

# **ARBITRATION AWARD**

Panellist/s: THOMAS MAHASHA  
Case No.: GPBC130/2019  
Date of Award: 27 MAY 2019

In the ARBITRATION between:

**POPCRU OBO G TSHABANGU**

**APPLICANT**

**AND**

**DEPARTMENT OF JUSTICE AND CONSTITUTIONAL DEVELOPMENT**

**RESPONDENT**

**Union/Applicant's representative: ASNATH SEDIBANE OF PSA.**  
Applicant's address:  
Telephone:  
Telefax:

**Respondent's representative: SANKIE MKHONTO.**

Respondent's  
address:

Telephone:  
Telefax:

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## **ARBITRATION AWARD**

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### **DETAILS OF HEARING AND REPRESENTATION:**

1. The employee, Godfrey Tshabangu, attended the hearing and was represented by Asnath Sedibane of PSA.
2. The employer was also in attendance and represented by Sankie Mkhonto, a Deputy Director, Employment Relations and employed as such by the Respondent.
3. After having satisfied myself that the employer was properly served with a notice of set down, I proceeded with the arbitration, in the absence of the employer.
4. The hearing was digitally recorded.
5. The Applicant, Godfrey Tshabangu, attended the hearing and was represented by Asnath Sedibane of PSA
6. The respondent also attended the hearing and was represented by its employee, Sanki Mkhonto.
7. The hearing was digitally recorded.

### **ISSUE TO BE DECIDED:**

8. Whether or not the employer committed an unfair labour practice by not awarding the employee a performance bonus, and if so, the appropriate relief.

### **BACKGROUND TO THE MATTER.**

1. The employee referred an unfair Labour Practice, relating to benefits dispute with the GPSSBC in terms of section 186(2) (a) of the Labour Relations Act 66 of 1995 ("the LRA") as amended.
2. The matter was not resolved at the conciliation stage, and was therefore referred for arbitration.
3. The matter was set down as an arbitration process on 27 May 2019 at the Department of Justice and Constitutional Development, in Nelspruit.
4. Parties agreed to submit written arguments, which they did.

### **SURVEY OF EVIDENCE AND ARGUMENT:**

## **SUBMISSIONS BY THE APPLICANT.**

5. The final score as agreed between the supervisor and the applicant was 120%. The score was reduced by the Moderating Committee to 100%. The Moderation Committee returned the appraisal to the supervisor, who maintained the score of 120% and submitted that there was no further motivation to be submitted.
6. The Moderation Committee is required to have oral interactions with the supervisor regarding his scoring of the supervisee and to clarify the questions arising from the scoring. In this case, the Committee only communicated with the supervisor in writing and seek any clarity regarding the ratings. The committee did not comply with clause 2.4.3 of the PMDS Policy.
7. The Moderation Committee reduced the score without engaging the supervisor, and disregarding the explanation from the supervisor.
8. Despite the Moderation Committee having been provided with explanation of the reasons for the scoring by the supervisor and without first referring the dispute regarding the scoring to the Appeal Committee, the Moderation Committee reduced the employee's performance score.
9. Despite having been provided with reasons for the scoring of 120%, the Moderation Committee still reduced the score and failed to make such recommendations to the Appeals Committee.
10. The employer, had through its Central Appeal Committee, failed to address the procedural flaws of the Moderation Committee that exceeded its powers by reducing the applicant's score.
11. The relief sought by the employee is that the council should order the employer to reverse the decisions of the Moderating Committee and the Central Appeal Committee to reduce the score

## **RESPONDENT'S SUBMISSIONS.**

**The written submissions were as follows:-**

14. The employee is appointed by the employer as a principal interpreter at Evander Magistrate Office.
  15. The applicant was assessed by his supervisor, Mr K Masha, and was awarded the score of 120% during the 2016/2017 performance cycle. The Moderation Committee reduced the agreed score of 120% to 100%. The reviews were moderated on 20 July 2017.
  16. Following the moderation process, the employee was requested to submit additional motivation, which he did not do.
  16. The employee appealed against the recommendation of the Moderation Committee.
  17. The duty of the Moderating Committee is to monitor the performance management process by obtaining an overall sense of whether norms and standards are being applied consistently and realistically to all employees.
- The score of 120%, on its own does not qualify the employee to be awarded a performance bonus.
18. The Roles and Responsibilities of the Moderation Committee are as follows:-

