



# ARBITRATION AWARD

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Case Number:	PSCB30-13/14
Commissioner:	Malusi Mbuli
Date of Award:	05-08-2014

In the ARB between:

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**PSA obo F. CALAZA  
(APPLICANT)**

And

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**DEPARTMENT OF HEALTH – EASTERN CAPE  
(RESPONDENT)**

## **BACKGROUND AND DETAILS OF HEARING**

The matter came before the PSCBC as an Interpretation and Application of a Collective Agreement in terms of section 24 (2) and (5) of the Labour Relations Act 66 of 1995 as amended the (LRA).

It was set down for arbitration hearing on the 28<sup>th</sup> of July 2014 at the Nelson Mandela Hospital in Umtata at 09:00.

Both parties attended the hearing and the employer was represented by Mr. W. Smith an attorney appointed by the respondent.

The applicant Mrs. F. Calaza was represented by Mr. Z. J. Mbenyana, an official of the applicant's trade union PSA.

Before the commencement of the proceedings the respondent's representative raised two points in limine.

- The 1<sup>st</sup> *point in limine* raised by the respondent's representative is that the dispute referred by the applicant is *res judicata* because the matter has already been dealt with by another Arbitrator in the same council PSCBC under case number PSCB617-11/12.
- The 2<sup>nd</sup> *point in limine* raised by the respondent is that the applicant has no *locus tandi* to refer this type of a dispute because she is no longer the employee of the respondent.

The two *points in limines* were both dismissed and will deal with the reasons for such decision hereunder.

## **ISSUE TO BE DECIDED**

I am required to interpret and apply clause 7.3 (f) of the PSCBC Resolution 1 of 2003 and decide whether the respondent was permitted to be represented by a legal practitioner in the disciplinary hearing of the applicant Mrs. F. Calaza.

## **IN LIMINE POINTS**

- The 1<sup>st</sup> *in limine point* raised by the respondent was that the matter is *res judicata* as Commissioner Mare has issued an award on the same issue and that award is binding on

the applicant as PSA is also a party to the PSCBC. On this point what is binding on the parties is the resolution itself not the interpretation of another arbitrator in another dispute.

Furthermore even if that award was binding on the applicant Commissioner Mare refers to clause 2.4 of the PSCBC Resolution 1 of 2003 and says the respondent is permitted to exercise discretion before appointing legal representation and external chairpersons to represent and preside over internal disciplinary enquiries.

I do not know where this decision is coming from but what I know is that I am required to interpret and apply clause 7.3 (f) of the PSCBC Resolution 1 of 2003.

This award was not specifically dealing with this clause and even if it has dealt with it I am not bound by the decision of another Commissioner and this point in limine is hereby dismissed.

- The 2<sup>nd</sup> point in limine raised by the respondent was that the applicant is no longer the employee of the respondent and as such cannot file an interpretation and application of a collective agreement dispute against the respondent.

On this point the applicant raised an objection relating to clause 7.3 (f) of the PSCBC Resolution 1 of 2003 at the hearing and after the ruling was not in her favor referred this dispute to the PSCBC whilst she was still in the employ of the respondent.

The respondent cannot escape responsibility on the basis that the applicant has since been dismissed. The respondent is still bound by clause 7.3 (f) of the PSCBC Resolution 1 of 2003. This point is also dismissed.

## **SURVEY OF EVIDENCE**

The parties did not lead any evidence on the matter as they agreed that the facts in this dispute were common and it follows that the matter was not electronically recorded and the party's documents and arguments will form the record of the hearing.

The parties agree that their dispute is the dispute of law and not a dispute of fact.

## **ANALYSIS OF EVIDENCE AND ARGUMENT**

- *Section 23 of the LRA provides that the collective agreement is binding on the parties to it and also takes precedent over the provisions of the Act for whole period of that collective agreement.*

The PSCBC Resolution 1 of 2003 is a collective agreement hence it should be dealt with and applied in consideration of section 23 of the LRA. This collective agreement is binding on the parties to it and this means that compliance with the said collective agreement is compulsory.

This also means that there can be no dismissal of an employee in the Public Service if there was violation of a collective agreement as long as that collective agreement is still in place.

For the purposes of this dispute the relevant sub clauses are 7.3 (b) and 7.3 (f) (1) and (11) which provides that:

- *7.3 (b) the chairperson of the disciplinary hearing must be appointed by the employer and be an employee on a higher grade than the representative of the employer.*
- *7.3 (f) in a disciplinary hearing, neither the employer nor the employee may be represented by legal practitioner, unless –*
  - (1) 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.*
  - (2) The disciplinary hearing is conducted in terms of clause 7.3 (c).*

Clause 7.3 (c) of the PSCBC Resolution 1 of 2003 provides that:

- *The employer and 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 for review in terms of the Act.*

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

It is not in dispute that the respondent was represented by Mr. Wesley Pretorius in the disciplinary hearing of the applicant and that Mr. Wesley Pretorius is an admitted and a practicing attorney.

Clause 7.3 (f) does not permit the respondent to use the legal practitioners to represent the employers in disciplinary hearings in the public service.

The only exception to this clause is clause 7.3 (f) (1) where the employee charged is a legal representative or the representative of the employer is the legal representative.

These provisions are binding on the parties and both parties are not expected to deviate from the provisions of the collective agreement as it is binding on both of them.

The employer representative has referred me to a number of authorities and these authorities unfortunately do not address the issue.

The issue here is that clause 7.3 (f) of the PSCBC Resolution 1 of 2003 specifically excludes representation by legal practitioners in disciplinary hearings in the Public Service unless clause 7.3 (f) (1) is applicable and in this case clause 7.3 (f) (1) is not applicable because the employee Mrs. F. Calaza is not a legal practitioner.

This means that the respondent as a custodian of discipline has acted in violation of clause 7.3 (f) of the Public Service Co – coordinating Bargaining Council Resolution 1 of 2003.

In the circumstances I hereby make the following ruling.

## **AWARD**

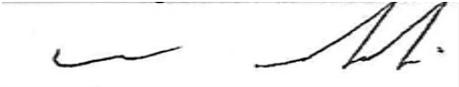
The applicant's dismissal was not effected in accordance with the PSCBC Collective Agreement Resolution 1 of 2003.

The dismissal of the applicant is therefore null and void.

The respondent is ordered to re – instate the applicant with full back pay with effect from the 15<sup>th</sup> of August 2014.

The said back pay from the period of dismissal to the 15<sup>th</sup> August 2014 will be paid to the employee not later than the 31<sup>st</sup> of August 2014.

This means that the applicant was effectively not dismissed by the respondent and is still the employee of the respondent until the respondent has complied with the PSCBC Resolution 1 of 2003.

A rectangular box containing a handwritten signature in black ink. The signature is stylized and appears to be 'M Mbuli'.

**M Mbuli**  
**PSCBC Arbitrator**