



GENERAL PUBLIC SERVICE
SECTOR BARGAINING COUNCIL

Arbitration Award

Case Number: GPBC882/2021

Commissioner: Nowethu Sangqu Ndiki

Date of Award: 26 October 2021

In the **ARBITRATION** between

PSA obo TF Mgogoshe

(Union/Applicant)

And

GPAA

(Respondent)

Union/Employee's representative: Mr Samkelo Mzuku

Employer's representative: Mr Linda Msikinya

DETAILS OF HEARING AND REPRESENTATION

1. This arbitration process was scheduled and heard virtually on 26 August, 08 September as well as 12 and 13 October 2021. It was heard under the auspices of the GPSSBC as a dispute in terms of section 186(2)(a) of the Labour Relations Act No. 66 of 1995, as amended (the LRA).
2. The Applicant, Mr Thembela Mgogoshe, appeared represented by Samkelo Mzuku, a union official of a registered trade union PSA. The respondent was represented by Linda Msikinya of Msikinya Attorneys
3. The proceedings were electronically recorded and conducted in English.

ISSUE TO BE DECIDED

4. I am required to determine whether or not the Respondent's actions of not paying the Applicant performance bonus for 2019/2020 financial year, amounts to an unfair labour practice, and if so, determine the appropriate remedy.

BACKGROUND TO THE DISPUTE

5. The Applicant was appointed by the Respondent on 01 November 2010 as CSA(Customer Service Agent) in Mthatha office. The applicant was employed on salary level 6. In 2020 the respond excluded him from the benefit afforded to other employees even though he qualified for the bonus in terms of his performance scores. He was entitled to the performance bonus which was withheld by the Respondent unfairly. He believed that this action amounted to Unfair Labour Practice. He is praying that I find that he was entitled to this bonus and order the respondent to pay the bonus due to him. The applicant would lead evidence and submit documents to substantiate its claim.
6. The Respondent argues that the applicant was not entitled to the performance bonus for the year 2019/2020 because he failed to submit his performance evaluation within the stipulated period. Evidence would be lead by witnesses and bundles of documents were submitted to substantiate this defence.

ISSUE TO BE DECIDED

Whether the Respondent committed unfair labour practice by refusing to pay the applicant's performance bonus for the 2019/2020 financial year.

SURVEY OF EVIDENCE AND ARGUMENT

7. I must state from the onset that I will consider all evidence brought before me but, will not be capturing the evidence verbatim. I will refer to the relevant evidence to make my finding. The closing arguments that were submitted have been considered in arriving to the finding below.
8. The applicant Thembani Mgogoshe testified under oath as the only witness as follows: He was employed by the Respondent in the Mthatha office. During the 2019/2020 performance evaluation season the country was put on lockdown. The offices were closed and returned back in June 2020. In the week of 22 June their office was scheduled for performance evaluations. Performance evaluation would result in the payment of a performance bonus for those who qualified based on the scores agreed to between employees and their supervisor. During this time he was bereaved and applied for family responsibility leave to attend to the burial of the family member. His assessment did not materialize as he was absent during this time. At the time of the evaluation Mr Jijana was the acting supervisor in the Mthatha office. This was so because Ms Vatsha had been booked off sick and ended up retiring from the position of supervisor in the Mthatha office.
9. Mr Jijana, the then supervisor told him that his evaluation would be sent to Mr Mnyande who was the supervisor in Bisho. He was surprised by this as he did not report to Mr Mnyande for the period he was being evaluated for.
10. Mr Mnyande came to the Mthatha office and met with him for evaluation. He presented his scores to Mr Mnyande. He scored himself a rating of 130. Mr Mnyande said that the scores were absurd and he should reduce it to at least 120 -123. He reduced the scores to 123 accordingly. It was his evidence that Mr Mnyande suggested that he should not sign for the scores as it was still going to be presented to Mr Lindique for further evaluation.
11. During this period, Mr Jijana sent a letter resigning from the acting position and would go back to his normal duties. At this juncture, Ms Magxala acted in the supervisory position as it was vacant. On 02 November Ms Magxala discussed the 123 score which was previously discussed with Mr Mnyande. According to her, she was tasked by Mr Mnyande to finalize the performance assessment for Mr Mgogoshe. He also said that he received an email on 23 October 2020 indicating that his performance assessment was not finalized.