- (a) To ensure that the annual performance is done in a realistic, consistent and fair manner.
- (b) To monitor is to monitor the performance management process by obtaining an overall sense of whether norms and standards are being applied consistently and

- realistically to all employees on the same level and across the department as a whole.
- (c) To provide an oversight role on the application of the PMDS Policies, ensuring that the performance management process including the setting of performance standard is valid, fair and objective.
  - (d) To set up a moderation or standards for the moderation process.
  - (e) Return the performance assessment with reasons back to the supervisor in case where they found the appraisal to be unacceptable and request for the review with additional information.
- 19) A performance bonus or merit is discretionary. An employee cannot claim performance bonus as it does not constitute a benefit to which an employee is entitled to ex contractu.
- 20) The employer also submitted documents, i.e E1( Route form for documentation), E2 (Minutes of the Central Assessment Committee), E5 ( a submission for approval of the Central Assessment Appeal Committee's recommendation), and F ( Roles and Responsibilities of a Departmental Moderation Committee).
- 21) The employer prays for the dismissal of the employee's dispute.

## **ARGUMENTS**

Parties did not submit closing arguments.

## **ANALYSIS OF EVIDENCE.**

22. Section 186(2) (a) of the LRA defines unfair labour practice, as *"any unfair act or omission that arises between the employer and an employee involving unfair conduct by the employer relating to ....of provision of benefits to an employee"*.
23. The applicant's case is based on the premise that the Moderating Committee had no authority to reduce the agreed score of 120%, that the employer's should have rewarded him with a performance bonus and that the employer's failure to do so amounts to unfair Labour Practice relating to benefits.
24. In the converse, the employer's case is that the Moderating Committee had authority in terms of the PMDS policy, to reduce the applicant's score, that the employee did not submit the requested additional motivation, and that there was no automatic entitlement to a performance bonus because there was no contractual obligation.
25. It is in dispute that payment of a performance bonus falls within the category of what is defined as benefits in terms of section 186(2) (a) of the LRA. The employer submitted that in terms of the Labour Court decision in *IMATU obo Verster v Umhlanthuse Municipality & Other* (2011) 9 BLLR 882, the court held that *"where performance bonus or merit award is a discretionary bonus which an employee cannot claim as a right as it does not constitute a benefit to which an employee is entitled to ex contractu"*. The employer's submission seek to suggest that the employee's dispute is that of mutual interest, and therefore not arbitrable. I disagree with the respondent in this regard. The issue that the court was faced with was whether or not the arbitrator was correct in setting aside a dispute of Unfair Labour Practice relating to benefits, on the basis of lack of

jurisdiction. The court had in fact, stated that it is wrong to think that rights can only accrue to employees *ex contractu* or *ex lege*.

