



ARBITRATION AWARD

Panelist/s: W R PRETORIUS

Case No.: GPBC341/2019

Date of Award: 20 April 2021

In the ARBITRATION between:

PSA obo M M Mokhethiea

(Union / Applicant)

and

Department of Higher Education and Training

(Respondent)

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ARBITRATION AWARD

Details of hearing and representation

1. This arbitration is in relation to a dispute regarding benefits as contemplated in section 186(2)(a) of the Labour Relations Act 66 of 1995 as amended ("the LRA").
2. The proceedings commenced before me on 4 September 2019 and was postponed to 22 January 2020 due to medical condition of the Applicant. The proceedings of 22 January 2020 remained part-heard and due to the Covid-19 regulations only proceeded on 25 January 2021 as a virtual arbitration hearing. The arbitration was finalised on 25 March 2021 as a virtual arbitration via the Zoom platform.
3. The parties submitted their respective written closing arguments on 9 April 2021 which is regarded as the last day of these proceedings.
4. The Applicant, Ms. Mokgantsho Mokhethiea, attended and was represented by Mr. Nico Cloete an official from the Public Service Association of South Africa ("the PSA").
5. On the other side, the Respondent, the Department of Higher Education and Training ("the DHET"), was represented by Mr. Mosiuoa David Mokhobo, the Deputy Principal Corporate from the Motheo TVET College in Bloemfontein.
6. These proceedings were recorded digitally and manually.

Issue to be decided

7. I am required to determine whether the Respondent committed an unfair labour practice by not paying the Applicant a cash bonus in terms of its policy pertaining to performance management styled as 'Performance Management and Development Policy for DHET Employees' ("the Policy"), and if yes, determine the appropriate relief.
8. The Applicant is seeking one month's compensation.

Background to the dispute

9. It is common cause that:
 - 9.1 This dispute concerns the performance assessment of the Applicant for the performance cycle 1 April 2017 to 31 March 2018 (2017/18).
 - 9.2 The Applicant, employed as Senior Accounting Clerk ("SAC"): Supply Chain Management, was assessed by her supervisor and received a score of 71.5% which qualified her to receive a cash bonus up to a maximum of 12% of her annual salary which was R203 988.00 at the time of assessment.
 - 9.3 The Institutional Moderation Committee meeting ("IMC") held on 31 July 2018 reduced the score of the Applicant from 4 to 3 which resulted in the Applicant not qualifying for a cash bonus as per her original assessment.
 - 9.4 The Respondent convened a grievance meeting on 30 November 2018 with the view to give the aggrieved employees, including the Applicant, an opportunity to beef-up their respective motivations for consideration by the Principal of the College.
 - 9.5 On 4 December 2018, the aggrieved employees submitted a joint letter to Mr. Ntsieng wherein they indicated that because the Respondent did not address their grievances they have decided not to submit the 'beef-up motivations'.
 - 9.6 On 12 December 2018, Mr. Ntsieng responded to the individual employees in which he stated that the Applicant failed to improve her motivation and return it on 4 December 2018 as per the outcome of the meeting of 30 November 2018, hence the decision to 'conclude the matter as moderated'.
 - 9.7 The Applicant followed the internal grievance processes and ultimately referred a dispute to the Council regarding the non-payment of her cash bonus.

Survey of evidence and argument

10. Both Parties submitted documentary evidence. The Applicant's documents were marked as bundle A, A1; A2 (withdrawn) and A3. The Respondent's documents were marked as bundle B. None of the documents submitted were placed in dispute.

11. The Applicant was the only witness in her case. The Respondent called three witnesses to testify. All the witnesses testified under oath.
12. This arbitration award is issued with brief reasons as provided for in terms of section 138(7)(a) of the LRA.

