PSCBC
PUBLIC SERVICE CO-ORDINATING BARGAINING COUNCIL

ARBITRATION AWARD

Case Number:	*PSCB511-13_14*
Senior Commission / Panellist:	*Martinus van Aarde*
Date of Award:	*10 April 2014*

In the **MATTER** between

NEHAWU obo MS Molakeng & 5 Others

(Applicant)

and

Department of Health (FS)

(Respondent)

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1. Details of hearing / representation

The case was set down for an arbitration hearing on 26 March 2014 (12h00) at DOH Offices. Mr MJ Motlaung: Official NEHAWU represented the Applicants. Mr JL Molokoane: Assistant Director Labour Relations represented the Respondent (DOH). The proceedings were digitally recorded (CD on file with arbitrator's notes).

2. Issue(s) to be decided

This is an application in terms of the **Labour Relations Act 66/1995, section 24(2)(5)**: interpretation /application of a collective agreement with specific reference to Resolution 1/2003 relating to the alleged unfair suspension of the Applicants in terms of clause 7.2(c). (Apparently, the Applicants also lodged a second dispute challenging the fairness of their suspension in terms of the unfair labour practice-doctrine **– section 186/LRA '95**.)

3. Background to dispute

3.1 The Applicant is in this matter are:

3.1.1 **Ms MS Molaleng**: She was in the employment of the Respondent since 5 July 2000 in the capacity of Deputy Director, job level 12.

3.1.2 **Mr MJ Mchotwane**: He was in the employment of the Respondent since 1 January 1999 in the capacity of Chief Accountant Clerk, job level 7.

3.1.3 **Ms MA Taats**: She was in the employment of the Respondent since 1 February 1996 in the capacity of Supply Chain Clerk, job level 5.

3.1.4 **Mr TP Ntetshe**: He was in the employment of the Respondent since 23 January 2012 in the capacity of State Accountant, job level 5.

3.1.5 **Mr MP Raleting**: He was in the employment of the Respondent since 1 July 2012 in the capacity of State Accountant, job level 7.

3.1.6 **Mr TJ Sethunya**: He was in the employment of the Respondent since 15 June 1992 in the capacity of Chief Accounting Clerk, job level 7.

3.2 With the exception of the 6th Applicant (Sethunya) who was suspended on 7 August 2013, all the other Applicants were suspended on 21 July 2013 for reasons of alleged misconduct pending an investigation. The Applicants received their respective charge sheets between the periods 7 October 2013 to 10 January 2014.

3.3 Following their suspensions, the Applicants lodged a (combined) dispute (LRA 7.11) on 6 November 2013 on basis set out above. The case was then set down for a conciliation hearing on 6 December 2013. The dispute was declared unresolved in terms of **section 135(5)/LRA '95**. The Applicants then filed a Request for Arbitration (LRA 7.13) on 19 December 2013.

4. Point *in limine*

4.1 The facts relates to the same dispute – the factual issues are not in dispute but it appears that the main question relates to a legal argument regarding the interpretation and/or application of Resolution 1/2003, clause 7.2(c) specifically, as to the question whether the failure to comply with the time frames render the disciplinary process void.

4.2 For so far as it may be relevant, the 2nd to 6th Applicants are joined to these proceedings under case number PSCB511-13/14 in terms of the PSCBC Rules (see Annexure A & B respectively).

5. Survey of Evidence / Argument

5.1 I have heard brief arguments from both parties. The parties however agreed that the main questions in dispute are of a legal nature (the facts common cause to the parties for so far as this specific case is concerned). The parties requested to file written submissions in support of their respective cases.

5.2 The following facts appear to be common cause between the parties―

5.2.1 the Respondent conceded that they did not comply with the 60 days' time-period prescribed by clause 7.2(c);

5.2.2 the Applicants' suspensions were since uplifted and some were already subjected to a disciplinary hearing (hearings still in process).

5.3 The Applicants' prayers are as follows―

5.3.1 to declare the charges, sanctions and pending hearings null and void; and/or

5.3.2 to declare the entire process of disciplining the employees null and void.

5.4 The Respondent, on the other hand, argued that the arbitrator/Council lacks jurisdiction to make the order as requested by the Applicants in terms of a section 24-application. It is argued that the arbitrator's powers are limited to rendering a compliance order against the Respondent to stay within the prescribed time frames.

6. Analysis of Evidence / Argument

I will address the material issues separately.

6.1 The relevant provisions read as follows—

6.1.1 **Section 186(2)(b)/LRA '95** reads as follows—

"S186: Meaning of dismissal and unfair labour practice

(1) …

(2) "Unfair labour practice" means any unfair act or omission that arises between an employer and an employee involving—

(a) …

(b) the unfair suspension of an employee or any other unfair disciplinary action short of dismissal in respect of an employee."