26. It is not in dispute that the Applicant was allocated a score of 120% by his supervisor. It is however in dispute that the score of 120% would automatically entitle the employee to a performance bonus. The employer submitted that it did not. The employee submitted that it did. Both parties did not submit reasons or supporting evidence for their assertions. In an unfair labour practice dispute, the employee carries the burden of proving existence of unfair labour practice. The employee failed to provide evidence to support his argument. It is therefore, not clear whether or not the score of 120% would have entitled the employee to a performance bonus had the score of 120% been maintained by the Moderating Committee and the Central Appeals Committee. I therefore find that the score of 120% would not automatically qualify the employee to an entitlement of a performance bonus.
27. The next issue to be determined is whether or not the Moderating Committee had powers to reduce the score. The employee submitted that the Moderating had no such authority, the employer submitted that it did. In terms of the available evidence, it is common cause that the moderating committee returned the performance assessment with reasons back to the supervisor, and that the supervisor confirmed the score of 120% without submitting additional motivation. It is clear from the employee's submissions that he reason for not submitting additional motivation is that there was no other available information to submit. Submission of additional motivation is aimed at justifying the score allocated. In terms of the PMDS Policy, it is the role of the Moderating Committee to provide an oversight role on the application of the PMDS Policies, ensuring that the performance management process including the setting of performance standards is valid, fair and objective and to set up a moderation criteria or standards for the moderation process. What is clear from the policy is that the Moderation Committee can only make a recommendations after having developed a criteria. What is in dispute is the procedural aspects to be followed when making such recommendations.
28. The employee submitted that the Moderating Committee should have sought oral submissions from the supervisor justifying the score of 120% and that failure to do so amounted to a procedural flaw. I do not agree with the employee because there was no evidence submitted to support that statement. Even if such an assertion could be accepted, one wonders if that could have had any effect to the score.
29. The employer's submissions is that there was no justification to award the score of 120%. All the supervisor was required to do, was to provide additional information to justify the score. The employee had no such information. One wonders if such information would only be available for purposes of oral submissions. The employee's assertion that the supervisor should have been allowed to make oral submissions, is tantamount to refusal to give written submissions. The Policy requires of the Moderating Committee to return the performance assessment with reasons back to the supervisor in the case where they have found the appraisal rating to be unacceptable and request for review with additional information. It is not clear from the submissions by both parties, that the supervisor did the review with additional information. The available or absence of such additional information can make or break the employee's case. What is clear is that there was no additional information available. Clause 7.7. (viii) empowers the Moderating Committee *"to review the submitted additional motivation and if results remain*

*unacceptable, the supervisor and employee shall refer the matter to the Appeal Committee through HR*". Bullet number five, of document marked A2 of the employee's bundle states " *Should you wish to appeal, it must reach the PMDS Unit.... Within five (5) working days of receiving this letter*". It is therefore, my finding that the responsibility to appeal the decision of the Moderating Committee lies with the employee and the supervisor.

30. I do not agree with the applicant's submission that the Moderating Committee reduced the score. What is evident is that the Moderating Committee made a recommendation to have the scores reduced as provided for by clause (ix) of paragraph 7.7 of the PMDS Policy. If the Moderating Committee had taken a final decision to reduce the score, the applicant would not have had an opportunity in terms of the PMDS Policy to appeal the decision. In terms of clause 8.1 of the PMDS Policy, the powers of the Central Appeal Committee involve amongst others, reviewing the outcome of the Moderation Committee. If the Moderating Committee had no powers to recommend the scores, there would be no need to have clause 8.1 inserted in the policy. Once more, if the Moderation Committee had nothing to do with the scores agreed to between employees and their supervisors, clause 7.7 (iii) of the policy will be without force and effect. This clause empowers the Moderating Committee to set up a moderating criteria for the moderation process. It would be unreasonable to expect the criteria not to affect the scores, either negatively or positively. I doubt if the applicant would still raise the same concern if his scores were instead added.
31. Section 186 (2) of the LRA requires of employers to act fairly when they decide on awarding benefits to employees. Unfair conduct or omission relating to benefits is Unfair Labour Practice. The question is whether or not a decision to reduce the score and not to award performance bonus, to the employee was fair. In *Apollo Tyres South Africa (Pty) Ltd v CCMA* the Labour Appeal Court held "*It has been said that unfairness implies a failure to meet an objective standard and may be taken to include arbitrary, capricious or inconsistent conduct, whether negligent or intended*" I find the Respondent's decision to reduce the score, to be fair.
32. There is no evidence before me that the respondent's moderating criteria had failed to meet the objective standard, or that it was arbitrary, capricious or inconstant.
33. On the basis of the reasons provided above, I do not find any rationality to interfere with the Respondent's decision not to pay the Applicant a performance bonus.
34. I therefore find that the applicant had failed to prove on a balance of probabilities, that the respondent had committed an unfair labour practice relating to benefits.
35. The employee is seeking as a relief, to order the employer to reverse its decision to reduce the score from 120% to 100%. It has to be emphasised that section 193 of the LRA empowers the Commissioner to award reinstatement, re-appointment or order compensation. It is my finding that the relief sought by

the employee is an incompetent one, and that awarding such a relief will be ultra vires.

**AWARD.**

**36.** The applicant's dispute is dismissed.

A handwritten signature in black ink, consisting of a series of loops and a long horizontal stroke at the bottom.

.....  
**MAHASHA TM**  
**GPSSBC PANELIST.**