The Applicant's case

13. **Ms. Mokgantshe Mokhetheia ("Applicant")** testified to the following effect:
 - 13.1 She submitted her performance plan for the period 2017/18 to her supervisor, Ms. Lecoko ("Lecoko"). She indicated that Lecoko did not come back to her regarding changes to the submitted performance plan and signed the performance plan dated 3 April 2018. She obtained a final rating of 71.5% which meant she was eligible to receive a cash bonus.
 - 13.2 On 28 November 2018 she was called to a meeting by Mr. Ntsieng ("Ntsieng"), the Chief Financial Officer ("the CFO"), also attended by Lecoko. She said that Ntsieng informed her that she did not qualify for a cash bonus. According to her, this was the first time she was informed of the decision not to pay her a cash bonus.
 - 13.3 She subsequently lodged a grievance because she was not happy with the response of Ntsieng and Lecoko did not say anything to her in respect of her rating as agreed between them. She indicated that it was unfair not to inform her prior the decision of the Institutional Moderation Committee ("the IMC") that she did not qualify for a cash bonus.
 - 13.4 After she submitted her grievance, they (the affected employees) were called to a meeting on 30 November 2018 which was chaired by Mr. Mokhobo ("Mokhobo"), the Deputy Principal Corporate Services. See bundle B1. She confirmed that she was unhappy because she was not consulted before the changing of scores were done. See bundle B3.
 - 13.5 The aggrieved employees remained dissatisfied with the outcome of the meeting of 30 November 2018 and wrote to Ntsieng on 4 December 2018 wherein they outlined their reasons for their continued dissatisfaction. See bundle A3. According to her, the Respondent was trying to cover-up their mistakes considering the provisions of the Policy.
 - 13.6 On 12 December 2018 they received a response from Ntsieng which indicated *inter alia* that the Respondent had no option but to conclude the matter as moderated because she had failed to beef-up her motivation.

- 13.7 According to her, the response by Ntsieng did not address the concerns which were raised in the 'petition' letter dated 4 December 2018. She said that no-one came forward to assist her with the beefing up of her motivation.
- 13.8 She indicated that in terms of the agreed performance workplan between herself and the supervisor, her performance was found to be above satisfactory and that she went the extra mile to assist suppliers. See pages 3 to 31, bundle A.
- 13.9 She submitted that the Respondent failed to comply with the Policy. See bundle A1. In this regard, she indicated that her assessment was not returned to you. See par. 9.1. of the Policy. The IMC also did not refer the PAR back to her supervisor. See par. 9.1.1 of the Policy. She was also not informed of the next level of moderation, i.e., the Central Moderation Committee ("the CMC") as provided for in par. 9.2.1 of the Policy.
- 13.10 In cross-examination she confirmed that she did not engage with Lecoko after she submitted her 2017/18 performance workplan for assessment. According to her, Lecoko never complaint about her performance. In terms of her performance workplan, Lecoko agreed with her that she is eligible to receive a cash bonus based on her performance assessment. However, her score was reduced by the IMC without consulting her as provided for in the Policy.
- 13.11 She maintained her version that the Respondent failed to comply with the Policy, because she was informed about the decision of the IMC after payment of cash bonuses has been effected. She indicated that it was not wrong to return the assessment provided that it is done in terms of the Policy, i.e., before the decision is taken to reduce the score.
- 13.12 She agreed that the aggrieved employees were allowed to state their cases in the grievance meeting held on 30 November 2018 and that they did not disagree with the outcome of the said meeting. However, they were concerned that there was no guarantee that they would receive their cash bonuses.
- 13.13 According to her, the Respondent's attempts, after almost three months, for them to beef-up their motivations were done to hide their non-compliance with the Policy. In this regard, one of the Labour Relations Officers (Ms. Tauoa Dieketseng) told them, in the presence of Mokhobo, that the Policy does not allow for submissions to be made after five days of the decision of the IMC.
- 13.14 She said that Lecoko did not inform her which areas of her motivation to improve. The minutes of the IMC that they received in the meeting of 30 November 2018 did not reflect the areas to improve.

According to her, Lecoko was supposed to sit down with her so that they could discuss the areas which needed to be beefed-up.

- 13.15 In re-examination she confirmed that she did not know which areas in her motivation had to be improved. She indicated that she does not know whether beefing-up of motivation is part of the Policy.

