



PUBLIC SERVICE CO-ORDINATING BARGAINING COUNCIL

ARBITRATION AWARD

Case Number: PSCB588-13_14
Senior Commission / Panellist: Martinus van Aarde
Date of Award: 9 August 2014

In the **MATTER** between

NEHAWU obo E Louw

(Applicant)

and

Department of Police, Roads & Transport (FS)

(Respondent)

Applicant's representative: Mr. J Makhubo

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Respondent's representative: Mr MPE Ngcosane / PJ Mojai

Respondent's address: Department of Police, Roads & Transport

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1. Details of hearing / representation

The case was set down for an arbitration hearing on 26 March 2014, 30 April 2014 and 8 August 2014 at Bloemfontein, DPRT Offices. Mr Jabu Makhubo: Official NEHAWU represented the Applicant. Mr MPE Ngcosane and Mr PJ Mojai: represented the Respondent (DPRT). The proceedings were digitally recorded (CD on case 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) *re* the interpretation /application of a collective agreement, with specific reference to Resolution 1/2003 relating to the disciplinary- and appeal process/actions taken against the Applicant.

3. Background to dispute

- 3.1 The Applicant is Me. E Louw. She was in the employment of the Respondent since 1 April 1991 in the capacity of Registry Clerk, job level 6. The Applicant was charged and dismissed for reasons of alleged misconduct on 27 September 2012 following a disciplinary hearing. She lodged an appeal-application and it is common cause that up until today (8 August 2014) she did not yet receive the outcome of the appeal-application.
- 3.2 Subsequently, the Applicant lodged a dispute (LRA 7.11) on 6 December 2013 challenging the disciplinary process (or failure to comply with the time frames thereof) in terms of Resolution 1/2003. The case was set down for a conciliation hearing on 22 January 2014. The dispute was declared unresolved in terms of section 135(5)/LRA '95. The Applicant then filed a Request for Arbitration (LRA 7.13) on 22 January 2014.
- 3.3 The case was set down for an arbitration hearing on 26 March 2014. The case was part heard and postponed (with the consent of the parties) to 30 April 2014 in an endeavour to call witnesses to address certain factual issues relating to the delay to comply with the prescribed time frames. The case was again postponed for reasons set out in my ruling dated 30 April 2014 and rescheduled for today (8 August 2014). At the start of the proceedings Mr Mojai informed me that the Respondent is not anymore in the position to call witnesses to testify about the delay (the said witnesses since resigned or were intimidated not to testify). See also par 4.1.2 *infra*.

4. Survey of evidence / argument

4.1 Opening statements

4.1.1 Mr Makhubo argued that the Respondent specifically failed to comply with the following provisions (time frames) contained in Resolution 1/2003 viz. clauses 1.5, 1.7, 2.2, 2.4, 7.3 & 88. It is argued that due to the Respondent's failure to do so, they (the Respondent) waived their rights to take any further disciplinary action against the Applicant – the preceding disciplinary process of no effect at all – justice delayed is justice denied. Mr Makhubo also submitted a bundle of documents marked Annexure A.

4.1.2 Respondent's case

Mr Ngcosane initially submitted that the disciplinary (appeal) process is (almost) finalised and they only await the final signature/approval of the MEC. Mr Ngcosane furthermore argued that the arbitrator's powers are limited in making an order of compliance with time frames (with or without costs) and the arbitrator lacks the jurisdiction in a section 24-dispute to grant the prayers of the Applicant. Mr Mojai furthermore/later argued that the delay was caused by the Applicant as the latter did not send her appeal application to the ER/LR Department but to the Office of the MEC directly.

4.1.3 The parties furthermore agreed that the questions put before me are of a legal nature/the facts are common cause to the parties.

4.2 Applicant's case

4.2.1 The following facts appear to be common cause between the parties—

(a) the Applicant was charged on 24 May 2012 and found guilty of the following offences:

"CHARGE ONE

That between the periods 19th and 22nd August 2008 you allegedly committed an act of identity theft within your workplace, by illegally and fraudulently using the particulars of Ms Francette le Roux in order to obtain a loan amounting to R30,000.00 from Direct Axis.

CHARGE TWO

That between the periods of 19th and 22nd August 2008 you allegedly contravened the Code of Conduct for the Public Service C4.5.4 which states that an employee does not use or disclose any official information for personal gain of others by stealing the personal file of Ms Francette le Roux from the Department's registry and used her identity number to apply for a loan from Direct Axis.

