

PSCBC

PUBLIC SERVICE CO-ORDINATING BARGAINING COUNCIL

ARBITRATION

AWARD

Case No.: **PSCB 133 -14/15**

Date of Award: 3 September 2014

Panelist: Khomotjo Daniel Matji

In the matter between:

NEHAWU OBO A.NDWENI

(Unions / Applicants)

And

DEPARTMENT OF SOCIAL DEVELOPMENT - GAUTENG

(Respondent)

DETAILS OF HEARING AND REPRESENTATION

- [1] This matter was heard at the offices of the Department of Social Development at 69 Commissioner Street in Johannesburg on the 20th of August 2014. The respondent, Department of Social Development, was represented by Mr. C. Makapela, whilst the applicant, Mr. A. Ndweni, was represented by Mr. M.G. Motaung.
- [2] The proceedings were conducted through the medium of English and there was therefore no need for an interpreter. There were no documents that were entered into the arbitration.
- [3] There was no viva-voce evidence as the representatives presented oral arguments only.

PRELIMINARY ISSUE

- [4] It was submitted on behalf of the Respondent that the Council does not have jurisdiction as the applicant was dismissed from the Public Service in terms of section 17 of the Public Service Act for unauthorized absence from duty for more than 30-days. It was submitted further that the applicant has appealed and the decision was still awaited from the Executing Authority.
- [5] Mr. Motaung argued that the Council has jurisdiction to hear the matter. He stated that a collective agreement, Resolution 12 Of 1999, was entered into between the State and labour to regulate the conditions of service of employees. The matter was referred to conciliation and the respondent did not raise the objection to jurisdiction. A certificate has been issued and the respondent had 14 days to apply for it to be set aside but it failed to do so.
- [6] The parties held a pre-arbitration meeting and the issue of jurisdiction was not raised.

SURVEY OF EVIDENCE AND ARGUMENT

The Applicant's case

- [7] Mr. Motaung stated that the applicant was employed by the respondent as a driver/messenger. He fell ill while at work on the 12th of February 2014. The employer was notified was at all material times aware of the applicant's condition. The manager of the applicant was Mrs. De Beer and she was duly informed about the applicant's condition.

- [8] The applicant was released from work in order to consult a doctor as it was clear that he was sick. The employer was aware at all material times that the applicant was sick. The whereabouts of the applicant were well known to the employer. The employer failed to comply with the well-known practice of visiting the employee as provided in the collective agreement.
- [9] Mr. Motaung submitted that the respondent failed to comply with clauses 1, 2, 3, 4,5 ,6 and 7 of Resolution 12 of 1999 The respondent opted for section 17 of the Public Service Act while it knew the whereabouts of the applicant. The applicant brought a medical certificate to prove that he was ill. The respondent acted unfairly against the applicant. The relief sought is reinstatement of the applicant.
- [10] Due to the breach of the collective agreement, the respondent must be ordered to consider the applicant's medical certificate and comply accordingly. It is not disputed that the applicant was sick during the period of his absence.

The Respondent's case

- [11] Mr. Makapela stated that incapacity can only be applied if the 36 sick leave days in a circle have been exhausted. There would have been no grounds to apply incapacity in the case of the applicant. According to the department's records, the applicant had no ground to be subjected for incapacity. An employee's normal sick leave days must be exhausted before an employee could be subjected to incapacity.
- [12] The respondent denies that it acted in breach of Resolution 12 of 1999 as the applicant's condition did not warrant its provisions.

ANALYSIS OF EVIDENCE AND ARGUMENT

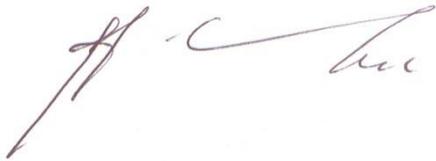
- [13] Although I had no doubt that the matter is possessed of sufficient legal merit to warrant the relief sought, I had after careful consideration of the matter and its far reaching implications came to the inescapable conclusion that the relief sought by the applicant is not capable of being obtained from the Council as it has no jurisdiction.
- [14] It was clear from the nature of the relief sought that the real dispute is about the fairness or otherwise of the applicant's dismissal. Consequently, the Council has no jurisdiction to adjudicate over dismissal disputes and the relevant forum to which the dispute must be referred is the relevant sectoral bargaining

council. I am satisfied that the dispute is not about the interpretation and application of Resolution 12 of 1999 but is about the dismissal of the applicant.

AWARD

[15] The Council has no jurisdiction on the matter as it relates to the dismissal of an employee.

[16] The case is accordingly dismissed.

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

K.D. MATJI _____
COUNCIL ARBITRATOR