



ARBITRATION AWARD

Case No: **PSHS1111-23/24**

Commissioner: **Kelvin Kayster**

Date of award: **07 November 2024**

In the matter between:

Nkosinathi Qilingele

Applicant

and

Department of Health- Eastern Cape

Respondent

DETAILS OF HEARING AND REPRESENTATION

1. The arbitration hearing in this dispute was held on 29 October 2024 in Gqeberha.
2. The applicant is Mr. Nkosinathi Qilingele, an employee of the respondent. He was represented at the arbitration hearing by Mr. Benson of the PSA..
3. The respondent is the Department of Health- Eastern Cape, and was represented by Mr. Deon May.
4. On their request, the parties were granted until 06 November 2024 to exchange and submit written closing arguments.
5. The matter was referred to the PHSDSBC as an unfair labour practice dispute related to an alleged unfair suspension. The applicant alleges that his suspension was not in compliance with the time limits specified in the disciplinary code for the public service, PSCBC Resolution 1 of 2003.

ISSUE TO BE DETERMINED

6. I am called upon to determine whether or not the applicant's suspension was fair.

BACKGROUND

7. The applicant was appointed as supervisor at Emergency Medical Services (EMS) in May 1997. He was seconded to the labour relations unit at the district office late in 2019. He was suspended from duty on 04 December 2023. He contends that the 60-day period for precautionary suspension lapsed on 04 February 2024. He however remained on precautionary suspension until 17 April 2024, when he was “precautionary transferred” to the Nelson Mandela Bay office and then to the Sarah Baartman labour relations office.
8. With reference to the provisions of PSCBC Resolution 1/2003, he contends that the respondent failed to hold a disciplinary hearing within the stipulated 60 days, and that the extended duration of his suspension renders it unfair. He seeks an award for the upliftment of his suspension.

SUBMISSIONS AND ARGUMENTS

9. The parties submitted separate bundles of documents, and it was accepted by the parties as what it purported to be. Here follows brief outlines of the parties’ respective cases and arguments. I do not intend to traverse it in detail, save for those that are relevant to the issues in dispute. Submissions not specifically mentioned were also taken into account in reaching my findings.

Applicant’s submissions

10. The applicant, Mr. Nkosinathi Qilingele, repeated the background of the dispute, and testified that he was allowed to keep his official phone and laptop during the suspension. However, on 11 June 2024 he received communication that his cellphone connection would be suspended, and the number allocated to another colleague. He viewed it as a punitive measure. He was initially suspended 11 months ago pending the outcome of the investigation, but up to now he has not been contacted at all. Clause 7.2 of Resolution 1/2003 limits the duration of a suspension to 60 days in cases of serious allegations. This time limit is reiterated in paragraph 8.10 (page 24 of bundle) of the DPSA Directive on Discipline Management. Also, paragraph 16.5(c) of the Respondent’s Policy on sexual harassment (page 37 of the bundle) requires the HOD to ensure that a reported complaint is investigated and resolved within 30 working days. The period can be extended with a maximum of 14 days if the investigation is not concluded within the 30 working days. Any disciplinary measures must be conducted in terms of PSCBC Resolution 1/2003 (page 42 of the bundle). Any delays should be avoided (page 43, paragraph 19.1(i)). The respondent merely informed him that the delay was caused by the complainant’s medical condition (page 4 of the bundle). The Public Service precautionary suspensions guide reiterates these principles, and directs that a suspended employee must return to work should the hearing not be concluded within 60 calendar days. The employee concluded that the suspension has affected his physical and mental well-being, his dignity and reputation, and his family life. The suspension appeared to be punitive, because he was treated as if he was already found guilty of serious misconduct.

11. In cross-examination, Mr. Qilingele explained that the precautionary transfer was made without any documentation, and he currently does not have his own office. He disputed that the complainant's sick leave and hospitalization was sufficient extraordinary circumstances to prolong his precautionary suspension and transfer, especially since complaints of this nature should be investigated and concluded within 30 days. The prolonged suspension and the respondent's failure to conduct a proper investigation affected him mentally, and he underwent psychiatric treatment as he was suicidal. His medical aid was exhausted, and his reputation is ruined.

Respondent's submissions:

12. For the respondent, District Manager Ms. Sonia Lupondwana elaborated on the history of the complaint, and expressed her concern that the applicant's affair with the complainant had an impact on the workplace. The complaint of sexual misconduct came to her attention on 27 November 2023, and they suspended the applicant on 04 December 2023. The complainant was on sick leave at the time, and it was difficult to conduct the investigation. She returned to office on 01 March 2024. She was uncooperative, and was again booked off sick intermittently until August 2024. As she was previously also a victim of assault, they had to protect her in her traumatized state. It was complex complaint, and it was not easy to conduct the investigation. Ms. Lupondwana explained that she was short-staffed, and could not prioritise the investigation due to a backlog with other grievances. She also expected that the criminal investigation of the incident was going to guide the respondent on how to approach the complaint against the applicant. His suspension was uplifted on 11 April 2024, and was replaced with a precautionary transfer pending the finalization of the investigation. She conceded that by that time the suspension was already in effect for 4 months. She also conceded that the precautionary transfer prohibited the application from entering the premises of his erstwhile workplace, and not to interfere with any potential witnesses or anyone else in relation to the complaint. She conceded that the respondent did not conclude the investigation as yet, but argued that the complexity of the matter must be considered. As the applicant is a labour relations officer, there is no other place where he can be accommodated in the district. She conceded that the suspension was replaced with precautionary transfer only after the dispute was referred to the PHSDSBC.

