IN THE PUBLIC SERVICE CO-ORDINATING BARGAINING COUNCIL

In the arbitration between:

NUPSAW obo V. L. BUTHELEZI Applicant

and

DEPARTMENT OF HEALTH Respondent

ARBITRATION AWARD

ARBITRATOR	**:**	**R. LYSTER**
CASE NO	**:**	**PSCB 165-14/15**
DATE OF ARBITRATION	**:**	**7 NOVEMBER 2014**
DATE OF AWARD	**:**	**8 NOVEMBER 2014**
ISSUE	**:**	**INTERPRETATION AND APPLICATION OF COLLECTIVE AGREEMENT**

BACKGROUND, REPRESENTATION AND ISSUES

The arbitration was held at Natalia Building in Pietermaritzburg on 7 November 2014. The Applicant was represented by Mr.Dlamini from NUPSAW, and the Respondent was represented by Mr. Luthuli from the Department of health. The issue related to an interpretation and application of PSBC Resolution 1 of 2003, the Disciplinary Code and Procedure.

SUBMISSIONS AND EVIDENCE

The following facts are common cause:-

- Applicant was employed by the Dept. of Health in 2007, in Ulundi.
- He was subjected to a disciplinary inquiry on 18 February 2014, and the decision of the chairman was that his services be. terminated
- At the disciplinary inquiry, an objection was raised to the position of the chairman and an application for the recusal of the chairman was made and declined.
- The Applicant lodged an appeal to the HOD, and the appeal was finalized on 28 July 2014 and the dismissal was confirmed.
- On 22 May 2014, prior to the finalization of the appeal, Applicant lodged his referral to the Bargaining Council. The dispute related to the interpretation and application of a collective agreement (Resolution 1 of 2003 Disciplinary Code and Procedure).
- That is the dispute which now comes before me.

IN LIMINE ISSUE

At the outset, Mr. Luthuli raised an in limine issue relating to the jurisdiction of the Council. He said that the dispute was out of time. He said that the incident which triggered the running of time for the purposes of the dispute referral was the Applicant's objection to the chairman which the objection was raised on 13 February. He had 90 days to lodge a dispute and he had lodged his dispute outside of that time. He said that the Applicant had claimed in his referral that the dispute arose on 30 April, which was the date of the chairman's findings. However, the incident which started the 90 day

period running began on 13 February. The referral was therefore out of time, as it was filed on 22 May. Furthermore, he said that the dispute should have been lodged as an unfair labour practice dispute and that was only available to employees and not to former employees. Alternatively, he ought to have lodged the dispute as an unfair dismissal dispute which must be lodged within 30 days.

In response, Mr. Dlamini said that on the referral reference was made to 30 April as the date that the dispute arose i.e. 30 April. The chair had not applied clause 7.3.m, n, and o of Resolution 1/2003. When the decision was communicated to the Applicant, the letter was not in line with the Resolution, i.e. it was not communicated by the chair, and no reasons were provided. Furthermore, he did not give the Applicant an opportunity to make submissions in mitigation, in contravention of the Resolution.

In response, Mr. Luthuli said that those issues should have been raised by way of an unfair dismissal dispute wherein he could have raised a procedural challenge to the behaviour of the chairman for his failure to recuse himself or to permit the Applicant to testify in mitigation of sanction. He should have lodged that unfair dismissal dispute within 30 days from the date that the decision of the appeal was communicated to the Applicant which was in July 2014. He had not lodged any such unfair dismissal dispute.

Mr. Dlamini said that the Applicant had a choice as to how to challenge the unfairness or unlawfulness of his dismissal.

SUBMISSIONS ON THE MERITS OF THE DISPUTE

Mr. Dlamini then dealt with the merits of the dispute, i.e. the ways in which he believed the chair of the inquiry had failed to follow the Resolution. He said that the chair had not applied clause 7.3.b, and 7.3 m, n, and o of Resolution 1/2003.

With regard to clause 7.3.b, he said that the Resolution prescribed that the chair should be of a higher grade than the Applicant's representative, whereas the chair had been an outsider and not an employee of the Respondent. If the Respondent had wanted to appoint an outsider, it was obliged to follow the directions laid down in clause 7.3.c.

Secondly, when the decision was communicated to the Applicant the letter was not in line with the Resolution, i.e. it was not communicated by the chair, and no reasons were provided. They were communicated by the chair of EMRS, Mr. Sithole who was not the chair.

Furthermore, he did not give the Applicant an opportunity to make submissions in mitigation, in contravention of the Resolution. (Clause7.3.n). This was an incorrect application of the Resolution.

Furthermore, the outcome was not communicated within 5 days in contravention of clause 7.3.o. It was communicated within 5 days, but not by the chairman.

