ARBITRATION AWARD

PHSDSBC
Public Health and Social Development Sectoral Bargaining Council

Commissioner: **Bhekinhlanhla Stanley Mthethwa**

Case No: **PSHS619-20/21**

Date of award: **27 January 2021**

In the matter between:

PSA obo Brian Sithembiso Ndaba (Union / Applicant)

and

Department of Social Development- KwaZulu Natal (Respondent)

Details of hearing and representation

1. The matter was scheduled for arbitration on 18 January 2021 at 10h00, at the offices of the Department of Social Development in Pietermaritzburg. Mr M Mbanjwa, a trade union official from PSA represented Mr Brian Sithembiso Ndaba (hereinafter referred to as the Applicant) and Mr RM Madlala who is an Acting Director: Labour Relations represented the Department of Social Development- KwaZulu Natal (hereinafter referred to as the Respondent). The proceedings were digitally recorded.

Preliminary points

2. There were no preliminary points raised.

Application for postponement by the respondent

3. In the middle of the arbitration the respondent's representative applied for postponement on the grounds that its witness was not available on the day. According to the respondent's representative this was the only witness that could be able to demonstrate that the disciplinary enquiry was held within 60 days as stipulated in clause 2.7 of of Chapter 7 of the Senior Management Handbook ("the SMS"). The applicant was employed in terms of the Public Service of 1994, ("the PSA"), as such days involved are defined and calculated in terms of the PSA. Accordingly, the matter should be postponed to a later date to allow the respondent to call its witness in support of its case.

4. The applicant's representative opposed this application on the grounds that there was no valid reason for the respondent not to bring its witness. The applicant had been on suspension since 23 July 2020 without any explanation. The applicant would suffer further prejudice if the matter is postponed. Accordingly, the application should be refused.

5. After hearing submissions from both parties I issued *ex tempore* ruling and determined the application in the following terms:

   (a) Based on the submissions made by both parties it is clear that the respondent had adopted a lax attitude in preparing for this arbitration.

   (b) The respondent's representative had failed to advance valid reason for postponement. In my view there was no justification for the respondent's non compliance with the Council's Rules to apply for the postponement.

   (c) The respondent's one and only witness to be called would not add any value in this arbitration; in light that it was common cause that the disciplinary enquiry was conducted after 60 days prescribed in Resolution

1 of 2003 concluded at the Public Service Co-ordinating Bargaining Council ("the PSCBC").

(d) Therefore, I am satisfied that by not granting this application the respondent could not suffer any prejudice.

(e) It is my conclusion that this application had no merits, as such, it should be refused.

(f) Accordingly, this matter shall proceed as scheduled".

Submissions by parties

6. The respondent's representative moved an application for postponement on 18 January 2021 on the basis that he was not having a witness that could testify on the reasons that led to the disciplinary enquiry conducted after the expiry of 60 days as stipulated in Resolution 1 of 2003 read in conjunction with clause 2.7 of the SMS Handbook. The applicant was appointed in terms of the Public Service Act of 1994 ("the PSA"). Therefore, days are calculated in terms of the PSA which defines days as working days. The respondent's witness would be able to lead evidence that would prove that disciplinary enquiry was conducted within 60 days and how the days were calculated. As such, this matter should be adjourned to a later date to allow the respondent to call this witness.

7. The applicant's representative opposed this application on the grounds that there were no issues in dispute. It was common cause that the applicant was precautionary suspended on 23 July 2020 and the disciplinary enquiry was conducted on 21 October 2020. Clearly, that was in contravention of Resolution 1 of 2003. That being the case the applicant's suspension is unfair. The applicant only wants suspension to be lifted since the respondent had contravened Resolution 1 of 2003. Therefore, there was no valid reason to postponement the

matter so that somebody could come and testify that the disciplinary enquiry was conducted within 60 days.

8. Accordingly, there was no basis to grant this application. For this reason, this application should not be granted.

Analysis of the submissions

9. In this type of application, one should be guided by the reasons advanced by the applicant for the application. In this instance it is important to consider whether or not there would have been fairness in proceeding with the matter in the absence of the applicant's ("the respondent in the main application") witness. The guiding factor should be whether or not the respondent would suffer any prejudice if the matter proceeds in the absence of its witness. If the respondent would suffer any prejudice the application must be granted. However, it is also important to consider what practical steps were taken by the respondent to avoid postponement in view that it was properly notified 14 days prior to the arbitration date. All these factors should be weighed against the preparation and the costs incurred by the Council to administer the matter as well as the applicant. It is also important to consider the Council's Rules; more specifically Rule 23 read in conjunction with Rule 32, in relation to the application of this nature.

