICENCE AND ARGUMENTS:

Heads of arguments from Applicant:

NOTE: This is a verbatim reflection of the heads of arguments received:

[9]

*"[9.1] **ISSUE TO BE DECIDED***

The commissioner is called upon to consider whether the respondent acted unfairly by failing to proceed with formal disciplinary hearing despite having levelled allegations of misconduct against him and proceed to find the applicant guilty without hearing and following necessary procedures.

*[9.2] **FACTUAL ISSUE(S)***

The Applicant on the 23 September 2014 was served with a letter outlining allegations of misconduct against him in that he negligently or intentionally misused the 3G card issued to him by making phone calls from it which resulted in the department incurring costs. .

[9.3]

On the 30th September 2014 applicant responded to the allegations stating that he had not used the 3G to make calls as he kept it in the car while her Departmental PC was taken in for repairs and that he had only realised a year later when the bill came that there had been calls made on the 3G.

[9.4]

The applicant also submitted that the one Mr Booysen G had told him that the 3G setting was for data usage only (kindly see page 16 par 1 of bundle A- Employers for easy ref)

[9.5]

Subsequent to the Applicant's response, the responded serve the him with charge sheet and a notice to attend a disciplinary enquiry dated30 January 2015 and the hearing was

scheduled for the 18 February 2015. The hearing was postponed and rescheduled for the 12 August 2015 but failed to materialise for reasons of Chairperson not attending and being absent.

[9.6]

Commissioner, since then the applicant was convicted or found to have been guilty based on a submission by the responded recommending that the applicant be issued with a final written warning and pay back the amount of R18 261,87 as a results (kindly see attached annexure marked A2). This recommendation as then approved by the Head of the Department Mr M Seoke (kindly see attached annexure marked A3).

[9.7]

The Disciplinary Code and Procedure for Public Service at clause 6 reads as does

'' SERIOUS MISCONDUCT

If the alleged misconduct justifies a more serious form of disciplinary action than provided in paragraph 5, the employer may initiate a disciplinary enquiry……"

[9.8]

The Respondent initiated an enquiry as indicated in par 7 herein above and as such went ahead and complied with the provision 7.1 of the Code. The applicant was served with a description of the allegations against him. Date, time and place of the enquiry.

[9.9]

The Respondent in doing so as indicated in par 10 above, saw it befitting to institute formal hearing and have the applicant respond to the allegations against him but failed to afford him an opportunity to respond and defend himself.

[9.10]

When there is a disciplinary hearing scheduled or conducted, the Disciplinary Code and Procedure provides that at clause 7.4(a) " if the chair finds an employee has committed misconduct, the chair must pronounce a sanction (within the period referred to in clause 7.3(o),….) ……".

In the case of the applicant none whatsoever transpired and a decision was made based on a submission.

[9.11]

Commissioner, it is the submission of the applicant that the provisions stated at clause 7.4(a) of the disciplinary code and procedure for public service is peremptory and must be followed. Any administrative act outside this provision is unfair.

[9.12]
The respondent recommended a sanction of Final Written Warning and pay back of money to the amount of R18 261,87 (kindly see par 4.1 and 4.2 of the attached annexure marked A3) following a disciplinary hearing that did not take place and to this effect a total amount of money take from the applicant to date of this submission is R10 716,87.

[9.13] ***RELIEF***
The Commissioner is requested to find that the respondent act unfairly when approving and issuing the applicant with final written warning and repayment of monies without following proper and fair procedure."

Supplementary heads of arguments from the Applicant:

[9.14]*"The submission on par 4.1.3 of the respondent is disputed in that the charges and the Notice of the formal disciplinary hearing was not withdrawn and the applicant was made to believe that he had charges to answer. If it were true that the respondent had intended to follow informal process why went ahead to charge.*

[9.15] At 4.6 the applicant dispute submission made. Applicant has already shown that by means of annexure A1-3 that as part of the sanction the respondent found that the applicant should also pay for the loss incurred (see Annexure A2 last par as well as par 4.1 & 4.2)."

Heads of arguments from the Respondent:

NOTE: This is a verbatim reflection of the heads of arguments submitted.