CHARGE THREE

That on the 28th February 2011 you allegedly brought the Department's name into disrepute when you were arrested on its premises for being suspected of committing fraud (CAS 873/4/2009)."

(b) the disciplinary hearing was finalised on 25 January 2013 and the Applicant only received the outcome/sanction on 22 April 2013 (disciplinary report dated 1 August 2013). The

dismissal letter was only issued on 14 August 2013 – that is to say some seven (7) months after the disciplinary hearing was finalised;

- (c) the Applicant then lodged an appeal on 20 August 2013 at the MEC's office. Up until today (8 August 2014) she did not yet receive the outcome of the appeal application;
- (d) at no time was the Applicant suspended pending the disciplinary process or transferred to an alternative position. She was even assessed/evaluated and received a positive mark (notch-increase) in the meantime.

4.2.2 Applicant argued that the Respondent failed to observe the requirements set out in Resolution 1/2003, and in doing so, the disciplinary process became obsolete/the Respondent waved its rights to effect the disciplinary process. Mr Makhubo's argument simply boils down to the fact that the Respondent failed to deal with the disciplinary process promptly within the prescribed time frames – Respondent's failure makes the whole disciplinary process obsolete (null and void) and/or cannot be effected (anymore). Mr Makhubo also heavily relied upon Annexure A.pp.47-55 with specific reference to/reliance on the *UPMW v Stadsraad van Pretoria*-case (1992) where the Industrial Court held that excessive delays to take positive action amounts to a waiver of the employer's rights and vitiate the decision of dismissal (see also Annexure A).

4.2.3 Mr Ngcosane/Mojai's basic argument is that the Applicant herself is to be blamed for the (excessive) delay as she did not lodge her application at the ER-/HR Department as per notice of discharge dd. 14 August 2013 (Annexure A.p.56).

4.2.4 The relevant provisions of Resolution 1/2003 read as follows—

Resolution 1/2003: Disciplinary Code

"(1) Purpose and Scope

(1.5) To provide employees and the employer with a quick and easy reference for the application of discipline.

(1.7) To prevent arbitrary or discriminatory actions by managers towards employees.

(2) Principles

(2.2) Discipline must be applied in a prompt, fair, consistent and progressive manner.

(2.4) A disciplinary code is necessary for efficient delivery of service and the fair treatment of public servants, and ensures that employees:

- (a) have a fair hearing in a formal or informal setting;*
- (b) are timeously informed of allegations of misconduct made against them;*
- (c) receive written reasons for a decision taken, and*
- (d) have a right to appeal any decision.*

7. Conducting the disciplinary hearing

(7.3) *The chair must communicate the final outcome of the hearing to the employee within **five** working days after the conclusion of the hearing, and the outcome must be recorded on the employee's personal file.*

(8) Appeal

(8.8) *Departments **must** finalise appeals within **30 days** failing which, in cases where the employee is on a precautionary suspension, he/she must resume duties immediately and await the outcome of the appeal while on duty."*

(my emphasis)

4.2.5 Considering the evidence before me, the following facts appear to be common cause, the—

4.2.5.1 alleged offences occurred on 19 & 22 August 2008. I cannot align myself with the Respondent's initial argument (per Mr Ngcosane) that the Respondent only became aware of the alleged misconduct in 2012 (*sic*). Having regards to charge 3 it is clear that the Respondent was aware of the Applicant's conduct on the latest 28 February 2011 – the latter opened a criminal case/reported the incident to the SAPS in April 2009 (CAS 837/4/2009);

4.2.5.2 Applicant was however only formally charged on 24 May 2012 and the disciplinary hearing was finalised on 25 January 2012;

4.2.5.3 Applicant received the outcome/sanction of the hearing on 14 August 2013 (letter of HOD in response to the disciplinary report dated 22 April 2013);

4.2.5.4 Applicant lodged an appeal application on 20 August 2013. Up until today (8 August 2014) the Respondent did not address this application for reasons mentioned.

4.2.6 I must point out that it is clear that the Respondent failed to observe the procedural requirements set out in Resolution 1/2003. Respondent's argument that the Applicant is to blame for the delay (due to the fact that she lodged her appeal application directly at the MEC's office) does not hold water in terms of clause 8.8 above. One would expect of the MEC's office to acknowledge receipt of the application/letter and to refer the letter to the responsible person (Director HR/LR).