10. It is also important to note that no party that is entitled to postponement but postponement is an indulgence. Therefore, a party cannot decide to leave its witnesses behind because it intends to apply for postponement. Certainly, the applicant for the postponement should come prepared for the arbitration and bring along its bundle of documents and witnesses. Without any doubt the application for postponement must be supported by valid reasons. In this instance I do not view the reasons advanced by the respondent's representative as the valid reasons to justify postponement.

11. In this instance all issues were common cause and there was no issue in dispute; clearly, the respondent's witness would not add any value to these proceedings. However, if the respondent believed that it required to call a witness; it had an obligation to come prepared with a relevant witness and ready for the arbitration. Nonetheless, the respondent only came prepared to submit heads of argument and close its case without calling any witness. Moving the application for postponement was an after-thought having heard me outlining the consequences of not calling witness or witnesses. It was only at that stage that the respondent's representative requested an adjournment to consult his principals. After that adjournment the respondent's representative moved an application for postponement. Obviously, had I proceeded without warning the respondent of the consequences of relying on heads of argument without calling any witness; the respondent would have proceeded in a manner it had planned to conduct its case. The respondent should understand and appreciate that there are some acts that are impossible to perform, such as proving that disciplinary enquiry was conducted within 60 days from the date of the applicant's precautionary suspension. In actual fact; when the disciplinary enquiry was conducted on 21 October 2020; that was on the 90th day. This is what makes this postponement application frivolous and vexatious.

12. In terms of the Oxford dictionary (3rd edition) the word vexatious is defined as annoying and/or irritating or to cause irritation, the word frivolous is defined as lacking a serious purpose. Without any doubt this is an application that is annoying and lacks serious purpose.

13. For all the reasons stated above I did not find any compelling and reasonable grounds that support this postponement application.

14. It has come to my attention that in paragraph 5 (c) of my ruling I had erroneously referred to Resolution 1 of 2003 concluded at the PSCBC, instead, of Chapter 7 of the SMS Handbook since the applicant was a member of the senior management

15. In the circumstances I have decided on my own accord to vary paragraph 5 (c) of the aforesaid ruling in terms of section 144 of the Labour Relations Act 66 of 1995 ("the Act").

Ruling:

16. I vary paragraph 5 (c) of my *ex tempore* ruling issued on 18 January 2021 in so far as it relates to Resolution 1 of 2003 concluded at the PSCBC.

17. I therefore vary paragraph 5 (c) to read as follows; "The respondent's one and only witness to be called would not add any value in this arbitration; in light that it was common cause that the disciplinary enquiry was conducted after 60 days prescribed in the SMS Handbook".

Issues to be decided

18. I have to decide whether or not the respondent committed "any unfair suspension in respect of the applicant", as contemplated in section 186 (2 (b) of the Act; and,

19. I am also required to determine whether or not the applicant's precautionary suspension was in contravention of clause 7.2 of Resolution 1 of 2003 concluded at the PSCBC.

Background to the dispute

20. The applicant is currently appointed as a Chief Financial Officer. He was precautionary suspended on 23 July 2020 without any explanation.

21. In the belief that the suspension was unlawful and amounted to an unfair labour practice, the applicant referred a dispute in terms of section 186 (2) (b) of the Act

to the Council. The applicant sought, as a remedy, that his suspension be uplifted. The dispute was not resolved at conciliation and the conciliating panellist issued a certificate indicating that the dispute remained unresolved after the conciliation process on 1 December 2020. The applicant thereafter submitted a request for the matter to be resolved through arbitration and the dispute was scheduled for arbitration as indicated above.

Survey of evidence and arguments

22. The applicant gave evidence under oath and the respondent did not call any witness.

23. The applicant testified that he was employed as a Chief Financial Officer. He had been occupying this position for the past 2 years and 10 months. On 23 July 2020 he reported for duty as usual and knocked off in the afternoon and went back home in Durban. While he was at home that evening, he received a call from the Head of the Department ("the HOD") to come back to the office. According to the HOD he wanted to meet him urgently. He then drove back from Durban to the office in Pietermaritzburg. He arrived at the office at 17h45 and met the HOD. However, when he met the HOD there were no discussions; the HOD just issued him with a letter for precautionary suspension without any explanation.