[10]
"[10.1] ***ISSUE/S TO BE DECIDED***
The Commissioner is called upon to determine a section 186(2)(b) unfair labour practice dispute relating to final written warning against Mr Rametse was fair/unfair.

Should the Commissioner finds that a final written warning sanction was unfair, the Respondent should be compelled to withdraw same.

[10.2] ***BACKGROUND TO THE ISSUE***

Mr Rametse *is employed by the Department of Social Development Free State, as a Chief Probation Officer. The department issued him with a 3G card for work related purposes, but strictly for internet purposes. It is alleged that during the* ***May 2013 to October 2013****, he allegedly made voice calls from the 3G card to the amount of* ***R 18 216, 87****,and further that he failed to report the loss of the said 3G card. After having considered all circumstances relating to these alleged acts of misconduct coupled with his reasons thereof, the department then decided to issue him with a* ***final written warning*** *as a form of sanction without invoking provisions item 6 of the Disciplinary Code and Procedures. He was then issued with same as a form of disciplinary sanction. He then filed an appeal with the Appeal Authority who confirm the outcome of the informal disciplinary proceeding.*

[10.3] ***ISSUES TO BE DETERMINED BY THE COUNCIL***

(a) Disciplinary Code

One of the most important purposes and objectives of the Code is, inter alia; to promote acceptable conduct; to provide employees and employer with a quick and easy reference for the application of discipline, and also to avert and correct unacceptable conduct.
Furthermore, in relation to the above purposes, the Code is further underpinned by the following important principles:-

4.1.1 Discipline is a corrective measure and not a punitive one;
4.1.2 Discipline must be applied in a prompt, fair, consistent and progressive manner
4.1.3 Disciplinary code is necessary for the efficient delivery of service and fair treatment of public servants, and ensures that employees have a fair hearing in a formal or informal setting.

It is the argument of the Applicant party that Mr Rametse was found guilty without hearing and following necessary procedures. This assertion is incorrect because the Code empowers the Employer either to follow an informal process or formal

processes. Department chose an informal process, and not a formal process. An informal process implies that after having made Mr Rametse aware of allegations of acts of misconduct levelled against him, he was afforded an opportunity to provide reasons as to why disciplinary action should not be instituted against him.
*(**Annexure A of employer bundle A, page 15**). This is after making an assessment of the Seriousness of the misconduct after having considered the following:-*

- *the actual or potential impact of the alleged misconduct on the work of the public service,*
- *Mr Rametse's nature of work and responsibilities;*
- *the circumstances in which the alleged misconduct took place.*

(b) Formal / Informal Procedures

The Code further provides on item 5.5 that for less serious forms of misconduct, no formal enquiry should be held. Therefore, it was the department's assertion that acts of alleged misconduct levelled against Mr Rametse, did not warrant a formal disciplinary hearing.

(c) Evidence for finding guilty

Finance Circular 1 /2011: Cellular phone and 3G utilization, which is addressed to all departmental cellular phones and 3G users, provides as follows:-

1 .-------

2 .-------

*3. Users are kindly reminded that **no sms, mms or calls** may be made from the departmental 3G contract. Failure to comply will result in the amount being deducted from the official's salary. Department's Chief Financial Officer wrote a letter **dated 26 May 2014**, making him aware that he was misusing 3G card by making calls from it. Documentary evidence of calls is captured on pages **18 to 21** of the Employer's bundle A. There is no documentary evidence from the Applicant contradicting the employer's version.*

On page 8 of the employer's bundle B, it is stated as follows:-

' The loss of an official cellular phone shall immediately be reported by the user to the Financial Administration Directorate, who in turn shall immediately inform the service provider immediately. There is no evidence before the Council that Mr Rametse, after realizing that he has lost or misplaced the 3G card, he immediately informed

theFinancial Administration Directorate. Should he have done that, there would be no need for the CFO to have written a letter to him, dated 26 May 2014.Furthermore should he have informed the Financial Administration Directorate, they would have immediately informed the service provider to block the usage of such item.