12. It was his testimony that he was bereaved in the period of submission which was the week of 22 to 30 June 2020. He then applied for family responsibility leave which was granted. He however managed to submit his performance evaluation to Mr Mnyande on 30 June 2020. He referred to the email sent to Mr Mnyande on 30 June 2020.
13. During cross examination he maintained that he submitted the documents to Mr Mnyande on 30 June 2020.
14. When asked to mention the names of people who were paid even though they were late he mentioned Ms Nkunzi.
15. It was put to him that he submitted his documents on 02 November and his response was that those documents were a follow up of submission made on 30 June 2020.
16. He admitted that the email was sent to all employees communicating the due date of 30 June, however there was a circular that extended the due date issued by DPSA. It was his submission therefore that the circular issued in October supercedes the directives issued earlier with regards to dates,
17. Mr Mgogoshe said that he was never made aware of any due date for his documents for performance evaluations taking into consideration that he was on family responsibility leave.
18. He submitted on the 30 June 2020 because it was the due date initially communicated to all staff.
19. Mr Mgogoshe maintained that he was entitled to the bonus because the Respondent's documents submitted in these proceedings also proves him to be entitled to the bonus even though the respondent claimed that the documents were signed in error

Respondent's Version

20. Mr Bongi Mnyande) was the 1st witness for the Respondent and testified under oath as follows:
The Applicant was employed as a branch manager since 1 July 2021. He previously held a position of a supervisor responsible for the entire region. His responsibilities included Human Resources, he had three supervisors, He was responsible for three offices. He reported to the branch manager Mr Lindique.
21. He testified that Mr Mgogoshe's documents were signed by supervisor after numerous attempts to get then signed by Mr Mgogoshe.
22. Mr Mnyande was aware that Mr Mgogoshe was not evaluated by Mr Jijana, and he was not evaluated by him.

23. Submission dates for all evaluations were set for 30 June 2020. He received the documents sent by Mr Mgogoshe on 30 June 2020 but he was already at home at the time.
24. Mr Mnyande mentioned that all employees had to submit their evaluations including any documents for compliance by 18 August 2020. This meant that every document relating to performance evaluations including non compliance was expected to be submitted by this date even though the initial date was 30 June 2020.
25. He explained the evaluation process to include the sitting between the employee and the supervisor to discuss the scores employees score themselves. The documents will then be presented to the moderation committee where they will be endorsed or amended.
26. He explained the document on page 24 of the bundle to have been signed by himself as well as the manager but with no signature of Mr Mgogoshe. This was because Mr Mgogoshe failed to comply with the instruction to sign the document. He and the supervisor signed the document for compliance only.
27. In terms of scoring, there was a score of 123 as well as the score of 100. both these scores were signed by himself and the manager but not by Mr Mgogoshe. Both these scores qualified one to receive the bonus but in this case Mr Mgogoshe did not comply.
28. He confirmed that he had sitting with Mr Mgogoshe but it was not fruitful. Mr Mgogoshe seemed to be unhappy with the score of 100 given to him. He decided to include Mr Jijana in that sitting even though he was not supervising the applicant during May and June 2020.
29. During cross examination Mr Mnyande maintained that it was the responsibility of the employee to submit the required documents in time and in this case Mr Mgogoshe was aware of the consequences as per the policy on Performance evaluation bonuses payments.
30. When asked why he decided to do the performance evaluation instead of Mr Jijana the supervisor, he said that Mr Jijana would not have managed to do the evaluations because of the acting period which was relatively short. He then did the evaluations along with Mr Jijana. He was fit to do the evaluations because the team leader had fed him with reports regarding the performance.
31. He maintained that Ms Vatsha did not finalize all performance evaluations as she became ill and was booked off.
32. He agreed that a supervisor initiates the discussion of performance evaluation with its team. In this case Mr Jijana communicated with his team.
33. Responding to the issue of Ms Vatsha's taking off ill and the bereavement of the Applicant, he agreed that it was impossible to hold the evaluation sitting during this period.

