



ARBITRATION AWARD

Case No: **PSHS434-22/23**

Commissioner: **Allan Kayne**

Date of award: **12 February 2023**

In the matter between:

NEHAWU OBO DUDUZILE DANISA

Applicant

and

DEPARTMENT OF HEALTH – NORTHERN CAPE

Respondent

DETAILS OF THE HEARING AND REPRESENTATION

1. The National Education Health and Allied Workers Union (“NEHAWU”) referred an unfair labour practice dispute on behalf of the applicant to the Public Health and Social Development Sectoral Bargaining Council (“the Council” or “the PHSDSBC”) in terms of section 186(2)(b) of the Labour Relations Act, 66 of 1995 (“the LRA”). The arbitration proceedings took place on 27 January 2023 at the respondent’s EMS¹ base in Kimberley. Parties agreed to submit written closing arguments, which they duly did.
2. Mlawuli Mguye, a NEHAWU official, represented the applicant, while Paul Koopman appeared for the respondent.
3. Only the applicant submitted a bundle of documents to be used during the arbitration proceedings.

¹ Emergency Medical Services

4. The proceedings, conducted in English, were digitally recorded, and the record was filed with the Council's administration.
5. This award is issued in terms of section 138(7) of the LRA, which requires a commissioner to provide brief reasons for his outcome.

BACKGROUND

6. Given an extensive attempt to conciliate the dispute, after reverting to arbitration, the parties agreed to accept the following facts as common cause:
 - 6.1. The applicant was employed by the respondent as Operational Manager at the City Clinic, earning a monthly Basic Salary of R50,503.50.
 - 6.2. The respondent placed the applicant on precautionary suspension with effect from 06 June 2022.
 - 6.3. On 27 July 2022, the respondent notified her of a disciplinary hearing scheduled for 05 August 2022, where the parties appeared, but no presiding officer was present. The respondent could not provide the appointment letter for the presiding officer, and consequently, the hearing could not proceed.
 - 6.4. After the present dispute was conciliated on 23 September 2022, the respondent rescheduled the applicant's disciplinary hearing for 17 November 2022 but inadvertently did not notify her of those proceedings. Only on the morning of the hearing did Mr Koopman request Mr Mlawuli to attend the proceedings. At those proceedings, before the presiding officer, Ms van Wyk, she furnished them with her appointment letter from the Head of Department ("HOD"), confirming that she had only been appointed to chair the hearing on 02 November 2022.
 - 6.5. The disciplinary hearing was rescheduled for 12 and 13 December 2022. However, on 12 December 2022, Ms van Wyk advised the parties via teleconference that her employer had not released her due to the respondent's request having been submitted late. Accordingly, she was unable to proceed with the applicant's hearing.
 - 6.6. The hearing was rescheduled for 16 January 2023, where all parties were present. The applicant was asked to plead, but the respondent could not proceed with its case due to the unavailability of its witnesses.

6.7. The respondent rescheduled the hearing for 22 to 24 February 2023.

ISSUE/S TO BE DECIDED

7. I must determine whether the respondent subjected the applicant to an unfair labour practice in terms of section 186(2)(b) of the LRA, and if so, the appropriate relief should follow.
8. The applicant seeks that her precautionary suspension be declared unfair, it be uplifted and that she be awarded compensation for the respondent's unfair conduct.
9. She further seeks to be paid the allowance that she was entitled to receive for acting as its Health Area Manager (Frances Baard District).

SURVEY OF EVIDENCE AND ARGUMENT

The following constitutes a summarised version of the parties' respective, **relevant evidence** and has not been captured verbatim. The fact that I have not captured all of it should not be misconstrued that I have not considered it. My findings are accordingly within the context of all the evidence tendered.

APPLICANT'S EVIDENCE

Duduzile Danisa ("Ms Danisa")

10. The applicant testified under oath that she was the Operational Manager for the respondent's City Clinic but, at the time of her suspension, on 06 June 2022, had been acting in the position of Health Area Manager since 22 February 2021.
11. She testified that no disciplinary hearing proceeded within the prescribed 60-day period, despite receiving a charge sheet on 28 July 2022, wherein a hearing was scheduled for 05 August 2022. She was present at the venue that day, but the matter never proceeded.
12. She presented into evidence a letter addressed to Ms van Wyk of the Department of Health – Free State, dated 01 November 2022, appointing her as chairperson of the applicant's disciplinary hearing scheduled for 17 and 18 November 2022. However, the respondent failed to notify the applicant of these proceedings, resulting in her not attending. During the failed proceedings of 12 December 2022, she received a copy of Ms van Wyk's letter of appointment dated 08 December 2022. However, Ms van Wyk was not in attendance, and the hearing could, once again, not proceed. To date, she

has not been furnished with a letter of appointment for the initial hearing scheduled for 05 August 2022.

13. Following the expiry of the 60 days after being suspended, the respondent failed to uplift her precautionary suspension, and she received no direct communication from the respondent since 28 July 2022.
14. Under cross-examination, Ms Danisa acknowledged that she had not included any proof in her bundle to show that she was acting in the position of Health Area Manager, in the Frances Baard District, at the time of her suspension but explained that a submission had been made to the Head of Department (“HOD”) for approval, which had not been returned by the time she was suspended.
15. She acknowledged that had the matter proceeded on 05 August 2022, her representative was instructed to request a postponement. However, given the absence of a presiding officer, no such application could be made.
16. During her suspension, she was deprived of the additional acting allowance that ought to have been paid to her as Acting Health Area Manager but confirmed that she had not received a new acting appointment letter from the HOD before her suspension.