It is Mr Rametse's version that he had not used the 3G to make calls as he kept it in his car. It was irresponsible of him to keep it in his car because he might have taken it to carwash for cleaning purposes and it got stolen, or anything could have happen to it whilst kept in his car. On page 11 of Employer Bundle A, it is stated that the 3G was stolen and not lost. Consequently as it is the Applicant's version that it was stolen, he was supposed to have reported such stolen property of the State to SAPS and open a criminal case. This did not happen. Failure by him to report a stolen state property to the Respondent and/or the SAPS, an inference is then drawn that he continued to misuse it. Respondent cannot be held responsible for his failure to safely keep his 3G card at a safe place.

Wherefore, this is the evidence that the Respondent assessed before deciding on a sanction of final written warning.

***(d) Was fair procedure followed**.*

Fair procedures were followed as outlined above under 4.1 to 4.3.

(e) Was Applicant's version considered

It was considered. However, circumstances relating to the use of 3G card as outlined on Employer's bundle A vis a vis his version, warranted the Respondent to issue him with a sanction of final written warning.

[10.4] Deductions lawfulness

*The Council does not have jurisdiction to entertain a section 186(2)(b) relating to deductions**.** The MEC confirmed the outcome of the appeal as final written warning. The disciplinary code only make provision for the following sanction:-*

- *Corrective counselling;*
- *Verbal warnings;*
- *Written warning valid for six months;*
- *Final written warning valid for six months;*
- *Demotion;*
- *Suspension without pay for no longer than three months;*
- *Dismissal.*

Therefore, according to the Code, Head of Department's issue a sanction are only restricted to the above sanction. These are the type of sanctions that the Bargaining Council is empowered to look their unfairness/fairness application in terms of the Labour Relations Act. Deduction is not a sanction. ***On page 9 of Employer Bundle A****,*
then MEC stated as follows:-

" ***it is further more recommended that you continue paying off the debt as a result of a lost 3G card****"*

It is important to note that as per item ***3 of the Department's finance circular 1 /2011****,*
it is stated that failure to comply will result in the amount being deducted from the official's salary.

The MEC's decision to recommend that Mr Rametse should continue to pay off the debt, bring into debate a new issue that relates to an administrative decision/action which is governed by the branch of Law which deals with administration (PAJA).

Before administrators can make decisions that have an impact on another person, they must be allowed to do so a law. MEC's decision to recommend paying off of the debt by Mr Rametse is an administrative decision which is governed by principles of

administrative law. A decision could be a decision (or a failure to make a decision) relating to:-

- *making a determination;*
- *imposing a condition;*
- *making a declaration;*
- *making a requirement*

Because paying off a debt is an administrative decision and not a sanction, PAJA sets
out the procedures and grounds for challenging a particular type of government decision / administrative action. The most important way in which Mr Rametse's rights which are affected can be enforced, is by ***judicial review****.*

Therefore, if the Applicant party feels that paying off of debt by Mr Rametse is unlawful, unreasonable or that fair procedures were not followed, they can approach a court for judicial review of the
decision. High Court or Labour Court shall have jurisdiction to entertain a dispute relating to unfair deductions. If the High Court or Labour Court finds that the administrative decision is unlawful, unreasonable or procedurally unfair, it can make any of a number of possible orders to rectify the situation. The Bargaining Council lacks such jurisdiction.

Basic Principles of BCEA relating to deductions

The law is unfairly biased against the employee who may be financially unable to recover from losses caused by employee. Section 34 provides as follows:-

1 ----------

(2) A deduction in terms of subsection (1)(a) may be made to reimburse an employer for loss or damage only if –

(a) the loss or damage occurred in the course of employment and was due to the fault of the employee,

(b) the employer has followed a fair procedure and given the employee a reasonable opportunity to show why deductions should not be made.

[10.5] ***Jurisdiction.***

Applicant's prayer is that a sanction of final written warning be withdrawn. Mr Rametse
received the outcome of the appeal on the ***14 July 2016****.The Code provides as follows:-*

> ***' The Final Written Warning remains valid for six months. At the expiry of the six months, the final written warning must be removed from the employee's personal file and destroyed."***

It is worth noting to state that a sanction of final written warning which was issued against Mr Rametse, had since lapse.

[10.6] ***PRAYER***

The Respondent prays that the matter be dismissed."

ANALYSIS OF EVIDENCE AND ARGUMENT:

[11] The onus in proving that an unfair labour practice was committed rests on the Applicant.