34. He confirmed that he did not return the unsigned documents sent by Mr Mgogoshe on 30 June 2020. It was practically impossible for him to return the document that had no motivation and it was not evaluated for those reasons. The document was also unsigned.
35. He confirmed that the document was finally signed by the applicant and Ms Magxala who was supervising Mthatha office.
36. It was Mr Sonwabile Jijana, the respondent's 2nd witness's testimony that: He worked for the Respondent since 7 May 2015. At the time of this testimony he already resigned from the Respondent.
37. His original position was Regional Coordinator in special pensions. At the time of the issue at hand he was acting team leader in Mthatha office. This was the time of covid 19 where teams were rotating. He had his team and Ms Vatsha had her team.
38. His duties included running of the office, performance of the office was his responsibility.
39. During the time of performance evaluation, Mario Lindique requested Bongi and Mr Mnyande to come and assist in assessing the entire team. At the time he was new in the position. Bongi came at the time that he had to submit the evaluations.
40. He submitted that he evaluated some six employees and only two people were not assessed including Mr Mgogoshe.
41. Mr Mgogoshe had a bereavement at the time of the evaluation therefore he could not sit with him .
42. On 17 August him and Mr Mnyande requested the Performance Evaluation documents including the supporting documents. There were misunderstanding between Mr Mnyande and Mr Mgogoshe.
43. During the meeting of 20 August 2020 Mr Mgogoshe was asking Mr Mnyande about the date of submission as he mentioned that it was late for submissions. On both meetings held on 17/08 and 20/08 what was expected in the meeting was not achieved in that no documents were submitted.
44. Emails were sent to Mr Mgogoshe to submit the supporting documents. He did not recall any submission up until around October when there was a request for Mr Mgogoshe's signature.
45. He explained the process of performance evaluation to include sitting with supervisor, discussion on scores submitted by subordinates to supervisors, motivating the score if one claims to have performed more than expected.

The normal period for performance evaluations was just after the end of the financial year. It is normally April up to June. This particular period was affected by Covid .

46. When Mr Mnyande came to evaluate other staff members Mr Mgogoshe was on approved family responsibility leave. It was then impossible to evaluate him at that time. Other than that there were no other tangible reasons for him not to submit. It was however Mr Mgogoshe's responsibility to get his documents ready for submission and submit in time as per the directive sent to all employees in terms of the email on page 55 of the respondent's bundle.
47. In cross examination he confirmed that the teams worked on rotational basis when the country was partially opened. Mr Mgogoshe was not in his not within the team he supervised while on rotation.
48. He also confirmed that when they did assessment with Mr Mnyande, they assessed everyone including those that were assessed by Ms Vatsha while she was still around. He also confirmed that there were only two employees who were not assessed and Mr Mgogoshe was one of them.
49. He confirmed that it was impossible to sit with Mr Mongogohse while he was on bereavement, but he was aware of the due date.
50. He confirmed that Mr Mgogoshe only returned on 30 June which was the submission date. Mr Mgogoshe sent the documents to Mr Mnyande directly not to him.
51. Mr Jijana confirmed that there were no further arrangements made for Mr Mgogoshe as he was on family responsibility leave.
52. Mr Jijana confirmed that on the 17/08/2020 meeting it was agreed that Mr Mgogoshe would submit documents as motivation for his score for the meeting of 20/08/2020.
53. In the meeting of 20/08/2020 was not to discuss the score but to submit the substantiating documents. Mr Jijana was not involved on the scoring of 123 and the signing of documents.
54. Mr Lindique testified as the respondent's 3rd witness under oath as follows:
55. He was the senior manager of the respondent. He was responsible for managing all offices including Mthatha office.
56. He explained that the date was set for performance evaluations and sent to all staff. Mr Mgogoshe only signed and submitted his performance evaluation in November 2020.
57. He admitted that he signed the documents indicating that there was budget to pay bonuses, however the one for Mr Mgogoshe was signed in error as he had not complied. Mr Mgogoshe did not meet the deadline for submission.
58. He referred to the document in page 24 and enplaned that it was the performance evaluation score-sheet which determines the score and rating for performance evaluation. His signature appeared on that document in error because the document had no motivation for the rating.
59. He said that Mr Mgogoshe did not want to co-operate and this was not the first time.