RESPONDENT’S EVIDENCE

17. Mr Koopman elected not to call any witnesses.

ANALYSIS OF EVIDENCE AND ARGUMENT

18. Section 186(2)(b) of the LRA defines an unfair labour practice to include, amongst others, any unfair act or omission that arises between an employer and an employee involving the unfair suspension of an employee. In disputes of this nature, the onus rests with the referring party to prove its case on the balance of probabilities.
19. The respondent’s disciplinary code, in the form of the PSCBC² Resolution 1 of 2003 sets out the provisions relating to the precautionary suspension of employees at paragraph 7.2(c) as follows:

“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

² Public Service Coordinating Bargaining Council

of the matter and the length of the investigation. The chair of the hearing must then decide on any further postponement.”

20. In ***Dlamini and Others v Independent Police Investigative Directorate and Another (J1782/15) [2016] ZALCJHB 452 (29 April 2016)***, the Labour Court held, at paragraph 11, that:

“... In other words, an employer is afforded 60 days during which to conduct any necessary investigation during which the employee may be transferred as a precautionary measure assuming, of course, that the suspension or transfer is legitimate, at least to the extent that there is a proper and justifiable reason for the transfer, and that the affected employee is given an opportunity to state his or her case prior to any final decision being made. Once that period expires, any extension of any period of transfer can be effected only by the chairperson of a disciplinary enquiry. If by that date a chairperson has not been appointed, it follows that the period of transfer lapses and the employee must return to his or her permanent post... (my emphasis).

21. Reliant on the applicant’s largely undisputed evidence, the first occasion where the respondent convened a valid disciplinary hearing where she could answer the charges preferred against her was on 16 January 2023. Prior to that, each of the scheduled hearings was plagued with irregularities or blunders directly attributable to the respondent. The first hearing on 05 August 2022 appears to have been hastily called to coincide with the 60th day since her suspension in order to meet the provisions of the disciplinary code. However, it could not proceed because no chairperson had been appointed. The respondent then sat on its hands for more than three months before convening a disciplinary hearing on 17 November 2022, this time omitting to serve the notice on the applicant or her representative. Its representatives then attempted to convene a hearing on 12 December 2022, but this time failed to secure the chairperson’s release because that application was only made to the Department of Health – Free State four days prior. Eventually, the applicant’s first proper opportunity to answer the allegations was a further month later. However, the hearing could not proceed due to the respondent’s challenges with its witnesses.
22. Accordingly, the 60 days afforded to the respondent to convene a hearing expired on 05 August 2022, at which time it was not extended by the chairperson of her disciplinary hearing. At that stage, the respondent ought to have uplifted her suspension. Instead, a further 164 days ensued before the respondent convened a proper and valid disciplinary

hearing. Interestingly, by this stage, the issue of her continued suspension was not even addressed by the respondent at that sitting.

23. In its defence, the respondent failed to make any attempt to demonstrate that the matter was complex, perhaps warranting an extension of the precautionary suspension. Instead, it presented a weak, unsubstantiated argument that it did convene a hearing within the prescribed 60 days, which is patently false, given that no chairperson was appointed to hear the matter on 05 August 2022. The issue raised by Mr Koopman that the applicant intended to bring an application to postpone the proceedings on 05 August 2022 is irrelevant, given that that hearing did not even make it off the starting block.
24. No evidence to support the applicant's claim that she was appointed to act in the position of Health Area Manager at the time of her suspension was forthcoming, apart from her oral submissions, which the respondent challenged in cross-examination. It bears further noting that the dispute initially referred by the applicant pertained only to her suspension in terms of section 186(2)(b) of the LRA, thus depriving the Council of jurisdiction to deal with a new dispute that had never been conciliated.
25. Accordingly, in subjecting the applicant to an inordinately long suspension, the respondent subjected her to an unfair labour practice.
26. Guided by the judgment of ***IMATU obo of Senkhane v Emfuleni Local Municipality and Others (2016) ZALCJHB 296***, where the Labour Court considered, *inter alia*, the impairment to the employee's dignity caused by an unnecessarily protracted period of suspension, the employer's non-compliance to its own code, and the need to deter further comparable offending conduct, as grounds on which to award the applicant compensation, the respondent's unfair conduct in the matter to hand is simply shocking. Accordingly, in addition to addressing the suspension, which, to date, remains in place, a *solatium*, equivalent to one month's remuneration, calculated to be R50,503.50, would be just and equitable in the circumstances and hopefully discourage the respondent from similar unfair conduct in the future.

AWARD

27. Based on the merits of the dispute, the respondent's protracted and unnecessary continued suspension of the applicant after 05 August 2022 was unfair and constitutes an unfair labour practice relating to suspension within the meaning of section 186(2)(b) of the LRA.
28. The respondent, the Department of Health – Northern Cape, is ordered to uplift the applicant's suspension with immediate effect and allow the applicant to resume her former duties. The applicant is directed to report for duty on 20 February 2023.
29. The respondent, the Department of Health – Northern Cape, is ordered to pay the applicant, Duduzile Danisa, the amount of R50,503.50 (Fifty Thousand Five Hundred and Three Rand and Fifty Cents) by no later than 31 March 2023.

Signed and dated at Johannesburg on this 11th day of February 2023.



Allan Kayne