Furthermore, in contravention of clause 2.4.c of the Resolution, the Applicant had not been given reasons for the decision of the chair to dismiss him.

He said that the failure of the Chair to abide by the Resolution had tainted the entire process and rendered it irregular and unfair. He made reference to various Labour Court and Supreme Court of Appeal judgements which he submitted were of relevance to the dispute, and copies of which were provided in the Bundle.

He also made reference to the Public Service Amendment Act of 2007 Section 7.1 which amends Section 5 of the principal Act. It provides that the reference to the word “act” included the making of any regulation or determination and the issuing of any directive or the taking of any decision. He also made reference to amending section 7.4 which provides that any act by any functionary in terms of the Act may not be contrary to the provisions of the (p 26)

With reference to A117 (HR Management Circular 93/2009) issued by the Respondent’s HOD, he said that this also re-iterated that the chair had to be of a higher grade than the employer representative. The Circular also laid down that the Disciplinary Code of Practice had to be adhered to. (A119). With reference to A122, he said that the director General of the DPSA had prescribed that if the disciplinary inquiry was chaired by an arbitrator appointed by the Bargaining Council, then the Applicant and the Respondent could be represented by legal practitioners. In this matter the chair had not been an arbitrator appointed by the Council. He argued that the Department at all levels had

insisted that the relevant prescripts, regulations and resolutions should be complied with at all times.

He said the Resolution was a Collective Agreement and that the parties were obliged to follow same.

He argued that the Constitution (Section 197.4) provided that the Resolution was a "uniform norm" within the meaning of the section and had to be complied with. He said that the inquiry that the Applicant had been subjected to was not within the uniform norms and was not in compliance with the Resolution and the Respondent's own circulars and directives and those of the DPSA.

He argued that Section 172.1 of the Constitution related to laws and actions which were inconsistent with the Constitution and said that the actions of the Respondent were unfair and invalid ab initio.

In response, Mr. Luthuli said that the application lacked the necessary merits and that it had been referred to the Council on a misguided basis with regards to the chair's refusal to recuse himself. He said that persons were delegated to perform duties in terms of the Public Service and the Resolution. The chair had not been delegated to conduct the inquiry but had been appointed to chair the inquiry and his appointment was valid. The Resolution was not a static, rigid or conservative document and essentially remained a guideline and this had been determined as such by a Court of Law. He said that this applied not only to Resolution 1 of 2003 but to any Collective Agreement and that if there was good cause to deviate from it then such deviation was not unfair. (see the decision of Hamata and others which he would file later. The courts have repeatedly said that Collective Agreements were not to be rigidly interpreted and rational deviations were permitted. One of the reasons for deviations from the strict letter of the Resolution was the acute shortage of specialized staff to chair inquiries. Huge backlogs existed within the Department and the Department had established a panel of attorneys to prosecute and chair inquiries in an attempt to comply with the spirit of the Labour Relations Act which emphasized the speedy and efficient resolution of disputes.

There had been no basis on which to call for the recusal of the chairman, and the only issue which had been raised was the Resolution. That was not a basis on which to set aside the process as the Applicant sought.

With regard to the Applicant's argument that the failure of the chair to communicate the findings to the Applicant, and the failure to attach reasons rendered the procedure null and void he said that there was no legal basis for making such a submission. These were technical issues which had no impact of the critical issues i.e. the hearing itself, whether there was evidence presented upon which the Applicant could have been found guilty, and whether the Applicant was given a fair opportunity to defend himself. He argued that none of the cases cited by the Applicant's representative were relevant. They dealt with suspension of employees and not dismissed employees. They also dealt with issues of wages and payments and did not take the Applicant's case any further. No cases had been cited to support Applicant's argument that he should be reinstated and that his entire disciplinary hearing be regarded as being null and void. He argued that I had no power or right to make such an order in a dispute relating to the interpretation and application of a Collective Agreement. The obvious route for the Applicant to have pursued was to have lodged an unfair dismissal dispute where he could have raised all the procedural issues above.

With regard to the failure of the chair to permit mitigating submissions, he said that the employer party likewise did not submit aggravating factors and therefore there could not be said to be any prejudice to the Applicant. With regard to the references to the South African Constitution, he said that these did not advance the Applicant's case in any way, and he called for the Applicant's referral to be dismissed.

In response, Mr. Dlamini said that the issue was not about an unfair labour practice or an unfair dismissal but it was about the incorrect application of the collective agreement.
He confirmed that the written findings of the chair had been attached to the letter given to him by Mr. Sithole. He said that nevertheless the Collective Agreement said that the chair had to communicate the decision and findings, not Mr. Sithole.

