



GENERAL PUBLIC SERVICE
SECTOR BARGAINING COUNCIL



Physical Address:
260 Basden Avenue,
Lyttelton, Centurion,
Pretoria

Postal Address:
PO Box 16663,
Lyttelton, 1040

Tel: 012 664 8132
Web: <http://www.gpssbc.org.za>

JURISDICTIONAL RULING

Panellist/s: SM. Beesnaar
Case No.: GPBC2080/2023
Date of Ruling: 16 July 2024

In the ARBITRATION between:

PSA obo H. Stevens
(Union / Applicant)

and

DEPARTMENT OF JUSTICE AND CONSTITUTIONAL DEVELOPMENT

(Respondent)

Union/Applicant's representative: Mr. KAF. Williams – Union Rep (PSA)

Union/Applicant's address:

Telephone: 072 426 5895

Email: 1972williams838@gmail.com

Respondent's representative: Mr Nkosinathi Fanele – LR Practitioner

Respondent's address:

Telephone: 083 662 4752

Email: NFanele@justice.gov.za

RULING

DETAILS OF HEARING AND REPRESENTATION

1. This is the ruling in the arbitration matter between PSA on behalf of H. Stevens, the applicant and the Department of Justice and Constitutional Development, the respondent.
2. The arbitration was scheduled under the auspices of the GPSSBC (the Council). The referral is in terms of section 186(2)(a) of the Labour Relations Act, 66 of 1995 as amended (herein referred to as “the LRA”).
3. The arbitration hearing was held on 2 July 2024 at the respondent’s premises in Kimberley.
4. The applicant appeared in person and he was represented Mr. KAF. Williams from PSA in his capacity as Union Representative. The respondent was represented by Mr. Nkosinathi Fanele, the LR Practitioner. He was accompanied by Mr. Karabo Gaborone who appeared as an observer.
5. The parties submitted into evidence bundle of documents which were accepted as what they purported to be. The applicant’s bundle is herein after referred to as Annexure “C” while the respondent’s bundle is Annexures “A and B”.
6. The proceedings were conducted in English and were manually and digitally recorded.

ISSUE TO BE DECIDED

7. It must be determined whether the respondent committed unfair labour practice relating to a benefit, when he was not awarded pay progression after he was suspended for 18 months.
8. At the outset of the proceedings, the respondent raised two jurisdictional points to be determined.

BACKGROUND TO THE DISPUTE

9. It is common cause that the applicant was placed on precautionary suspension for 18 months. He returned to work on 24 October 2022 and was not awarded pay progression for the 2022/2023 performance cycle.
10. He was informed that he did not qualify because he failed to sign a performance Agreement (PA). He appealed the decision not to grant him pay progression on 29 September 2023 (see C10-11). He was furnished with a response on 16 October 2023 to apply for condonation for late submission of PA (C9).

11. Aggrieved by the outcome that he must apply for condonation for late submission of his PA, he filed a grievance on 3 November 2023. The grievance remained unresolved and the Union referred the matter on his behalf to the Council for conciliation on 3 December 2023.
12. Conciliation was scheduled on 16 January 2024 2023 and failed to resolve the dispute. Certificate of non-resolution was issued and the union applied for arbitration 21 February 2024.

PRELIMINARY ISSUE/S

13. At the outset of the arbitration proceedings there were two (2) jurisdictional issues raised by the respondent.

The respondent's submissions –

14. The respondent submitted that the applicant failed to sign his PA and he was disqualified. However he was advised to apply for condonation for the late submission of his PA and he refused nonetheless. Without a PA in place, he maintained that the Council lacked the jurisdiction to entertain the matter.
15. The second issue according to the respondent was that the referral was prematurely to the Council. Mr Fanele held that the applicant failed to exhaust the internal Departmental processes. He also maintained that the Council lacked jurisdiction as a result.
16. He concluded that while the matter was prematurely referred to the Council, it was outside the prescribed 90 days and was late before the Council without a condonation application. That was further his submission that the Council lacked the necessary jurisdiction on the matter.