(emphasis added)

and,

The SMS Handbook: Chapter 7: Misconduct and Incapacity (2003) furthermore reads as follows—

"(2.7) Disciplinary Enquiry

(1) …

(2) Precautionary suspension or transfer

(a) The employer may suspend or transfer a member on full pay if—

- *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 wellbeing or safety of any person or state property.*

(b) As suspension or transfer of this kind is a precautionary measure that does not constitute a judgement, and must be on full 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 of the hearing must then decide on any further postponement."

(emphasis added)

6.1.2 In terms of clause 2.7(2) above, it is clear that the Respondent basically has two options to decide upon in the alternative when an employee allegedly committed serious misconduct, viz.—

(a) to place the employee on precautionary suspension; or

(b) to transfer the employee to an alternative post for the same reason as precautionary measure.

6.1.3 In *casu*, the question of precautionary suspension or transfer is governed by the SMS Handbook (or for that matter Resolution 1/2003 which contains similar provisions), being a collective agreement in terms of section 23/LRA ’95. As such it falls in my opinion within the context of **section 186(2)(b)/LRA ’95**. See also *Jocum v Lansdown Textile Industries / Invitex (2000) 21 ILJ 250 (CCMA)* where it was held that the challenge to an alleged unfair suspension is to be limited to or according with disciplinary action. It is thus my opinion that by collective agreement the parties firmly intended to broaden the scope of the unfair labour practice-doctrine by including precautionary transfers pending disciplinary action. The question before me is however limited as pointed out in par.2 & 4.1 *supra*.

6.1.4 Having stated the above, it is thus clear that a ‘precautionary suspension’ or a ‘precautionary transfer’ must be seen in the same light. If so, then it follows that the Respondent is also bound by the 60 day time limit referred to in clause 2.7(2) *supra*.

6.2 Similar questions received much debate by our courts in the past—

6.2.1 In **<u>Minister of Labour *v* GPSSBC & Others</u> (2006) 27 ILJ 2650 (LC)** Francis J held furthermore as follows—

> *“It is clear from clause 7.2(c) of the resolution that after an employee has been suspended a disciplinary hearing must be held within a month or 60 days. If the matter is complex, the disciplinary hearing must be held within 60 days and the chairperson of the hearing must then decide on any further postponements. The suspension can therefore not exceed more than 60 days without a disciplinary hearing being held. Facts can be placed before the chairperson to grant a further postponement due to the complexities of the matter.”*

Francis J was also dealing with a situation where the applicant had referred an unfair labour practice dispute arising out of his prolonged suspension.

6.2.2 Cheadle, H: **<u>Regulated Flexibility: - Revisiting the LRA</u>** stated *inter alia* as follows—

> *“It is suspension pending disciplinary action that requires considered review. There are two abuses: arbitrary decisions and the inordinate periods of suspension. Suspension is the employment equivalent of arrest. The only rationale for suspension is the reasonable apprehension that the employees will interfere with investigation or repeat the misconduct. It follows that it is only in exceptional circumstances that an employee should be suspended pending a disciplinary enquiry. The employee suffers palpable prejudice to reputation, advancement and fulfillment. These limited reasons for suspension and this prejudice make a compelling case for regulation.”*

I believe that this is the very reason why clause 2.7(2) *supra* was adopted – *inter alia* to curb the abuse or powers. See also **<u>SAPO Ltd. *v* Jansen van Vuuren</u> (2008) 8 BLLR 798 (LC)**.

6.3.3 And in **<u>Muller & Others v Chairman of the Minister’s Council House of Representatives & Others</u> (1991) 12 ILJ 761** it was furthermore held [at 775/6] that—

> *“The implications of being barred from going to work and pursuing one’s chosen calling, and of being seen by the community round one to be so barred, are not so immediately*

realized by the outside observer and appear, with respect, perhaps to have been underestimated in the Swart and Jacobs cases. There are indeed substantial social and personal implications inherent in that aspect of suspension. These considerations weigh as heavily in South Africa as they do in other countries."

6.3.4 And in **Mogothle *v* Premier North West Province (2009) 30 ILJ 605 (LC)** the Court held (at 39) as follows—

> *"In summary: each of the preventative suspensions must be considered on its own merits. At the minimum though, the application of the contractual principle of fair dealing between employer and employee, imposing as it does a continuing (obligation) of fairness on employers when they make decisions affecting their employees requires first that the employer has a justifiable reason to believe, prima facie at least, that the employee has engaged in serious misconduct; secondly, that 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 the affected parties in jeopardy; and thirdly, that the employee is given the opportunity to state a case before the employer makes a final decision to suspend the employee."*

6.3.5 Lastly see also **SA Post Office Ltd. *v* Jansen & Others (2008) 29 ILJ 2793 (LC)** where the Court held that—

> *"There is however a need to send a message to employers that they should refrain from hastily resorting to suspending employees when there are no valid reasons to do so."*

