



OMBUDSMAN

SINT MAARTEN

FINAL REPORT

(Article 21 sub 1 National Ordinance Ombudsman)

Complainant: Complainant
Date complaint filed: 24 November 2014
Complaint no.: 2014/00192

**Ministry of Public Health, Social Development and Labor,
Secretary General Ms. Joy Arnell**

Summary of Complaint:

Complainant claims that a flagrant violation of her rights occurred, when she was denied the right to fair handling of her case regarding a dismissal permit, dated 15 September 2014, that was issued to her employer. Complainant claims that she was not given access to information/documents by the Labor Department lawfully due to her, while she opposed the dismissal permit. This according to her jeopardized her chances to have a fair trial at the Dismissal Committee and on the final decision by the Secretary General of the Ministry of Public Health, Social Development and Labor (VSA). Subsequently, she was dismissed by letter from her employer dated 6 October 2014.

Findings:

By decree dated 15 September 2014 the Acting Secretary General of VSA, Ms. Joy Arnell, granted permission to Complainant's employer to terminate their labor agreement.

By letter dated 6 October 2014 Complainant was informed by her employer that the Labor Department had granted the employer's request to terminate her services. According to the letter, Complainant's services were terminated with immediate effect.

By letter dated 18 November 2014 Complainant's legal advisor, requested that the acting Secretary General of VSA reconsider her decision to grant permission to Complainant's employer to terminate the labor agreement with the Complainant.

In the letter it was stated that Complainant's right to access all information pertaining to her case was not adhered to, which he claims "*jeopardized her chances to sufficiently understand the debt of the case against her, and to prepare her case and or seek legal advice during the case and before the hearing at the Dismissal Advisory Committee.*"



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The Secretary General was also informed that “*due to the flagrant violations of the procedures and consequentially the social and economic rights of the worker*” a complaint would be filed with the Ombudsman.

By letter dated 3 December 2014 the acting Secretary General of VSA provided Complainant’s legal advisor with an overview of the facts of the case regarding Complainant’s dismissal.

In a document dated 12 December 2014 addressed to the Ombudsman, Complainant’s legal advisor requested that the situation regarding Complainant’s dismissal be investigated. The legal advisor presented a number of arguments in the document to support his claims that Complainant’s rights were violated.

On 19 March 2015 a Notification of Complainant (NOC) was sent to the Secretary General of VSA. The Secretary General was requested to respond to the NOC within 4 weeks from the date of the letter, however no later than 17 April 2015.

The following questions were included in the NOC:

- Explain why Complainant as stated in the letter dated December 3, 2014 from the SG was only verbally informed about the content of the claims made by her employer. Though, the ‘*Richtlijnen voor Toepassing van de Landsverordening Beeindiging Arbeidsovereenkomsten*’ in par. 2.1 provides that the procedure will be as much as possible in writing.
- Which are the documents regarding the dismissal request that were verbally explained to Complainant?
- Did Complainant receive a copy of the dismissal request from the SG as provided by the ‘*Richtlijnen voor Toepassing van de Landsverordening Beeindiging Arbeidsovereenkomsten*’ par. 2.4?

On 22 April 2015 the Secretary General of the Ombudsman informed the acting Secretary General of VSA that the deadline to respond to the NOC had passed. The Secretary General was granted an additional week, until 29 April 2015, to respond.

On 22 June 2015 the Preliminary Findings Report (PFR) was sent to the Secretary General of VSA. To date of the PFR, no response was received to the NOC dated 19 March 2015.



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In the PFR the Secretary General of VSA was informed that as no response was received to the NOC, the Ombudsman would convene a Hearing to be informed about the general procedures at VSA and the procedures followed in the case.

On 14 July 2015 a Hearing was convened to discuss the case. Present at the Hearing were the Ombudsman, the Legal Advisor at the Ombudsman, the Complaint Officer handling the case at the Ombudsman, Complainant, Complainant's legal advisor, the Head of Labor Affairs also functioning as Acting Head Social Services who represented the Secretary General of The Ministry of VSA. (The synopsis of Minutes of the Hearing forms an integral part of this Revised Preliminary Findings Report.)

At the opening of the Hearing the Ombudsman elucidated the authority of the Ombudsman to investigate the case.

The Ombudsman stated that based on article 17 of the National Ordinance Ombudsman which states that the Ombudsman is not authorized to investigate an administrative decision, or an ongoing procedure. As such the Ombudsman was not authorized to investigate the decision in the dismissal case.

However the procedure followed by the Labor Department regarding the request to dismiss an employee is a matter that can be investigated by the Ombudsman. This is not only based on the National Ordinance Ombudsman, but also on article 7A of the National Ordinance Termination of Labor Agreements, which states that the supervision of the implementation and execution of the procedures for dismissal can be assigned to third-persons.

The Ombudsman stated that she found it unfortunate that a Hearing was needed as cooperation with the Labor Department has been generally good, but pointed out that the complaint required answers from the SG of VSA, charged by law to provide permission for dismissal.

During the Hearing the Ombudsman established that Complainant did not receive all the information (in writing) as stipulated in the Guidelines for the implementation of the National Ordinance Termination of Labor Agreements. Complainant did not receive a copy of the dismissal request, neither did she receive a copy of the underlying documents supporting said request. Complainant had not received any documentation from the Labor Department to respond, and was expected to make her response based on the verbal information she received.



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Mrs. Dros-Richardson stated that although Complainant had not received any documentation from the Labor Department with regard to the dismissal request; the Complainant had previously received a copy of the letters from the employer.

Mrs. Dros-Richardson also mentioned that with regard to the dismissal procedure, there is a discussion about sharing the dismissal request file with the employee in question, considering the confidentiality of sensitive information such as an audited report which may be attached to said request.