24. It was his testimony that his suspension was unfair and there was no valid reason to be suspended beyond 60 days prescribed in law. There was no justification to keep him on suspension because the allegations against him arose during the 2019/2020 financial year. The financial statements for 2019/2020 have been closed and it could not be opened and/or interfered with in any manner. The investigation against him had been concluded. He had been issued with the charges and he was attending a disciplinary enquiry. Accordingly, there was no investigation that he could interfere with at this stage. There was no point to keep

him on precautionary suspension because that continues to injure his reputation unnecessarily. This suspension should be uplifted.

25. In closing Mr. Mbanjwa argued that the applicant's suspension was substantively unfair in that it was in breach of clause 7.2 of Resolution 1 of 2003 concluded at the PSCBC. It should be noted that there was no issue in dispute in these proceedings. The respondent had submitted that it could not have conducted a disciplinary enquiry within the prescribed period owing to Covid-19 Regulations. Nonetheless, there were many processes that were conducted after 23 July 2020. Accordingly, there was no valid reason why the applicant's disciplinary enquiry was not held within 60 days as stipulated in Resolution 1 of 2003 read in conjunction with clause 2.7 of the SMS Handbook. This is the reason why the respondent's failure to hold disciplinary enquiry within 60 days becomes unfair. Accordingly, the applicant's suspension must be uplifted.

26. Mr. Madlala contended that in terms of clause 2.7 (b) and (c) of the SMS Handbook the respondent was entitled to precautionary suspend an employee on full pay if that employee is alleged to have committed a serious offence and it believes that the presence of that employee at the workplace might jeopardize investigation into the allegations against him or endanger the well-being or safety of any person or state property. In this instance the applicant is alleged to have abused state funds to the tune of R41 million in procuring blankets during the National Lockdown. It was these serious allegations that the respondent wanted to investigate. The applicant was employed in terms of the PSA; as such, in counting the number of days from 23 July 2020, weekends and public holidays should be excluded. Therefore, when the respondent issued the applicant with a notice to appear before a disciplinary enquiry on 17 October 2020 it was well within 60 days. However, it was the applicant that requested the disciplinary enquiry to be postponed hence it was conducted for the first time on 21 October 2020. The applicant had not suffered any prejudice since he was on suspension with full pay. It was for these reasons that the respondent believes that it did not commit any unfair labour practice as outlined in section 186 (2) (b) of the Act.

Analysis of evidence and arguments:

27. As much as parties referred and relied on Resolution 1 of 2003 concluded at the PSCBC that collective agreement is not applicable in this matter since the applicant was a member of the senior management. Chapter 7 of the SMS Handbook is the only instrument regulating disciplinary measures for the senior managers in the public service.

28. In my view the point of departure in this case must be found in the following instruments; (a) Section 186 (2) (b) of the Act and the SMS Handbook.

29. Section 186 (2) (b) of the Act sets out the meaning of unfair labour practice as follows: “Unfair labour practice’ means any 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”.

30. SMS Handbook is a Regulation issued by the Minister of Public Service and Administration that regulates the terms and conditions of service for senior managers in the public service. The provisions of clause 2.7 of the SMS Handbook are that the employer may suspend or transfer a member on full pay if – (a) the member is alleged to have committed a serious offence; and the employer believes that the presence of a member 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 judgment, and must be on fully pay. (c). If a member is suspended or transferred as a precautionary measure, the employer must hold a disciplinary hearing within 60 days. The chair for the hearing must then decide on any further postponement.

31. In view of the above legal framework it is clear that preventative suspension must be supported by valid reasons. In this instance it is important to note that prior to

the applicant's suspension he was never informed of the alleged allegations that had been brought to the respondent's attention.

32. It is important and worth noting that the applicant's version that he was issued with a letter of precautionary suspension without explanation was not disputed. In fact, the respondent elected not to cross-examine the applicant. Therefore, it is my conclusion that the applicant's suspension was substantively and procedurally unfair. It is so because the manner in which the applicant was suspended infringed upon his rights and the terms and conditions of his employment as outlined in the SMS Handbook. The fact that the applicant was issued with a letter of precautionary suspension without issuing him with a notice of intention of the precautionary suspension confirms the above conclusion. The applicant was entitled to be given an opportunity to make representations to the allegations against him. I am mindful of the fact that the applicant did not take issue with the procedural aspect of his suspension.