60. Mr Lindique did not get any documents about the bereavement, however if there was leave applied for he must have approved it.
61. He said that Nkunzi who was paid the bonus in error was later deducted from her salary.
62. During cross examination he agreed that the documents were only signed in November 2020.
63. He reiterated that his signature was an oversight.
64. He confirmed the score of 100 to have been moderated because there was no supporting documents for the score above 100.
65. He confirmed that even though there is no exception to the rule, there could be a deviation in the circumstances where there is exchange of documents from HR down to staff for compliance.
66. When confronted with the circular directing all performance evaluation processes to be completed by March 2021 and bonuses to have been paid by December 2020, he said there was no need to comply with such a circular as it meant that the entire process should be completed by 31 March 2021. It also referred to bonuses to be paid by December meaning that evaluations and submission must be done before the payment date.
67. He was asked if the score of 100 was communicated to Mr Mgogoshe and responded to the negative

ANALYSIS OF EVIDENCE AND ARGUMENT

68. Section 185 of the LRA states that the employee has a right not to be unfairly dismissed or subjected to unfair labour practices.
69. In this matter it is common cause that the Applicant was not paid performance bonus for the year 2019/2020. The Applicant bears the onus to prove that such bonus was unfairly withheld and as such, amounts to unfair labour practice.
70. It was the applicant's submission supported by the documents as well as the testimony of the respondent's witnesses that he was bereaved during the the period of evaluation. He did not have the opportunity to be evaluated during the period other employees were evaluated. This is a reasonable submission and both Mr Jijana and Mr Mnyande agree that the applicant was on approved family responsibility leave.
71. The applicant further submits that when he had the opportunity to meet with Mr Mnyande, he finally agreed to a score of 123. Mr Mnyande then told him not to sign the documents because he was still going to speak to Mr Lindique about the score. He sent the unsigned document to

Mr Mnyande on 30 June 2020. I agree with the fact that the score of 123 was sent on 30 June 2021 because there is an email submitted to these proceedings. Mr Mnyande also agrees that he received the email. I however, do not agree with the fact that he was told not to sign the document because Mr Mnyande would be speaking to Mr Lindique. If this is what transpired, the applicant would have sent the email together with the supporting document for a score above 100 so that Mr Lindique can make that decision based on the submissions. Alternatively the email sent would indicate that based on the discussion that Mr Lindique will re-look at his score, the document is sent without the signature. I do not think he would have just sent it without any explanation. The only reasonable explanation to this is that the applicant scored himself 123 in a bid to initiate the opportunity for discussion of his scores, there was no discussion. He then sent the document to Mr Mnyande because the 30th of June was the due date. In the process he did not notice that the document was unsigned.