ANALYSIS

13. Herewith brief reasons for my findings. As stated, the applicant was placed on precautionary suspension on 04 December 2023. The precautionary suspension was then replaced with a precautionary transfer/placement on 11 April 2024. The precautionary transfer/placement is still in effect. The applicant contends that the prolonged precautionary transfer constitutes an unfair labour practice, especially in view thereof that the investigation has still not bene concluded.

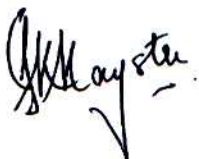
14. The applicant referred to the disciplinary code (PSCBC Resolution 1/2003) and several policies that are applicable to the issue. Clause 2.2 of Resolution 1/2003 provides that discipline must be applied in a prompt, fair, consistent and progressive manner. Clause 7.2(a)(ii) provides that the employer may suspend an employee on full pay if the employer believes that the employee's presence at the workplace may jeopardize any investigation into the alleged misconduct, or endanger the well-being of any person or property. Clause 7.2(c) provides that if an employee is suspended or transferred as a precautionary measure, the employer must hold a disciplinary hearing within a month or 60 days, depending on the complexity of matter and the length of the investigation. The chairperson of the hearing must then decide on any further postponements. Paragraph 8.10 of the DPSA Directive on Discipline Management in the Public Service provides that "the disciplinary inquiry must commence strictly within a month or 60 days of the suspension, which days are counted from the date after the employee received the suspension letter." Paragraph 3, bullet 7 of the same policy directs that the employee must return to work should the hearing not be concluded within 60 calendar days. Paragraph 16.5(c) of the Eastern Cape Department of health Policy on sexual harassment provides that the HOD shall ensure that a reported sexual harassment complaint is investigated and resolved within 30 working days. The period can be extended with a maximum of 14 days if the investigation is not concluded within the 30 working days. The Public Service precautionary suspensions guide reiterates these principles, and directs that a suspended employee must return to work should the hearing not be concluded within 60 calendar days.
15. These directives and collective agreement clearly place strict timelines on the duration of precautionary suspensions and transfers. It is common cause that the applicant is still on precautionary transfer. Ms. Lupondwana also conceded that the investigation has not been concluded.
16. As stated, Clause 7.2(c) of Resolution 1/2003 provides that if an employee is suspended or transferred as a precautionary measure, the employer must hold a disciplinary hearing within a month or 60 days, depending on the complexity of matter and the length of the investigation. The applicant's initial suspension was from 04 December 2023 until 11 April 2024. Ms. Lupondwana argued that the prolonged precautionary measures were caused by the complexity of the investigation and the complainant's frequent unavailability. She however conceded that the initial suspension was replaced with a precautionary transfer only after the applicant referred the dispute to the PHSDSBC. The applicant accordingly argued that the upliftment was in reaction to the dispute referral.
17. I accept that the complainant was on sick leave intermittently from the date of the alleged incident until August 2024. The applicant has however testified undisputedly that up to now, he was not served with a charge sheet, and no investigator contacted him for a consultation in respect of the investigation. It creates the impression that the investigation is not progressing. Also, the respondent explained that they were

hoping that the criminal investigation would provide guidance on how to approach the disciplinary process. However, clause 2.6 of Resolution 1/2003 provides that if an employee commits misconduct that is also a criminal offence, the criminal procedure and the disciplinary procedure will continue as separate and different proceedings. The respondent cannot therefore rely on this aspect as justification for the delay.

18. In *Lekabe v Minister: Department of Justice & Constitutional Development* (2009) 30 ILJ 2444 (LC) the Court confirmed that a suspension would fall away after the 60 days unless the chairperson of the disciplinary hearing extends that period. In this instance the disciplinary hearing has not even been constituted after 11 months.
19. I can accordingly find no justification for the prolonged precautionary processes. I find that the precautionary suspension and transfer constitutes an unfair labour practice. The applicant argued that he was prejudiced by the lengthy suspension. He suffered mental and physical illness and reputational damage. He accordingly argued that he is entitled to compensation in addition to having the precautionary processes set aside. I have considered the applicant's argument, but in view thereof that he is stationed at a workplace, and has not suffered any loss of remuneration, I consider it reasonable not to award any additional compensation.

AWARD

20. In the premise I find that the applicant's precautionary suspension and transfer is unfair, and constitutes an unfair labour practice.
21. The respondent is directed to reinstate the applicant with effect from 18 November 2024 to his position as labour relations officer at the Nelson Mandela Bay District Office.



Kelvin Kayster