PSCBC

PUBLIC SERVICE CO-ORDINATING BARGAINING COUNCIL

ARBITRATION AWARD

Case Number: ***PSCB240-14_15***
Senior Commission / Panellist: ***Martinus van Aarde***
Date of Award: ***15 October 2014***

In the **MATTER** between

PSA obo L Leiee & 2 Others
(Applicant)

and

Department of Police, Roads & Transport (FS)
(Respondent)

Applicant's representative: ***Mr AJ Greeff***
Applicant's address: ***C/o: PSA***
PO Box 7673
BLOEMFONTEIN, 9300

Telephone: ***(051) 403 1300***
Telefax: ***(051) 403 1315 / 19***
E-mail: —

Respondent's representative: ***Mr T Bangani & Mr PJ Mojai***
Respondent's address: ***Department of Police, Roads & Transport***
BLOEMFONTEIN

Telephone: ***082 665 9299***
Fax: —
E-mail: ***banganit@freetrans.gov.za***

1. Details of hearing / representation

The case was set down for an arbitration hearing on 3 October 2014 at Bloemfontein, DPRT Offices. Mr AJ Greeff: Official PSA represented the Applicants. Mr T Bangani: Director LR represented the Respondent (DPRT).

2. Issue(s) to be decided

2.1 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, clause 7.3(a)-(f) which relate to the appointment of the chairperson (presiding officer) and initiator at in-house disciplinary hearings.

2.2 I am called upon to decide on whether the Government has a legal right or a general discretion to appoint third parties (e.g. attorneys/advocates) to chair the hearing/represent the department's case at such proceedings or not.

2.3 This appears to be a question of law hence no need to call any witnesses. The parties accordingly requested to file written submissions in this regard (Annexure A & B). The question at hand is also not limited to the specific applicants/employees in question, but has a broader effect on the Government as a whole, including the Office of the State Attorney. It also follows that this award is of public interest and most probably will be scrutinised over time to come.

3. Background to the Dispute

3.1 The Applicant in this matter is Mr L Leiee and two other co-employees (Me KM Pienaar: Assistant Director Licensing and JES Lourens: Admin Clerk). The parties lodged a dispute (LRA 7.11) on 18 July 2014 on basis set out above (par 2.1 *supra*). The case was then set down for a conciliation hearing on 6 August 2014. The dispute was declared unresolved in terms of section 135(5)/LRA '95 and a certificate on non-resolution was issued. The Applicants then filed a Request for Arbitration (LRA 7.13) on 8 August 2014.

3.2 As pointed out the case was set down for arbitration on 3 October 2014. The parties requested to file written submissions in support of their cases (Annexure A & B respectively).

3.3 The nub of the question is whether the Respondent is entitled to appoint a third-/outside party as a chairperson and/or initiator (prosecutor) to in-house disciplinary proceedings within the context of Resolution 1/2003. I will address these issues in more detail.

4. Analysis of Evidence / Argument

4.1 The relevant provisions read as follows—

> *"**Resolution No 1/2003: Disciplinary Code & Procedure for the Public Sector***
>
> *2.8 The Disciplinary Code and Procedures constitutes a framework within which departmental policies may be developed to address appropriate circumstances, provided such policies do not deviate from the provisions of the framework.*
>
> *6. Serious Misconduct*

If the alleged misconduct justifies a more serious form of disciplinary action than provided in paragraph 5, the employer may initiate a disciplinary enquiry. The employer must appoint an employee as a representative, who as far as possible should be the manager for the employee, to initiate the enquiry.

7.3 Conducting the disciplinary hearing

a. The disciplinary hearing must be held within ten working days after the notice referred to in paragraph 7.1(a) is delivered to the employee.

b. The chair of the hearing must be appointed by the employer and be an employee on a higher grade than the representative of the employer.

c. The employer and the employee charged with misconduct may agree that the disciplinary hearing will be chaired by an arbitrator from the relevant sectoral bargaining council appointed by the council. The decision of the arbitrator will be final and binding and only open to review in terms of the Labour Relations Act, 1995. All the provisions applicable to disciplinary hearings in terms of this Code will apply for purposes of these hearings. The employer will be responsible to pay the cost of the arbitrator.

d. If the employee wishes, she or he may be represented in the hearing by a fellow employee or a representative of a recognised trade union.

e. If necessary, an interpreter may attend the hearing.

f. In a disciplinary hearing, neither the employer nor the employee may be represented by a legal practitioner, unless—

(i) the employee is a legal practitioner or the representative of the employer is a legal practitioner and the direct supervisor of the employee charged with misconduct; or

(ii) the disciplinary hearing is conducted in terms of paragraph 7.3.c.

For the purpose of this agreement, a legal practitioner is defined as a person who is admitted to practice as an advocate or an attorney in South Africa."

(emphasis added)

See also Amendment Memo 1/10/1 dd. 3 September 2003 — Annexure B.