The Ombudsman stated that the first principal of fair procedures is the right to know exactly what a person is responding to, or is being accused of. Not giving the employee the request is unfair, because the issue cannot be comprehensively addressed based on just verbal third party information.

The Ombudsman indicated that the choice not to hand over the dismissal request is an internal procedure, and there is no law or formal guideline to forbid such. The dismissal request provides the employee the information necessary to draft a proper response.

Moreover, the law provides that the employee should have the opportunity to review and respond to the request.

The Ombudsman however offered the suggestion that the SG could be given the authority to withhold sensitive information to protect the rights of the employer.

A reaction to the Synopsis of the Hearing was received offering some additional points on behalf of the Complainant. These were disregarded as they were irrelevant for the conclusion regarding this complaint.

Legal Basis:

Pursuant to article 19 section 1 of the *National Ordinance Ombudsman (AB 2010, GT no. 20)*, the Ombudsman is authorized to request from government bodies, civil servants, the complainant, civil servants as experts or witnesses, all information and or documents pertaining to the investigation.

The persons mentioned in the aforementioned article are obliged to respond to the request within the time indicated by the Ombudsman, except in cases where the persons can appeal to legal grounds (“*verschoningsrecht*” - see article 19 section 4).

National Ordinance Regarding Dismissal (“Landsverordening Beëindiging Arbeidsovereenkomsten”):



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Article 7A section 1 provides that the supervision of the implementation and execution of the procedures for dismissal can be assigned to third-persons.

National Decree containing general measures for the Implementation of Article 6 of the ordinance terminating employment (“*Landsbesluit, houdende algemene maatregelen, ter uitvoering van artikel 6 van de landsverordening beëindiging arbeidsovereenkomsten*” AB 2013, GT no. 209):

Article 2 section 1 provides that if the Secretary General receives a request to terminate an employment contract, he shall afford the employee in question the opportunity to give his opinion on the reasons given by the employer to terminate the employment contract, within a period of time determined by the Secretary General.

Guidelines for the application of the Ordinance Termination of Employment P.B. 1972, no. 111)

Chapter 2 Processual Provisions

2.1 Introduction

The procedure should be carried out in writing, as much as possible. It should always be determined first whether the request for termination has been adequately substantiated. A request is fully substantiated if the data submitted can be examined to factually justify the reason for termination. An insufficiently motivated request is returned to the employer, who is given the opportunity to sufficiently substantiate said request. The procedure begins only after receipt of an adequately substantiated request pursuant Article 4 section 4 of the Ordinance Termination of Employment.

2.4 The Validity Period of the Decision

The date of the decision of the Director should also be the date of dispatch of the notification of the decision. A photocopy of the decision is sent to the employee. In principle, the validity period of the decision is three months. In exceptional cases a shorter or longer period of validity can be set. A copy of the decision is sent to the employee. The Director may not give any retroactive effect to his decision.

Standard(s) of Proper Conduct:

The Ombudsman investigates whether the behavior of public bodies towards citizens is correct. The applicable standard of proper conduct in this case is *Fair Play*.



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Fair play

Fair play requires that administrative bodies and civil servants provide the citizen the opportunity to properly utilize procedural opportunities provided for by law and otherwise.

The principle of *Fair play* entails that a public body is expected to allow the citizen the opportunity to express and defend their views and opinions, while also being able to object the position and or point of view of a public body. Thus the behavior of the public body has to attest to openness, honesty and loyalty. A public body should be transparent and cannot prepare covert actions against a citizen. On the contrary, a public body is required to actively assist the citizen in utilizing its procedural options. There are various ways to provide the citizen the opportunity to utilize the different procedural options.

Conclusion:

Complainant claims that a flagrant violation of her rights occurred, when she was denied the right to fair handling of her case regarding a dismissal permit as she was not given access to information/documents by the Labor Department lawfully due to her, while she opposed the dismissal permit.

By letter dated 6 October 2014 Complainant was informed by her employer that the Labor Department had granted the employer's request to terminate her services. According to the letter, Complainant's services were terminated with immediate effect.

By letter dated 18 November 2014 Complainant's legal advisor, requested that the acting Secretary General of VSA reconsider her decision to grant permission to Complainant's employer to terminate the labor agreement with the Complainant. In the letter it was stated that Complainant's right to access all information pertaining to her case was not adhered to.

The standard of *Fair play* requires that administrative bodies provide the citizen the opportunity to properly utilize procedural opportunities provided for by law and otherwise. During the Hearing Mrs. Dros-Richardson, the Head of Labor Affairs, representing the Secretary General of VSA, indicated that Complainant had received documentation from her employer regarding the dismissal request and that information regarding said request had been relayed to Complainant during a meeting with the Dismissal Officer. Although Complainant had received verbal information about the dismissal request, the decision of the Labor Affairs Department not to provide Complainant with a copy of the formal dismissal



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request and the supporting documents, deprived Complainant of the opportunity to review and respond to said request comprehensively.

Judgment:

- The complaint filed is founded. The Ministry of VSA acted improperly with regard to the complaint.
- The standard of *Fair play* has been violated.

Recommendation(s):

Considering the above stated findings, the Ombudsman recommends as follows:

- Review the policy/procedures with regard to the handling of requests for dismissal of employees, to ensure that employees are provided the opportunity to review and comprehensively respond to a request for their dismissal.
- o I agree with the recommendation(s)
 - o I do not agree with the recommendations (please explain by submitting a written reaction **no later than 27 November 2015**).

The Ombudsman requests a status report on the recommendation(s) within three (3) months from the date of this letter.

Philipsburg, 13 November 2015

Dr. R. (Nilda) J.A. Arduin
Ombudsman