

ARBITRATION AWARD

Panelist: Khomotjo Daniel Matji _____
Case No.: PSCB 715-12/13
Date of Award: 8 July 2013 _____

In the ARBITRATION between:

JUSTINE NGOBEZA

(Union / Applicant)

And

STATISTICS SOUTH AFRICA

(Respondent)

DETAILS OF HEARING AND REPRESENTATION

- [1] This matter was heard at the offices of the Statistics South Africa situated at the 6th floor Manaka House in Pretoria on the 27th of June 2013. The respondent, Statistics South Africa, was represented by Mr. Sam Phaladi assisted by Tumelo Tami, whilst the applicant, Mr. Justine Ngobeza, was represented by Mr. Paul Maraba, a trade union representative of NEHAWU.
- [2] No documents were entered into the arbitration except the appeal outcome dated 4 June 2013.
- [3] The proceedings were conducted through the medium of English and hand written notes were taken.

PRELIMINARY ISSUE

- [4] Mr. Phaladi stated that the dispute referred by the applicant relates to the interpretation and application of a collective agreement, Resolution 1 of 2003. The applicant's request for arbitration referral document

indicated that the dispute relates to unfair suspension. Initially the applicant's contention was that the disciplinary hearing was flawed concerning the appointment of the initiator and chairperson from the Department of Health.

- [5] The applicant has since been dismissed by the respondent after a formally constituted disciplinary enquiry. The applicant and his representative did not participate in the disciplinary proceedings. The hearing proceeded in his absence after he was formally warned of the consequences of walking out of the hearing. The applicant was dismissed on the 13th of June 2013.
- [6] The relief sought by the applicant that the disciplinary hearing must be declared null and void and set aside is not capable of being obtained under the interpretation and application of a collective agreement jurisdiction. The case has been overtaken by the events as the disciplinary hearing has been finalised and the applicant has since been dismissed.
- [7] The process can only be challenged through the unfair dismissal jurisdiction. The Resolution 1 of 2003 does not have prescription with regard to the appointment of a chairperson and initiator. Wherefore the respondent prays for dismissal of the case due to lack of jurisdiction.

REPLY BY MR. MARABA

- [8] He indicated that he could not understand the reason for the point-in-limine. The dispute referred by the applicant is in two-fold. One part is in terms of section 186(2) (b) of the Labour Relations Act relating to the unfair suspension of the applicant. The second part relates to Resolution 1 of 2003.
- [9] The dispute was raised on the 7th of May 2013 in a disciplinary hearing. The employer stubbornly proceeded with the hearing even after a dispute has been declared. The applicant did not refer an unfair labour practice to the General Public Service Sectoral Bargaining Council (GPSSBC). The suspension was in December 2010 and the applicant was only charged in October 2012.
- [10] The respondent failed to hold a disciplinary hearing within the time-frame of sixty days stipulated in paragraph 7.2 of the Resolution 1 of 2003. The omission constituted an unfair labour practice. The second dispute relates to the appointment of an initiator to whom the resolution did not apply. In terms of section 6 of the Resolution, the employer must have appointed an initiator who is the manager of the applicant.

- [11] The relief sought by the applicant is an order declaring the disciplinary hearing null and void and setting aside the dismissal effected as a result of an invalid disciplinary hearing.

ISSUE TO BE DECIDED

- [12] The issue to be decided is whether the Council has jurisdiction to arbitrate the dispute and whether the relief sought by the applicant is capable of being obtained under the interpretation and application of a collective agreement jurisdiction.

ANALYSIS OF EVIDENCE AND ARGUMENT

- [13] Mr. Phaladi brought it to my attention that in the request for arbitration referral document, the applicant indicated the nature of the dispute as the unfair suspension of the applicant. Mr. Maraba in response thereto mentioned that the dispute is two-fold. The first part of the dispute relates to the suspension of the applicant without a disciplinary hearing beyond the period stipulated in section 7.2 of Resolution 1 of 2003.
- [14] The applicant was suspended in October 2010 and the 60-day period expired in December 2010. The Applicant was served with the charges of misconduct in October 2012 after a period of two years and the applicant did nothing during a two year period to challenge the suspension either in terms of the interpretation and application of a collective agreement jurisdiction or in terms of the unfair labour practice jurisdiction.
- [15] After the formal institution of disciplinary proceedings against the applicant, the respondent has complied with the provisions of Resolution 1 of 2003 albeit after a considerably long period of two years. The suspension fell off in October 2012 when formal charges were served on the applicant. Therefore clearly, when the applicant referred the dispute to conciliation the suspension no longer existed.
- [16] Even more flabbergasting is the fact that the applicant referred an unfair suspension dispute to the PSCBC for arbitration and seemed to have abandoned the second part of the dispute. Disputes relating to unfair suspension are justiciable under section 191 of the Labour Relations Act and must have been referred to the GPSSBC and not the PSCBC.
- [17] Although I found the matter raised by Mr. Phaladi to be possessed of sufficient legal merit to warrant a

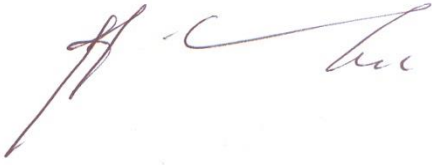
remedy, I have decided in the interests of fairness and fairness alone, to determine if the Council has jurisdiction on the second part of the dispute and whether the relief sought is capable of being granted. The applicant's complaint centred on the fact that the respondent appointed an initiator contrary to the provisions of section 6 of Resolution 1 of 2003.

- [18] According to the said provision, the respondent must have appointed an initiator who is the manager of the applicant and not a person from another department. The applicant's contention is that the resolution is applicable to employees of the State but does not apply to those State employees covered by a disciplinary code concluded in the sectoral bargaining council. The argument went further to state that the initiator appointed by the respondent was not covered under Resolution 1 of 2003.
- [19] With all due respect, Resolution 1 of 2003 is a disciplinary code that was concluded in the Public Service Co-ordinating Bargaining Council. When it is stated that the Resolution applies to State employees except those covered by a disciplinary code concluded in a sectoral bargaining council, it means that disciplinary proceedings cannot be instituted in terms of resolution 1 of 2003 against those employees to whom it does not apply.
- [20] As far as the issue of relief is concerned, the applicant must have sought an urgent interim relief to restrain and interdict the respondent from proceeding with the disciplinary hearing until the dispute raised is resolved. Mr. Phaladi is correct that the matter has been overtaken by events as the disciplinary hearing has been concluded and the applicant has since been dismissed. The disciplinary hearing has come to an end and dismissal is the legitimate outcome of that process.
- [21] In conclusion then, having duly applied my mind to the facts and merits of the case before me, I on a balance of probabilities can come to no other conclusion other than that the PSCBC has no jurisdiction to grant the type of relief sought by the applicant. The applicant is therefore not entitled to be granted the relief sought and if he seeks to challenge the dismissal, he must follow the unfair dismissal jurisdiction in terms of section 191 of the Labour Relations Act..

AWARD

- [22] The Public Service Co-ordinating Bargaining Council has no jurisdiction to grant the type of relief sought by the applicant.
- [23] The case is accordingly dismissed.

[24] I make no order as to costs.

A handwritten signature in dark ink, appearing to read 'K.D. Matji', written in a cursive style.

K.D. MATJI

PSCBC - PANELIST