



ARBITRATION AWARD

Case Number: GAJB1678-21
Commissioner: PAUL PHUNDU
Date of Award: 7 March 2022

Morgan Lesese

In the ARBITRATION between

(Union/Applicant)

And

Eskom Holdings SOC Limited

(Respondent)

APPROVED

Union/Applicant's representative: Mr Ducky Mchizama

Respondent's representative: Mr Moses Mamphondo

Details of hearing and representation

- [1] This is the award in the arbitration between Mr Morgan Lesese, (hereinafter referred to as the Applicant) and Eskom Holdings SOC Limited, (hereinafter referred to as the Respondent). The matter was set down for arbitration on 24 June, 10 August, 6 October, 18 November 2021 and 23 February 2022 at CCMA Offices, 127 Fox Street, Johannesburg.
- [2] The applicant was present at the arbitration hearing and he was represented by, Mr Ducky Mchizama, Co-employee. The respondent was represented by, Mr Moses Mamphondo, the Senior Advisor- Industrial Relations.
- [3] The arbitration hearing was held under the auspices of the CCMA in terms of section 191(5) (a) of the Labour Relations Act 66 of 1995, as amended (the Act). The award is issued in terms of section 138 (7) of the Act.
- [4] Bundle of documents marked annexure "A" and "B" were admitted into evidence and the content was not disputed.
- [5] The proceedings were digitally recorded. I have also kept handwritten notes.
- [6] Both parties submitted written closing arguments.

Issue to be decided

- [7] I am required to establish whether the respondent committed an unfair labour practice in relation to suspension or not, if so, I must determine the appropriate remedy.

Background to the issue

- [8] It is common cause that the applicant was in the employ of Eskom Holdings SOC Limited as an Insurance Advisor until his suspension on 31 December 2020. His salary at the time of the alleged unfair suspension was R43,000.00 per month.
- [9] The applicant alleged that his suspension was unlawful and unfair.

[10] The applicant declared a dispute. Conciliation failed and the certificate of non-resolution of the dispute was issued. The matter proceeded to arbitration. In terms of relief, the applicant prayed for upliftment of suspension and compensation.

Survey of arguments and evidence

The applicant's case

[11] **Mr Morgan Lesese** testified, under oath, that he is employed by the respondent as an Insurance Advisor. 24 December 2020, he received an intention to suspend letter from the respondent. The basis of the letter was that the respondent had received information that he might have committed a serious act of misconduct. This letter instructed the applicant to submit written representations on why the temporary suspension should not be made final, pending finalisation of the investigation and/or disciplinary action. On 29 December 2020, he submitted his written representation to the respondent as to why he should not be suspended. On 31 December 2020, the respondent took a decision to suspend him pending the finalisation of the investigation. His suspension was with full pay.

[12] The respondent's disciplinary code and procedure stipulates that "Eskom will endeavour to take disciplinary action within three months from the date that it becomes aware of any misconduct". It is the applicant's belief that his suspension was unlawful and unfair because the respondent charged him with misconduct sixteen days outside the time frames as prescribed by the disciplinary code and procedure.

[13] Moreover, the respondent did not comply with clause 3.2.4 (a) (c) of its disciplinary code and procedure which stipulates that "When it is suspected that an employee may have committed misconduct and that his/her continued presence in the premises of the company might interfere with the disciplinary investigations, the manager may decide to suspend with pay, the employee, pending the outcome of the investigation. The decision to suspend the employee must be considered if and when one or more of the following factors are involved: element of dishonesty in the alleged misconduct; possibility of tampering with evidence; possibility of interfering with the investigation process and possibility of intimidating witnesses". It is therefore, the applicant's belief that none of the above was contravened by him.

[14] Furthermore, the Chief Executive Officer of the respondent and his Chief Operating Officer were both involved in corruption. However, the respondent acted inconsistently by failing to suspend the two officials.

[15] Under cross examination the applicant confirmed that the reason for his suspension was because it was alleged that on 19 December 2020, he sent an email concerning Eskom's pensioner's details to third parties. The applicant conceded that reasons for the delay in charging him was further caused by an ongoing investigation. According to him, the delay was too long. The applicant stated that he was prejudiced by the delay and he suffered occupational distress. He said he was never interviewed during the investigations.

The respondent's case

[16] **Mr Moses Mampondo** testified, under oath, that he is employed by the respondent as a Senior Advisor-Industrial Relations. He said the applicant was suspended with full pay pending the finalisation of an investigation. The applicant was asked to submit written representation as to why he should not be suspended. He responded and the respondent took a decision to suspend him. The applicant's suspension was in terms of the respondent's policy and procedure concerning suspension. The applicant's suspension was fair because the respondent had a reasonable apprehension and a possibility that the applicant might interfere with the respondent's witnesses and a possibility of interfering with the investigation process if he was allowed to be present in the workplace hence a decision to suspend.