For the applicant –

17. Mr Williams submitted that the Council has the jurisdiction on the matter whether there is a signed PA or not. On the issue of premature referral, he submitted that the applicant lodged a grievance on 3 November 2023 and there was no response after 30 days from the respondent.
18. That was after the appeal process was unsuccessful. On 16 October 2023 they received the appeal outcome from the respondent which was unsatisfactory. Then on 3 December 2023 the dispute was referred to the Council for conciliation. He maintained that they referred the matter on time to the Council and there was no need for condonation application.
19. He concluded that the Council has jurisdiction to deal with the matter and the Commissioner must find in their favour.

ANALYSIS OF THE SUBMISSIONS

20. This is a referral in terms of section 186(2)(a) of the LRA. The applicant submitted that he has been denied pay progression after he was suspended for 18 months. The reason for not granting him pay progression was that he did not sign PA. At the outset, the respondent raised three jurisdictional points.
21. The term 'jurisdiction' means, as articulated in ***Gcaba v Minister of Safety and Security and others [2010] 31 ILJ 296 (CC); [2009] 12 BLLR 680 (CC)*** 'the power or competence of a Court to hear and determine an issue between parties'. It is a settled matter that the CCMA is a creature of statute and is not a court of law. As a general rule, it cannot decide its own jurisdiction. It can only make a ruling for convenience. I have no doubt that the same principle applies to this bargaining council.
22. The first jurisdictional point raised by the respondent is because there was no PA in place. Whether there is a signed PA in place or not, that in my view does not constitute a jurisdictional point to preclude the Council from dealing with the matter. I am satisfied that the employment relationship is still intact notwithstanding the fact that PA was not signed.
23. On the issue of premature referral and that the applicant failed to exhaust the internal processes, I hold a different view. Section 191(1)(b)(ii) of the LRA provides that a referral of an alleged unfair labour practice dispute must be made to the Council within "90 days of the date of the act or omission which allegedly constitutes the unfair labour practice or, if it is a later date, within 90 days of the date on which the employee became aware of the act or occurrence."
24. The proper interpretation of this subsection was recently deal with by the LC in ***NTEU obo Moeketsi v CCMA and Others (JR1157/20) [2022] ZALCJHB 226*** (handed down on 16 August 2022). The Labour Court made the following telling findings: 1). The 90 days prescribed in section 191(1)(b)(ii) of the LRA does not commence to run from the date that internal remedies were exhausted. 2). When parties fail to reach a solution during an internal grievance, a dispute is not birthed then. The non-resolution of a grievance simply signifies to the disputing parties that it is time to escalate the already existing dispute to another level. In short, it signifies a deadlock. A deadlock typifies a situation where opposing parties are unable to make progress towards resolving an existing dispute.
25. The jurisdiction to arbitrate or adjudicate in terms of the LRA is conditioned upon referral to conciliation or mediation. It is not conditioned upon any exhaustion of internal remedies. The fact that internal remedies have not been exhausted does not mean that a dispute cannot exist. Internal remedies are aimed at resolving an existing dispute/grievance. Logically, existentially, a dispute predates invocation of internal remedies.

26. It is wrong to suggest that before exhaustion of the internal remedies, an employee is not entitled to refer a dispute to the CCMA or the bargaining council for resolution. The time periods for referral exist for a reason. Labour disputes require speedy resolution. It could not have been the intention of the drafters of the LRA that a party is excused from the time frames for referral of disputes for as long as that party is still exhausting internal remedies.
27. I also hold that the referral was made on time and that there was no need for an application for condonation as submitted by the respondent.
28. After hearing the submissions made and having perused the documents submitted by the parties in support of their respective arguments, I am not persuaded by the respondent's representative on the jurisdictional points raised.
29. In the circumstances, I make the ruling here after –

RULING

30. The Council has the necessary jurisdiction to determine the matter as referred under Case No.: **GPBC2080/2023.**
31. The Council is herewith directed to schedule the matter for arbitration hearing to proceed.



Name: SM. Beesnaar
(GPSSBC) Arbitrator