72. I am of the opinion that if a reasonable accommodation was afforded for the applicant to meet with his supervisor or Mr Mnyande in this case, the scores could have been discussed and a proper document would have been sent to HR with signatures.
73. The other version of the employer is that Mr Mgogoshe was not co-operating. Instead of the respondent dealing with the failure to co-operate, the respondent decide to exclude the applicant from receiving the bonus which the same respondent has agreed that he qualifies and there are funds available. Other than the version that these documents were signed in error there is no further explanation or a different document explaining the error. The respondent failed to deal with misconduct of the applicant if there is such but chose to punish him by not paying the bonus even though he qualified in terms of the scores.
74. In my view the respondent is punishing the applicant for his general non co-operation but it does so in a manner that is unfair. At no stage did the respondent's witnesses indicate that the score of 100 was communicated with the applicant. At no stage did the respondent submit that the score of 100 was rejected. The score of 100 was signed for because there was no motivating documents for the 123 score. Performance evaluation have a purpose. The fact that the respondent is even prepared to pay its employees bonuses if they perform to an acceptable standard means that it is serious about performance. The bonus is linked to the performance to encourage the employees including the applicant to perform even more than the required standard with the hope that there will be a reward. Performance evaluation may not be used as punishment. It seems to me that the applicant did not get the opportunity for a face to face meeting or virtual meeting partly because he is known to be uncooperative. This became clear in the evidence of Mr Mnyande and Mr Lindique's evidence. They have both

repeatedly brought up the issue of the applicant being uncooperative, even referring to the performance evaluation period of the year 2018/2019.

75. From the evidence presented, the Applicant was not given any opportunity like other employees to sit and discuss his performance. In addition, the respondent was unable to rebut the applicant's evidence that he submitted his performance evaluation in time. I am saying this because Mr Mnyande confirmed to have received the applicant's document on 30 June 2020 and did not respond. He could not confirm if he had informed the applicant of the non compliance up until October 2020. No arrangements were made to meet with Mr Mgogoshe as he missed the opportunity to seat with Mr Mnyande and Mr Jijana due to his bereavement. Mr Mnyande disputes ever discussing the scores with Mr Mgogoshe which proves that no opportunity was ever given to him, given the fact that he was on family responsibility leave at the time of the evaluation. The only reasonable explanation in my view is that Mr Mgogoshe did not get the opportunity to be evaluated by Mr Mnyande and Mr Jijana. In my view if there was this meeting it would reflect somewhere, it could be in the applicant's submission or respondent. This could be in a form of minutes of such a meeting or a mere note indicating that the supervisor met with the applicant but there was no way that they could sign on a particular score. In this case, there is nothing from both sides. This makes it difficult for me to believe that there was a performance evaluation meeting.
76. All the respondent's witnesses are referring to the non co-operation by Mr Mgogoshe, but none of them are mentioning what process was followed to accommodate him as he was away at the time. They are all referring to the fact that it was his responsibility to submit his evaluation, but none of them take responsibility of having initiated the sitting with the applicant to evaluate and score him accordingly. I am of the opinion that the applicant's non compliance was overlooked and the alternative score was signed for and submitted to HR which qualified him to be paid at a score of 100.
77. The other version is that Mr Lindique had signed the score of 100 in error. If he signed the documents in error, why are the documents submitted to these proceedings. What evidence do these document support other than that the applicant was moderated on a 100 and it was signed for by the supervisor and the manager that he was entitled to the bonus and that there were funds available to pay.
78. The other version of Mr Mnyande was that the documents were signed only for compliance. I do not agree with this version because there is no answer to the notes written by HR on top of the document that requires signature of the applicant. I would understand it better if the

documents were signed with the notes that documents only signed by respondent due to non co-operation by the applicant and also indicate that the document is only signed for compliance. It is my conclusion therefore that, the score of 100 was given to the applicant because there were no documents to support the score of 123 and there was no opportunity to discuss it. The score was therefore submitted to HR and it qualified him to be paid the bonus at the score of 100.

79. In this matter the Applicant is challenging his exclusion from payment of performance bonus for the year 2019/2020 as unfair. The evidence presented to this arbitration does not support the respondent's claim that the applicant failed to submit his performance evaluation timeously. The reasons provided for the exclusion of the applicant from the payment of bonuses for 2019/2020 are therefore unreasonable.

80. In the circumstances, I make the following award:

AWARD

81. The exclusion of payment of performance bonus of TF Mgogoshe the applicant, by the Respondent GPAA, amounts to an unfair labour practice.

82. The applicant TF Mgogoshe is entitled to the bonus payment for the year 2019/2020 at the score of 100.

Signature:



Commissioner: **Nowethu Ndiki**

Sector: **Public Service**