



ARBITRATION AWARD

Panellist/s: JOYCE NKOPANE
Case No.: PSCB141-15/16
Date of Award: 05 DECEMBER 2015

In the ARBITRATION between:

PSA OBO NKOSI AND 28 OTHERS
(Union / Applicant)

and

DEPARTMENT OF HEALTH
(Respondent)

Union/Applicant's representative: Mr. Mashigo
Union/Applicant's address: PUBLIC SERVICE ASSOCIATION

Telephone:
Telefax:

Respondent's representative: Ms.
Respondent's address: DEPARTMENT OF HEALTH

Telephone:
Telefax:

Details of hearing and representation

1. The matter was set down for arbitration on 6 November 2015 at the respondent's premises in Johannesburg. The applicants attended the proceedings and Mr. Mashigo an official of PSA represented them. Ms. Maphunye represented the respondent.
2. The parties agreed to submit written arguments on 20 November 2015. The arguments were duly submitted; however there was a challenge with the respondent's attachment and this was received on 23 November 2015.

Issue /s to be decided

3. Whether Clause 7.4 (c) of the PSCBC Resolution¹ of 2003 ought to have been applied in the applicants' case?
4. Whether or not the dismissal of the applicants was in terms of Resolution 1 of 2003 or the Labour Relations Act.
5. Whether or not the respondent was correct in stopping the salaries of the applicants before providing them with the outcomes of appeal.
6. If I find in favour of the applicants I have to determine the appropriate relief.

Background to the issue

7. The applicants were appointed by the Department of Health as emergency medical officers. In 2014 they were summarily dismissed. The respondent conceded that the dismissal was not preceded by a hearing in terms of Resolution 1 of 2003.
8. It is further common cause that the applicants were rendering an essential service as defined in the Labour Relations Act.
9. The respondent contends that the applicants embarked on a strike, which action is prohibited by the Labour Relations Act. The applicants were dismissed and were afforded an opportunity to appeal. The appeals were processed pursuant to an award that was rendered under the auspices of the council.
10. The applicants referred a dispute of interpretation and application of a Collective Agreement to the Council. The dispute was conciliated and it remained unresolved at Conciliation. The applicants requested that the dispute be resolved through arbitration.

11. At the commencement of the proceedings the respondent raised a point in limine submitting that the matter was dealt with before. It was submitted that the applicants referred the same dispute before and an award was rendered.
12. I considered the matter and ruled that in the previous dispute the applicants' complaint related to an appeal that was not processed and an award was rendered in that regard. This matter relates to the payment of salary and I ruled that whilst it is desirable that all matters relating to same parties should be resolved at once to avoid piecemeal approach to dispute resolution, the applicant's dispute was not the same as the one that was dealt with and accordingly the Council had jurisdiction.

Survey of the Evidence and arguments

13. The parties agreed to submit written heads of argument and not lead viva voce evidence.
14. The applicants submitted that they were employed under the Public Service Act. Further that all Public Service Regulations and Collective Agreements concluded in the PSCBC and PHSDSBC formed part of their employment contracts.
15. They submitted that Resolution 1 of 2003 was applicable and binding on them and the employer in terms of Section 23 of the Labour Relations Act. It was submitted on behalf of the applicants that the employer cannot choose to apply the resolution when it suits them.
16. The appeal process is regulated by the Resolution thus if the employee is dismissed and is afforded an opportunity to appeal that is done in accordance with the resolution.
17. Clause 7.4 (c) of the Resolution provides that "the employer shall not implement the sanction during an appeal by the employee". The applicants submitted that it was on the basis of that provisions that they submit that the employer ought not to have stopped their salaries when the appeal was pending.
18. It was submitted that in this case the employer only finalized the appeals in August 2015 and the applicants were dismissed in November 2014. The applicants submitted that they ought to have been paid from that time until the appeals were finalized and by failing to pay them the respondent applied the provisions of the agreement incorrectly.

19. The respondent submitted that that these officers were not dismissed in terms of Resolution 1 of 2003; instead they were dismissed in terms of the Labour Relations Act hence their salaries were stopped. Further that they were not entitled to be paid.
20. It was submitted that their refusal to honour their shifts was tantamount to a strike as their action was concerted. It was submitted that the Resolution does not make any provision for summary dismissal and that the respondent summarily dismissed them when they embarked on strike.
21. It was submitted that summary dismissal is found or mentioned in the Labour Relations Act 66 of 1995 as amended and in particular section 6 of schedule 8. Further that where there is a conflict between the Labour Relations Act and the provision of any Act amending the Labour Relations Act, the provision of the latter prevail.

Analysis of the evidence and arguments

22. In this case the issue that I have to determine is whether respondent interpreted and applied the provisions of Clause 7.4 (c) Resolution 1 of 2003 correctly.
23. Whether this clause is applicable in the circumstances.
24. The applicants in the arguments added the issue of whether the applicants were dismissed in terms of the Resolution or the Act as another issue to be decided.
25. Clause 7.4 of Resolution 1/2003 provides as follows-
 - (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) depending on the nature of the case and the seriousness of the misconduct, the employee's previous record, and mitigating or aggravating circumstances....
 - (c) The employer shall not implement the sanction during an appeal by the employee.
26. In this case it is common cause that there was no disciplinary hearing. The respondent contends that the applicants are in essential services. They embarked on a strike which action is prohibited by the Labour Relations Act and they were dismissed it appears without a hearing.
27. The respondent conceded that the dismissal was not in terms of Resolution 1/2003. The respondent does not dispute that the collective agreement applies to the applicants, and it appears that both parties have same understanding of the meaning of the clause. Thus this

is not a case where the parties have different interpretations of the clause and they seek an arbitrator to interpret same.

28. What is at issue is whether the respondent should have stopped the applicants' salaries after it dismissed them. The applicants were not charged with misconduct. There was no chairperson appointed who determined that they committed misconduct and pronounced on a sanction. The respondent submitted that the applicants went on strike and were dismissed after being warned. A competent forum and not this Council should deal with the merits of whether the conduct of the respondent was fair or not.
29. Since there was no sanction pronounced by the chairperson in this case, it cannot be argued that a sanction should not have been implemented.
30. I accordingly find that the respondent dismissed the employees not as contemplated in Resolution 1/2003 as there was no hearing, and accordingly this dismissal was not pronounced as a sanction in terms of Clause 7.4 (a) of Resolution 1/2003. Accordingly Clause 7.4(c) of the Resolution is not applicable in the circumstances. The applicants' claim for salary should really form part of their challenge of whether their dismissal was fair and if the appropriate forum finds that it was not fair they would be entitled to relief. In the circumstances I find that their claim must fail.

Award

In the premise I make the following award.

(a) The applicant's claim is dismissed.

(b) No order as to costs



Panellist/s:

Joyce Nkopane