6.3.6 The Labour Appeal Court also held in the matter of **North Western Provincial Government *v* Gradwell [2012] 8 BLLR 747 (LAC)** the following:

> *"The proposition that all suspensions should be procedurally fair to avoid the stigma of an unfair labour practice, on the other hand, requires some qualification. Fairness by its nature is flexible. Ultimately, procedural fairness depends in each case upon the weighing and balancing of a range of factors including the nature of the decision, the rights, interests affected by it, the circumstances in which it is made, and the consequences resulting from it. When dealing with a holding operation suspension, as opposed to a suspension as a disciplinary sanction, the right to a hearing, or more accurately the standard of procedural fairness, may legitimately be attenuated, for three principal reasons. Firstly, as in the present case, precautionary suspension tend to be on full pay with the consequence that the prejudice flowing from the action is significantly minimised. Secondly, the period of suspension often will be (or at least should be) for a limited duration. The SMS Handbook for example imposes a 60 day limitation. And thirdly, the purpose of the suspension, the protection of the integrity of the investigation into the alleged misconduct-risks being undermined by a requirement of an in-depth preliminary investigation. Provided the safeguards of no loss to remuneration and a limited period of operation are in place, the balance of convenience in most instances will favour the employer. Therefore, an opportunity to make written representations showing cause why a precautionary suspension should not be implemented will ordinarily be acceptable and adequate compliance with the requirements of procedural fairness."*
>
> (own emphasis)

6.4 However, as to 'time-frames' *per se* see also **<u>Jonker *v* Okhahlamba Municipality & Others</u> (2005) 2 BLLR 564 (LC)** where the Labour Court held as follows—

> *"…the procedures and time limits are a commitment to deal with discipline expeditiously, and they serve as a guide to how this can be accomplished. To hold that the procedure and the time limits are written in stone and immutable must necessarily imply that the first respondent elected to abandon or waive its wide powers of discipline, which the law requires to exercise in a reasonable manner. Why the first respondent would contract away such substantial rights in favour of the applicant is unfathomable. The waiver or abandonment by the first respondent cannot necessarily or reasonably be inferred from the contract. Neither the terms of the contract nor the conduct of the first respondent's representatives amount to an unequivocal waiver of the right to discipline the applicant."*

See also **<u>Lekabe *v* Minister of Department of Justice & Constitutional Development</u> (2009) 30 ILJ 2444 (LC)**; **<u>van Eck *v* Minister of Correctional Services & Another</u> (2005) 6 BLLR 639 (EC)**.

6.5 Having considered to the above dicta it appears *prima facie* that there are two schools of thought on the issue. I am however of the opinion that the main question rather rests on the merits of each case and the underlying test of fairness. The mere fact that if an employer only charge an employee on the 61th day, it is an open question whether the subsequent proceedings are not *per se* unfair – there are other factors to consider as well. See *inter alia* the *Gradwell*- and *Jonker*-cases *supra*. I am not totally convinced that the failure to observe the said time frames would render the subsequent proceedings obsolete/to be null and void. I believe that the test to apply is to determine the facts on the merits of each case. This will normally be done within the context of an unfair labour practice dispute (and apparently the Applicants lodged a second dispute on this basis).

6.6 With regards to the argument of Mr Molokoane as to the limited powers (jurisdiction) of the arbitrator/ Council in terms of a section 24-dispute, I do not agree with the latter – the arbitrator's powers are much broader than to order a specific compliance. Mr Molokoane's argument is however correct as far as disputes relating to Resolution 14/2002 (grievance-disputes) are concerned.

6.7 To return to the main question/challenge as to the delays to charge/call the Applicants to a disciplinary hearing is difficult to address without considering evidence as to the reasons for the delay. *Prima facie* the time frames it however does not seem unreasonable considering the case law referred to above and the reasons tendered. Also, having regard to the *Jonker*- and *Okhlahlamba*-cases *supra*, I am not of the opinion that the delays (and/or the breach of the prescribed time frames in terms of clause 7.2(a)) are so excessive that it warrants an order that the Respondent has waved its rights to take disciplinary action against the employees. Failing to comply with the time frames the affected employee can file a dispute to uplift same. Of further importance is the fact that except for the Third Applicant (Taats) the disciplinary hearings of the other Applicants are already finalised, whilst Mr Taats' hearing will continue on 17 April 2014. To some extent the challenge/question becomes academic.

7. Award

In case PSCB511-13_14 the following Award is rendered—

7.1 The Respondent (Department of Health) failed to comply with the time frames set out in Resolution 1/2003, clause 7.2(c).

7.2 The non-compliance with time frames set out in Resolution 1, clause 7.2(c) however does not render the subsequent disciplinary process null and void. Each case must be determined on its own merits to determine the fairness of the suspension *per se*.

7.3 No order as to cost is made.

Signature:

Senior Arbitrator/Panellist: ***Martinus van Aarde***