ANALYSIS OF SUBMISSIONS

I shall deal initially with the in limine issue raised by Mr. Luthuli for the Respondent. With regard to the first issue relating to condonation issue he argued that the incident which Applicant objected to was the chairman's refusal to recuse himself, and that this issue had arisen on 18 February, and that accordingly any referral ought to have been brought within 30 days if it was an unfair dismissal referral from 18 February and if it was an unfair labour practice referral or interpretation and application referral within 90 days. However, in this matter the event which triggers the "count down" for the referral of the ~~a~~ dispute is the formal handing down of the chairman's findings which was in April and therefore there is no condonation issue to be decided here.

With regard to the other point in limine i.e. that the dispute was incorrectly referred as an interpretation and application dispute I shall deal with that below when I deal with the merits of the matter.

I shall deal with the points raised by Mr. Dlaimini collectively beginning with the failure of the chairman to recuse himself at the disciplinary inquiry. This was dealt with by the chairman in his findings Bundle B 2. The request for his recusal was not made on the grounds that such a request is normally made i.e. actual bias or an apprehension of bias on the part of the chair. It was made for one reason and one reason only i.e. that his appointment was in contravention of PSCBC Resolution 1/2003, in that he was not a graded employee one grade higher than the representative of the employer. (clause 7.3.b)

Mr. Dlamini argued that was not in compliance with the Resolution and on that basis alone, the decision of the chair was null and void ab initio, and should be regarded as never having taken place.

In dealing with this issue it is necessary to examine the guiding purpose and principles of Resolution 1 of 2003, which appear in Clauses 1 and 2 of the Resolution. One of the primary purposes (clause 1.5) is to provide employer and employees with a quick and easy reference for the application of discipline. Clause 2 deals with the guiding principles for the application and implementation of the Code. Clause 2.2 provides that discipline must be applied in a fair, consistent and progressive manner. Clause 2.3

provides that discipline is a management function. Clause 2.4 provides that the disciplinary code is necessary for the fair treatment of public servants and to ensure that employees have a fair hearing are timeously informed of the allegations against them receive written reasons for decisions taken and have the right to appeal any decision.

These are universal principles which apply to any disciplinary code whether they are part of directly mirror those which are to be found in the Code of Good Practice found in Schedule 8 of the Labour Relations Act, and the overriding principles are those of fairness to the employee, and the expeditious resolution of disputes. The other principle that is emphasized is that discipline is a management function. A Collective Agreement or whether they are an employer's code.

The issue which I must decide is that does the fact that the chairman was not an employee of the Respondent render the entire process null and void. Grogan J. (Workplace Law Juta) summarizes this dilemma which as follows;

> *Disciplinary codes usually specify that hearings must be presided over by managers or supervisors. If there is such a code in place, can the employer nevertheless appoint an outsider to perform this role? Khula Enterprises found itself confronted with this question when it decided to take disciplinary action against a senior manager for insubordination and gross negligence. The company instructed its attorneys to appoint a practising advocate to chair the hearing; a sensible option because of the manager's status and the fact that his superiors were both involved in the dispute. The advocate decided that the conduct of the accused manager warranted dismissal. A CCMA commissioner who later arbitrated the dispute decided that the dismissal was procedurally unfair because the company's code made no provision for appointing of "outsiders" as presiding officers, and because the advocate had been instructed by the company's attorneys. The matter reached the Labour Court on review* ***(Khula Enterprise Finance Limited v Madinane & others (Labour Court case no. JR660/02 dated 13 February 2004, unreported; SILCS 2004:5))****. The judge noted that the main, if not the only reason why the commissioner had found the dismissal unfair, was that the presiding officer was an "outsider". This meant that the commissioner had failed to give due consideration to the issue he was ultimately required to decide – namely, whether the actual procedure followed*

was fair. The court held that the procedure was fair; there were good reasons why the company had decided to appoint the advocate to preside over the inquiry. Managers senior to the accused had all been involved in the dispute. This would have made it impossible for them to fulfil that role. In these circumstances, the appointment of an independent advocate served the interests of both parties.

The reasons that Mr. Luthuli advanced as to why an outsider had been appointed were not the same as in Khula's case (supra) but nevertheless the reasons were rational and were directly linked to the guiding principles of Resolution 1 of 2003 as set out above i.e. the expeditious and fair resolution of disputes.

In the matter of **Highveld District Council v CCMA & others [2002] 12 BLLR 1158 (LAC),** the Labour Appeal Court specifically stated that where there was an agreed disciplinary code and procedure in a Collective Agreement the failure of an employer to comply with or abide by that Code did not necessarily render dismissal unfair. In this matter the union had contended that the proceedings were irregular because of technical non- compliance with the disciplinary code as set out in the collective agreement i.e. that the accusation against him was not made in writing by his accuser as was required and because the chair of the appeal hearing did not appoint a prosecutor as was also required by the procedure. The Court held that in spite of this the dismissal was not unfair.