[17] Under cross examination the respondent confirmed that the applicant was subsequently charged by the respondent. The applicant's suspension was fair and it was in terms of the disciplinary code and procedure. The applicant's suspension was not long and the delay was caused by an ongoing investigation and the availability of the chairperson.

Analysis of evidence and arguments

[18] Although I have considered all the evidence I will only refer in this award to those aspects relevant to determine the dispute, as I am required in terms of s 138(7) of the LRA to provide an award with brief reasons.

[19] *In terms of Section 186(2) (b) of the LRA, suspension of an employee falls within the meaning of an "unfair labour practise". section 186(2) provides that; (i) "unfair labour practice" means an unfair act or omission that arises between an employer and employee involving – (ii) unfair conduct by the employer relating to the promotion, demotion, probation (excluding disputes about dismissals for a*

reason relating to probation) or training of an employee or relating to the provision of benefits to an employee". The unfair suspension of an employee or any other unfair disciplinary action short of dismissal in respect of an employee.

- [20] The onus is on the applicant to prove, on a balance of probabilities, an unfair act or omission on the part of the respondent that gives rise to an unfair labour practice.
- [21] The dispute was referred as an allegation of an unfair labour practice concerning suspension. I am therefore required to determine whether the respondent's conduct was unfair in suspending the applicant, to succeed in such a claim, the applicant must show that the respondent's conduct was arbitrary, capricious and therefore unfair.
- [22] I agree with the applicant that he was charged sixteen days outside the stipulated time frames in terms of the disciplinary code and procedure. However, I believe that the respondent did not act unfairly because there were valid and justifiable reasons advanced by the respondent. The reason was that the initial chairperson of an internal disciplinary enquiry appointed to preside over the matter was suddenly unavailable and recused himself from the matter. And this chairperson was appointed within three months after the respondent became aware of the allegation of misconduct. Secondly, what caused the delay was an ongoing investigation. It is my finding that the applicant did not suffer any prejudice and the reasons given for the delay were justifiably reasonable and fair.
- [23] It is further my finding that clause 3.2.4 (b) of the respondent's disciplinary code and procedure does allow the respondent to extend the suspension pending finalisation of the investigations. In this case, the applicant was given the reasons for the delay.
- [24] It might be the applicant's view that clause 3.2.4 (a) to (c) was not contravened by him. However, in my considered view, as long as there exists a possibility or a reasonable apprehension that these factors might be contravened by the applicant, the respondent had every right to exercise its discretion and prerogative to suspend the applicant as long as the suspension was effected in a fair manner which is the case in this matter.
- [25] It is my finding that the respondent did not contravene clause 3.2.4 (a) and (c) of its disciplinary procedure and code. I disagree with the applicant that the delay was too long. In my view, a delay of sixteen days was not too long considering the reasons given for delay.
- [26] It is further my finding that the allegation of inconsistent application of the respondent's disciplinary code and procedure has no ground because the case of the applicant is not similar to that of the Chief Executive Officer as well as that of the Chief Operating Officer.

[27] I am convinced by the respondent's argument that Mr Dheshan Naran was asked to preside over the applicant's disciplinary enquiry. However, he was not ready to proceed and gave reasons for the delay, same reasons were directly linked to the applicant's suspension and investigation.

[28] I accept the respondent's argument that its decision to suspend was in accordance with clause 3.2.4 (a) to (c) of its disciplinary code and procedure which stipulates that the respondent can suspend if the following factors are involved: "element of dishonesty in the alleged misconduct; possibility of tampering with evidence; possibility of interfering with the investigation process and possibility of intimidating witnesses". As a result, I am inclined not to interfere with the respondent's decision to suspend if indeed it found that there was a possibility of interference, intimidation and tampering if the applicant was allowed to be present in the work-place.

[29] It is my finding that the applicant has failed to show that the respondent's conduct was arbitrary, capricious and therefore unfair.

[30] In **Aries v CCMA & others (2006) 27 ILJ 2324 (LC)** the Court held that *"there are limited grounds on which an arbitrator, or a court, may interfere with a discretion which had been exercised by a party competent to exercise that discretion. The reason for this is clearly that the ambit of the decision-making powers inherent in the exercising of a discretion by a party, including the exercise of the discretion, or managerial prerogative, of an employer, ought not to be curtailed. It ought to be interfered with only to the extent that it can be demonstrated that the discretion was not properly exercised. The court held further that an employee can only succeed in having the exercise of a discretion of an employer interfered with if it is demonstrated that the discretion was exercised capriciously, or for insubstantial reasons, or based upon any wrong principle or in a biased manner"*.

[31] It is my finding that the respondent did not commit any unfair labour practice in relation to suspension.

[32] I therefore make the following award:

Award

[33] The applicant has not discharged the onus to show that the respondent has committed an unfair labour practice in relation to suspension on a balance of probabilities.

[34] The applicant is not entitled to any relief.

[35] The applicant's referral of a dispute is dismissed.



Paul Phundu

CCMA Part-time Commissioner

APPROVED