4.2 Similar questions were put to our labour tribunals/labour courts in the past however, there appears to be conflicting dicta in this regard. In general parlance I wish to record the following general remarks—

4.2.1 legal representation at in-house disciplinary- or even CCMA-/BC proceedings is a vexed subject – see CCMA/BC Rule 25 to be read with the CCMA/Gauteng North Law Society (CC)/2014;

4.2.2 there are various reasons for not allowing legal representation at in-house disciplinary proceedings, *inter alia*, the hearing is not a court of law, the process must be dealt with in a speedily manner without legal technicalities (section 138(1)/LRA '95). This is also in line with our common law principles;

4.2.3 equally, it can be argued that the public service appoints various staff members (*viz.* Labour Relations State Attorneys or Legal Advisors) who can assist cross-departmentally with disciplinary hearings, without the need to appoint a third party to do so. In this regard I also cannot align myself with the general contention

that the opportunity to make use of legal representation is also open to the (accused) employee — the latter on equal fours. I differ: this must also be seen from a financial point of view — can the employee afford to appoint an attorney /advocate?

4.3 Be that as it may, having regard to Resolution 1/2003, a narrow interpretation indicates that legal representation (by either of the parties) is not an absolute right *per se*. Considering the case law, it appears that fairness is the ultimate arbitrator — each case to be decided on its own merits. I believe that this question is best to be addressed at the start of the proceedings by the chairperson (or even by another chair/on paper).

4.3.1 There are cases where such applications were turned down. See *SAMWU obo Mathabela v JS Moroka Local Municipality* [2011] 32 ILJ 2000 (LC)*; M Dukata v Department of Provincial Planning & Treasury (PE)* [2013] /P27-13 (LC).

4.3.2 On the other hand, our Courts held in favour of such applications based on the merits thereof. See *Ngongo v UNISA & Others* (J 2950/2011) ZALCJHB 146 [2012] 33 ILJ 2100 (LC).

4.4 In *The MEC: Department of Finance, Economic Affairs & Tourism (NP) v Mahumani* [2005] 2 ALL SA 479 (SCA) AJA Patel held that with reference to the clause that both the employer and employee are prohibited to appoint legal representatives as follows:

> *"In the **Mosena**-case it was submitted that, in the light of clause 2.8, clause 7.3(e) of the Code should not be construed as an absolute prohibition against legal representation at a disciplinary hearing. Wallis AJ held that clause 2.8 is an injunction in regard to an employer's general approach to discipline and should not be interpreted as authorizing wholesale discretionary departures from the Code and Procedures. It should be interpreted to only authorise departures where it would be necessary by agreement or otherwise, to depart in some respect from the strict terms of the procedures. He found in clause 2.7, which provides that disciplinary proceedings do not replace or imitate court proceedings, a strong indication that the parties considered clause 7.3(e) to be a fundamentally important portion of their agreement."*

4.4.1 Patel furthermore stated that—

> *"…I agree with Wallis AJ that clause 2.8 is an injunction as to the general approach that should be followed. I furthermore agree that clause 7.3(e) is a fundamentally important provision of the agreement and that it should not lightly be departed from. But, there may be circumstances in which it would be unfair not to allow legal representation (see Hamata & Another v Chairperson, Peninsula Technikon Internal Disciplinary Committee and Others* [2002] (5) SA 449 (SCA) at paras 12 & 13*."*

4.4.2 The SCA held as follows—

> *"The parties who agreed on the Code, were intent on devising a fair procedure (see clause 2.4) and it is reasonable to assume that they also knew that there may be circumstances in which it would be unfair not to allow legal representation. In these circumstances it is likely that they would have intended for the presiding officer to have a discretion to allow legal representation in circumstances in which it would be unfair not to do so. I can find no indication in the Code to the contrary. There is, therefore, no justification for interpreting 'appropriate circumstances' in clause 2.8 so as not to include such which would render it unfair not to allow legal representation at a*

disciplinary hearing."

4.5 It is thus my understanding that as a general rule both parties are not allowed to appoint legal representation at disciplinary hearings. However, in exceptional circumstances an application can be made to the presiding officer/chairperson to grant legal representation by either party or to appoint a third party as either a chairperson or initiator/prosecutor. Each case must thus be determined on its own merits.

5. Award

In case PSCB240-14_15 the following award is rendered—

5.1 The following criteria needs to be applied with reference to the interpretation/application of Resolution 1/2003, clause 7.3—

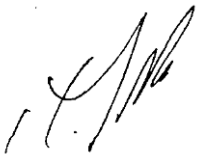
5.1.1 as a general rule, neither party (employee or employer) is *per se* allowed legal representation at in-house disciplinary hearings;

5.1.2 in exceptional circumstances:

(a) the accused employee might be represented by a legal practitioner on formal application/ruling; and

(b) the employer be represented by a third party (legal practitioner) appointed as either a chairperson/ presiding officer or initiator/prosecutor;

4.1.3 such applications to be dealt with in a formal manner (each party to state its own case).

Signature: 

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