Similarly, in the matter of **Dell v Seton (Pty) Ltd & others [2009] 2 BLLR 122 (LC),** Molahleli J. said that a departure from a disciplinary code will render dismissal unfair only if the procedure that was actually followed was unfair. In the matter of **De Jager De Jager v Minister of Labour & others [2006] 7 BLLR 654 (LC),** the Court held that where a disciplinary tribunal had failed to provide written reasons for dismissal as required by disciplinary code the appropriate relief was to order the presiding officer to provide reasons i.e. the Court did not set aside the dismissal because of the failure to comply with the Code – it simply ordered the chairman to provide those reasons.

The principles enunciated in these cases support the generally recognized view that a disciplinary code even an agreed code is a guideline and is not a document written in stone which the chair of an inquiry or an arbitrator is bound to slavishly follow **(see SA**

Tourism Board v CCMA & others [2003] 9 BLLR 916 (LC), NUM & another v CCMA & others [2003] 12 BLLR 1261 (LC), Hoechst (Pty) Ltd. Vs CWIU and Another 1993 (14) ILJ LAC, Saaiman and Another vs de Beers Consolidated Mines 1995 16 ILJ IC, Gcwensha v CCMA & others [2006] 3 BLLR 234 (LAC) Leonard Dingler (Pty) Ltd v Ngwenya [1999] 5 BLLR 431 (LAC) The overriding principle in every case is – was the procedure that was followed a fair procedure. If it was then issues of minor technical non-compliance are irrelevant or in any event do not warrant the entire disciplinary process being declared null and void which is what the Applicant in the current matter argued I should do.

The issues that the Applicant has raised in this matter are by and large technical in nature and none of them subject to what is said below constitute an attack on the actual fairness of the disciplinary inquiry the way it was run and the decisions of the chairman. The only substantive exception to this was the point that was raised in regard to the chair's failure to allow the parties to lead evidence in mitigation and in aggravation of sanction. That appears to have been an error of judgement on the part of the chair of the inquiry. However, and with reference to the above case law, the correct route for the Applicant to have followed after he had been dismissed was to have referred an unfair dismissal dispute in terms of section 191 of the LRA, wherein he would have been fully justified in raising the issue of procedural unfairness in relation to the issue of mitigation and in fact any other procedural issues which he wanted to raise. The other issues i.e. that the chair was not an employee a grade higher than the employer representative and the fact that the chair personally did not give the written findings to the Applicant at the end of the inquiry are petty technical matters which I am inclined to say fall foul of the *de minimus* rule (*de minimus not curat lex* – the law does not concern itself with trifling matters). The Applicant has attempted to overturn his dismissal by claiming ~~non compliance~~non-compliance by the Respondent with the disciplinary code. He would have been better advised to have lodged an unfair dismissal dispute. It is of course too late for him to do that now.

I should add that I am of course mindful of the principle of the primacy of Collective Bargaining and of Collective Agreements and this award is certainly not authority for the view that such agreements can or should be ignored or passed over. However the issues which the Applicant has raised here are issues of form only and not of substance and in this context, the technical deviation from the collective agreement does not render the dismissal unfair.

Formatted: Justified, Line spacing: 1.5 lines

Formatted: Font: Bold, Font color: Auto

Finally, I refer to judgement of Zondo J, in the matter of **Minister of Safety and Security v Safety and Security Sectoral Bargaining Council and Others 2010 6 BLLR 594 (LAC)**, in which the Court dealt comprehensively with the distinction between a dispute and an issue in dispute. This judgement is authority for the view that a dispute that is essentially an unfair dismissal dispute cannot be dressed up as an interpretation and application of a collective agreement dispute which is precisely what the Applicant has attempted to do in this case.

DETERMINATION

Applicant's claim is dismissed.

R. LYSTER

ARBITRATOR

Formatted: Font: Not Bold, Font color: Auto

Formatted: Font: Not Bold, Font color: Auto

Formatted: Font: Bold, Underline, Font color: Auto

Formatted: Font: 11 pt, Bold, Underline, Font color: Auto

Formatted: Font: 11 pt, Font color: Auto

Formatted: Font: Not Bold, No underline, Font color: Auto

Formatted: No underline, Font color: Auto

Formatted: Font: Not Bold, No underline, Font color: Auto

Formatted: Font: 11 pt, Font color: Auto

Formatted: Font: 11 pt, Underline, Font color: Auto