4.2.7 The nub of the question before me is whether the Respondent's failure to comply with the time frames (*viz.* the chairperson's failure to notify the Applicant *re* the outcome of the disciplinary hearing within five (5) working days and/or that the appeal-process should have been finalised within thirty (30) days) nullified the disciplinary process. *Prima facie* there appears to be two schools of thought on this subject matter (in my opinion purely based on the difference in the merits of each case):

4.2.8 on the one hand there is no doubt in my mind that the delay caused by the Respondent to bring the

case to finalisation, had a negative effect on the Applicant, her family and friends and even her work performance. See *inter alia*: *Minister of Labour v GPSSBC & Another* (2006) 27 ILJ 2650 (LC); *Fourie v Capitec Bank* [2005] 1 BALR 29 (CCMA). See also *Lekabe v Minister of Department of Justice & Constitutional Development* [2009] 30 ILJ 2444 (LC) re the 'time frames' in general.

4.2.9 Resolution 1/2003 requires that a disciplinary hearing must be held within 60 days once the employer becomes aware of the alleged misconduct. As to the question of a waiver the Labour Court held in *Jonker v Okhahlamba Municipality & Others* [2005] 2 BLLR 564 (LC) 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."

4.2.10 And in *North Western Province Provincial Government v Gradwell* [2012] 8 BLLR 747 (LAC) 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 *Lekabe v Minister of Department of Justice & Constitutional Development* [2009] 30 ILJ 2444 (LC); *van Eck v Minister of Correctional Services & Another* [2005] 6 BLLR 639 (EC).

4.3 Considering the dicta above, there are thus various facts to consider: Applicant argued that the mere fact that the Respondent simply failed to observe the prescribed timeframes (even if with one (1) day) renders the disciplinary hearing *ipso facto* unfair/obsolete. I cannot align myself with this strict general application of the criteria (time frames) referred to above — see also *Lekabe*-case above. However, there are also other factors to consider: a prolonged delay (as in the case before me) would certainly have a negative impact on the employee. Secondly, at all material times the Applicant continued with her normal duties/received a full salary and benefits and even received a positive performance evaluation. Having stated that, it is thus unlikely that the employer-employee relationship had broken down completely — see also *Maluti Transport / MRWTU* (LAC). As pointed out, the Respondent had ample time to address the appeal application, and, it also appears that the Respondent does not have the intention to address same (considering the fact that the arbitration case was initially set down on 26 March

and 30 April 2014 and postponed for exactly the same reasons). I believe that at some point a line must be drawn. Having stated the above, I also wish to reiterate that the charges appear to be of a serious nature and I do not condone any acts of dishonesty/gross-misconduct.

- 4.4 I am of the opinion that the dicta in *Stadsraad van Pretoria*-case are equally applicable to the facts before me — same principles were endorsed by our Labour Courts in later cases. As pointed out, at some point a line must be drawn to finalise the in-house disciplinary proceedings as quickly as possible (see also section 138(1)/LRA in this regard). The Respondent's action amounts to a waiver of its rights in the specific circumstances (that is to say in not taking positive steps to finalise the (appeal) hearing almost twelve (12) months. See also *Department of Public Works, Roads and Transport v Motshoso & Others* [2005] 10 BLLR 957 (LC); *Riekert v CCMA & Others* [2006] 4 BLLR 353 (LC) and *PSA obo BAWU v Department of Social Services* [2009] 6 BALR 575 (PHSDSBC) in support of this argument. In these cases the Labour Court held that due to the failure of the employer to tend to the disciplinary process, the employer 'reconciled/condoned' the employee's actions and waived their rights to take disciplinary steps after a prolonged period (6 months down the line). My award must thus be seen against this background.

5. Award

In case PSCB588-13_14 the following award is rendered—

- 5.1 The Respondent's failure to finalise the disciplinary (appeal) process within the prescribed time frames set out in Resolution 1/2003 amounts to a waiver to take any disciplinary actions against the Applicant.
- 5.2 The initial finding/sanction imposed on the Applicant on 14 August 2013 is thus set aside for reasons mentioned.
- 5.3 No order as to cost is made.

Signature:



Senior Arbitrator: **Martinus van Aarde**