



PSCBC

PUBLIC SERVICE CO-ORDINATING BARGAINING COUNCIL

ARBITRATION

AWARD

Case No.: **PSCB 111 -14/15**

Date of Award: 4 September 2014

Panelist: Khomotjo Daniel Matji

In the matter between:

HOSPERSA OBO SUPENG & OTHERS

(Unions / Applicants)

and

DEPARTMENT OF HEALTH - GAUTENG

(Respondent)

DETAILS OF HEARING AND REPRESENTATION

- [1] The matter was set down for arbitration at the SG Lourens Nursing College in Pretoria on the 19th of August 2014. The respondent, Department of Health, was represented by Mr. Tebogo Machiche, its Labour Relations Manager whilst the applicants, Portia Masilela, Francinah Supeng, AM Molopyane, Sophia Lekhuleni, Joyce Motshabi, Enos Makhubela, Ernest Mothabela, Tebogo Morapedi, Whiskey Ndlovu, Thomas Miyambo, Kenneth Hlongwane, Beauty Morudu, Gladys Mahopo, Johnny Mokoala, Pilane Mogomotsi and Bulunga Sandra, were represented by Mr. Herbert Leshaba, the provincial secretary of HOSPERSA.
- [2] There was no viva-voce evidence heard but the two representatives chose to submit written heads of argument by no later than close of business on 28 August 2014.

BACKGROUND TO THE ISSUE

- [3] The applicants are employees of the respondent and worked at Dr. George Mukhari Academic Hospital, at Ga-Rankuwa. They were suspended on 7 February 2014 following allegations of corruption and nepotism brought against them. The precautionary suspensions were later commuted to precautionary transfers in March 2014.
- [4] In terms of clause 7 (2) (c) of PSCBC Resolution 1 of 2003, if an employee is suspended or transferred as a precautionary measure, the employer must hold a disciplinary hearing within 30 or 60 days depending on the complexity of the case or the length of the investigation. It is common cause that the respondent failed to institute disciplinary proceedings against the applicants within the stipulated time-frame.
- [5] HOSPERSA subsequently declared a dispute and referred an unfair labour practice dispute to the Public Health Social Development Bargaining Council on behalf of the applicants. The matter proceeded to arbitration after it remained unresolved. An arbitration award 1081-13/14 was issued under the auspices of the sectoral bargaining council and it was found that the respondent has failed to comply with the provisions of clause 7 (2) (c) of Resolution 1 of 2003.
- [6] The commissioner specifically ordered the respondent to finalise the investigations and institute disciplinary proceedings and granted the respondent a grace period until 30 September 2014. HOSPERSA filed another dispute with the PSCBC on the interpretation and application of Resolution 1

of 2003 based on the same set of facts for which award 1081-13/14 was issued. The relief sought for the applicants is the upliftment of the precautionary transfers and reinstatement in their posts.

ISSUE TO BE DECIDED

- [7] The issue to be decided is the interpretation and application of PSCBC Resolution 1 of 2003 – clause 7 (2) © thereof.

SURVEY OF EVIDENCE AND ARGUMENT

The Applicant's Case

- [8] It is the applicants' contention that their precautionary transfer beyond the 60-day period stipulated in clause 7 2 © of Resolution 1 of 2003 is invalid and that it should be uplifted and the applicants reinstated in their posts at Dr George Mkhari Academic Hospital.
- [9] The respondent is further urged not to allow outside organisations like the ANC, SACP, and SANCO etc; to run its institution. The respondent is urged to report any conduct by these organisations threatening to disrupt the institution to the police.

The Respondent's Case.

- [10] It is common cause that the respondent has failed to institute disciplinary proceedings against the applicants within a 60-day period stipulated in the collective agreement. The case against the applicants is complex and involves people and civil organisations outside the public service.
- [11] The respondent fears for the safety of the applicants if they could be reinstated before the misconduct cases are finalised. The civil organisations and labour formations at the hospital have put immense pressure on the respondent and they threatened to take the law into their own hands if their pleas are not heeded.

ANALYSIS OF EVIDENCE AND ARGUMENT

- [12] Section 143 of the Labour Relations Act provides that an arbitration award issued by a commissioner is final and binding and it may be enforced as if it were an order of the Labour Court, unless it is an

advisory award. I am satisfied that the arbitration award issued under PHSDBC 1081-13/14 is not an advisory award and is therefore final and binding on HOSPERSA and the other parties involved .

- [13] It was extremely opportunistic of HOSPERSA to refer a dispute to the Council based on the same set of facts as the dispute that was referred to the PHSDBC. If HOSPERSA was not happy with the outcome of the proceedings under the auspices of the sectoral bargaining council, it should have invoked review proceedings in terms of section 145 read with section 158 of the Act to have it set aside.
- [14] If an arbitration award is not rescinded or set aside on review by the Labour Court, it will remain valid and in full force and effect. Since the PSCBC is not a tribunal clothed with review powers, I am obliged to respect the decision by the commissioner in case 1081-13/14 until it is set aside on review.
- [15] Another aspect which HOSPERSA seemed to have failed to realise is that the respondent cannot be held to be in breach of clause 7 .2 © of Resolution 1 of 2003 as it has been officially granted a grace period until 30 September 2014. As on the date of the arbitration, the respondent was no longer in *mora* as it was effectively covered by the grace period granted in the award.
- [16] There is no dispute between the parties on the interpretation and application of Resolution 1 of 2003. It is common cause that the respondent has not complied with the provisions of Resolution 1 of 2003, but the PHSDBC has already pronounced itself on the matter and its decision is final and binding. The real issue in dispute is the precautionary transfers of the applicants beyond the 60-day period.
- [17] It becomes very clear when one considers the nature of relief sought by the applicants. The relief sought by the applicants is not capable of being granted by the Council as its jurisdiction is limited to the interpretation and application of collective agreements. It seemed to me that HOSPERSA seeks to be granted the same remedy that it failed to obtain under the unfair labour practice jurisdiction.
- [17] Even if I were to find that the respondent is in breach of clause 7.2 © of Resolution 1 of 2003, it will not be competent for me to order the upliftment of the precautionary transfers as that remedy can only be granted under the unfair labour practice jurisdiction. HOSPERSA attempted it before and failed and now seeks to have a second bite at the same cherry, which I find to be extremely opportunistic.

RULING

[18] The case is accordingly dismissed due to lack of jurisdiction.

[19] HOSPERSA is ordered to pay the costs of the arbitration for the frivolous and vexatious referral.

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

K.D. MATJI _____
COUNCIL ARBITRATOR