[12] I am guided by section 186 (2)(b) of the LRA as well as the Disciplinary Code and Procedure, PSCBC Collective Agreement 01 of 2003.

[13] Section 5.5 of the Disciplinary Code and Procedure reads as follows:

" *For less serious forms of misconduct, no formal enquiry shall be held*".

[14] The above is read together with the paragraph 4 of the document issued to the Applicant on 23 September 2014 (page 15 of "A") with the heading "*Allegations of an act of misconduct levelled against you",* which read as follows:

"*Based on the abovementioned information, you are hereby requested to provide reasons as to why disciplinary action should not be instituted against you. You are further requested to submit your response within five working days from the date of*

receipt of this letter, for the attention of Mr Rapapali at the Labour Relations Office, failing which a disciplinary action may be taken against you without any further notice".

[15] The Applicant responded on 30 September 2014 (page 16 of "A") with his reasons. The Applicant did not deny that the phone calls charges were made on his 3G card, but claimed he always left it in his car. The Applicant was negligent over the tools provided to him by the Respondent to effectively do his work. The Applicant had an obligation to keep the tools provided to him by the Respondent safe and ensure that it was not misused or lost, and had an obligation to report any discrepancies to the Respondent. Same was confirmed by the circular issued by the Respondent (page 1 of "B") and the Administration, Management and Control of Cellular Phones and 3G Cards Policy (pages 2 – 16 of "B").

[16] From the evidence before me, the Respondent considered the submission made by the Applicant, and opted to act in terms of section 5.5 of the Disciplinary Code and Procedure in that it elected not to hold a formal disciplinary enquiry.

[17] The allegation that the Applicant was issued with a charge sheet, with a time and date, was not established by the Applicant, as same was not included in any of the bundles. The onus vested in the Applicant to prove same. Nevertheless, had the Respondent issued a charge sheet with charges, it remained the prerogative of the Respondent to dispense with a formal disciplinary hearing, after having had considered the submissions by the Applicant (page 16 of "A") and opted to act in terms of section 5.5 of the Disciplinary Code and Procedure. Such an action did not render the procedure flawed.

[18] The Respondent acted in Compliance with the Disciplinary Code and Procedure in respect of the procedure followed against the Applicant.

[19] The Respondent did not commit an unfair labour practice in terms of section 186(2)(b), and the final written warning was issued in a fair manner and for valid reasons.

[20] It was common cause that the final written warning issued to the Applicant for the misconduct had long since lapsed. The warning was issued 16 September 2015 and was valid for a period of six months. The warning read as follows:

"This final written warning will be placed on your personal file and will remain valid for a period of six months from the date of the written warning. After six months the written warning will be removed from your personal file and be destroyed."

[21] It is therefore clear that this aware is purely academic, in that the final written warning, which formed the subject matter of this dispute, had long since lapsed.

[22] The Respondent did not included the deduction of the R 18 213.87 as a penalty or disciplinary measure in the final written warning that was ultimately issued on 16 September 2015. The repayment of the R 18 213.87 was included in the motivation submitted to Mr MW Seoke, dated August 2015, yet only the sanction of final written warning was ultimately issued against the Applicant (pages 13 & 14 of "A").

[23] The outcome of the appeal further stated, on the ground of the alleged unfair deduction made, as follows:

"It is recommended that you continue paying off the debt as a result of a lost 3G card". (my emphasis)

[24] Reference is made to section 34(1) and 2(a) of the Basic Conditions of Employment Act (Act 75/1997) regarding deductions from remuneration specifically in respect of loss or damages incurred in the course of employment and due to the fault of the Employee.

[25] The PHSDSBC is not the appropriate forum to determine matters related to section 34 of the BCEA as it lacks the necessary jurisdiction. The Labour Court is the appropriate forum to adjudicate disputes of this nature.

AWARD:

[26] The PHSDSBC lacks the necessary jurisdiction to determine disputes related to the Basic Conditions of Employment Act, specifically of this nature.

[27] The final written warning has already lapsed, which renders this award purely academic.

[28] The claim is hereby dismissed.

Signature: 

Panelist: **Minette van der Merwe**