33. Our courts have confirmed that suspensions must, as minimum requirement satisfy three criteria. (a) The employer must have a justifiable reason to believe, *prima facie* at least, that the employee has engaged in serious misconduct. (b) There is some objectively justifiable reason to deny the employee access to the workplace based on the integrity of any pending investigation into the alleged misconduct, or some other relevant factor that would place the investigation or the interests of affected parties in jeopardy. (c) The employee is given the opportunity to state a case or to be heard before any final decision to suspend is made (See *National Union of Metalworkers of SA v Vetsak Co-Operative Ltd & others* 1996 (4) SA 577 (SCA) 589C–D; *National Education Health & Allied Workers Union v University of Cape Town & others* (2003) 24 ILJ 95 (CC) paragraph 38) & *Mogothle v Premier North West Province* (2009) 30 ILJ 605 (LC)**).**

34. Clause 2.7 of the SMS Handbook provides that the employer may suspend an employee if it is alleged that he had committed a serious offence and the

employer believes that the presence of a member at the workplace might jeopardise any investigation into the alleged misconduct, or endanger the well-being or safety of any person or state property. Importantly, it further provides that the employer must hold a disciplinary hearing within a month or sixty days, depending on the complexity of the matter and the length of the investigation. The chairperson for the hearing must decide on any further postponement.

35. In this case the applicant was charged and appeared before a disciplinary enquiry after 60 days which is in contravention of clause 2.7 of the SMS Handbook. Thereafter, there was no fair and valid reason to keep the applicant on precautionary suspension after issuing him with a charge sheet and he had appeared before a disciplinary enquiry, unless the respondent believed and could demonstrate that the presence of the applicant in the work place could endanger the well-being or safety of the witnesses or the state property. There is no evidence to that effect. Keeping the applicant on precautionary suspension beyond 60 days was an abuse of authority and brazen disregard of clause 2.7 of the SMS Handbook. This is the very mischief that instrument was put in place to curb.

36. In *Mashiane v Department of Public Works* (2012) ZALCJHB 69 (LC) Le Grange J stated the following at para 18: “There I am satisfied that the provision regarding a 60 day time limit within which a disciplinary enquiry must be held was intended to be peremptory and the discretion to extend the enquiry beyond that date rests with the chairperson. It seems to be reasonably incidental to the exercise of that discretion that he must consider the extension of the precautionary suspension, since the purpose of the provision is to prevent lengthy suspensions without disciplinary steps being brought to a conclusion. The chairperson will need to consider after 60 days whether the reasons for the suspension remain valid depending on the progress of the enquiry.

37. Clearly, the evidence before me demonstrates that to keep the applicant on precautionary suspension after being charged and he attended the disciplinary enquiry, was arbitrary and was maintained for the reasons that the respondent could not justify. There was not even a scintilla of evidence why the applicant was still on precautionary suspension. It is even worse that the respondent failed to conduct a disciplinary enquiry within 60 days as contemplated in the SMS Handbook.

38. Accordingly, it is my finding that the respondent committed an unfair labour practice within the meaning of section 186 (2) (b) of the Act because the applicant's precautionary suspension violates the applicant's terms and conditions of employment stipulated in the SMS Handbook.

39. Therefore, I find that the applicant's suspension was substantively unfair.

Relief sought

40. I have already found that the applicant's suspension was substantively unfair. I therefore need to decide what an appropriate remedy would be. I am alive to the fact that the applicant was suspended with full pay; however, that had not taken care of the resultant detrimental impact on him, the applicant's reputational damage, lack of the advancement in job career, job security and fulfilment that would arise from the prolonged suspension.

41. Having taken all the above factors into consideration I am of the view that given the allegations against the applicant it would be unfair to burden the respondent with a compensation award. In my view fairness cuts both ways; as much as the respondent had erred in the manner it had handled this matter; eventually, the applicant had been charged and afforded an opportunity to appear before a disciplinary enquiry and the next sitting is scheduled for 22 January 2021. I therefore believe that an appropriate remedy would be uplifting of the suspension.

42. In the circumstances I make the following award:

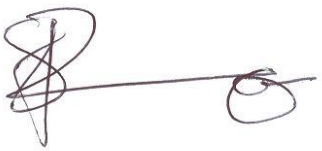
Award

43. I find that the applicant has established existence of an unfair labour practice in respect of his suspension that was effected on 23 July 2020.

44. I order the respondent to uplift the applicant's suspension with immediate effect.

45. The applicant must report for duty to the premises of the respondent on 1 February 2021.

46. No order as to costs is made.



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