The Respondent's case

14. **Ms. Boipelo Lecoko ("Lecoko")**, the supervisor of the Applicant, testified to the following effect:
- 14.1 She assessed the Applicant for the PMD 2017/18 cycle and confirmed the Applicant's assessment made her eligible for a cash bonus. She indicated that she did not receive training at the time on performance management, and she learnt through observation. She confirmed that she presented the Applicant's assessment to the IMC and it was recommended that the scores of the Applicant must be reduced.
- 14.2 According to her, Mr. Plaatjies ("Plaatjies") from the HR section was supposed to inform the Applicant regarding the recommendation of the IMC to reduce her assessment score from 4 to 3. However, the Applicant was not informed about the outcome of the MC.
- 14.3 She confirmed that she received complaints from the Applicant and other employees after they learnt that other employees have received cash bonuses. The Head of the Branch, Mr. Ntsieng, convened a meeting with the aggrieved employees which culminated into a second meeting with the Labour Relations and HR sections involved.
- 14.4 In the grievance meeting of 28 November 2018, the aggrieved employees, including the Applicant, agreed to beef-up their respective motivations and re-submit same for consideration. However, the aggrieved employees, including the Applicant, did not submit their respective motivations as agreed in the meeting. See bundles B1 and E1.
- 14.5 According to her, the Respondent addressed the earlier omission by not informing the Applicant of the outcome of the IMC by allowing her to beef-up her motivation.
- 14.6 Under cross-examination she confirmed that the original assessment of the Applicant which made her eligible for a cash bonus. She agreed that she did not inform the Applicant regarding the outcome of the IMC as she was under the impression that it was the responsibility of the HR section (Plaatjies).

- 14.7 She indicated that the IMC did not return the assessment back to her as the direct supervisor of the Applicant with the view to discuss the recommendation regarding the reduced score with the Applicant.
- 14.8 It was put to her that in terms of the policy, the IMC should have granted the Applicant an opportunity to beef-up her motivation. She responded that she was unable to speak on behalf of the IMC. She was only aware of the procedure followed by the chairperson of the grievance meeting, Mr. Mokhobo.
- 14.9 It was put to her that the IMC in terms of the policy did not have the powers to reduce the scores of job holders. She did not offer a response.
- 14.10 It was put to her that the grievance meeting of 30 November 2018 was not held in terms of the grievance procedure. See par. 9.3 of bundle A1. She said that she heard what the policy was saying, however, she believed that the Respondent followed the correct process in addressing the omission by convening the grievance meeting.
- 14.11 In re-examination she indicated that the IMC was not satisfied that the requirements to qualify for cash bonus were met, because the Applicant's responses were the same for the other quarters on her assessment. She said that Plaatjies informed the Applicant as well as the other employees regarding the outcome of the MC. She confirmed that the aggrieved employees agreed to beef-up their motivations and re-submit it for consideration.
15. **Mr. Theletsane Eugene Ntsieng ("Ntsieng")**, the Deputy Principal Finance ("CFO"), testified to the following effect:
- 15.1 He said that the Institutional Moderation Committee meeting ("the IMC") held on 31 July 2018 was chaired by the Principal of the College, Professor Phutsisi, and was attended by Deputy Principals, Campus Managers and HR officials. He referred to the decision of the IMC not to pay a cash bonus to the Applicant on the basis that the Applicant did not perform extra activities.
- 15.2 He indicated that the secretariat/HR was supposed to inform the employees who did not qualify for cash bonuses about the decision of the IMC. He was under the impression that Plaatjies from HR informed the Applicant about the outcome of the IMC. However, he learnt later when Applicant brought it to his attention that she did not get a cash bonus that Plaatjies did not inform her.

- 15.3 According to him, it was difficult to say whether policy issues were raised as part of the procedure in the IMC meeting, because the assumption was that the IMC would be conducted in accordance with the policy provisions as directed by HR. See page F35, par. 6.3.3 of bundle B.
- 15.4 He indicated that the aggrieved employees, including the Applicant, wrote a letter to him after they learnt that they did not get a cash bonus whilst other employees received it. He then sought advice from the Labour Relations section and was informed to convene a meeting to allow the aggrieved employees an opportunity to state their case.
- 15.5 The grievance meeting was subsequently convened on 30 November 2018. The grievance meeting resolved that all the aggrieved employees would beef-up their motivation for further consideration. See page B1 of bundle B. However, on the day the aggrieved employees were supposed to submit their beefed-up motivations, he received a letter which stated that they were no longer going to submit their motivations. See page C1 of bundle B.
- 15.6 On the issue of whether Ms. Tauoa Dieketseng ("Dieketseng") disagreed with management during the grievance meeting of 30 November 2018; he said he did not perceive her question as an objection but rather to seek clarity regarding the Policy.
- 15.7 According to him, the Respondent by convening the grievance meeting was trying to correct the omission whereby the Applicant and the other aggrieved employees were not informed about the decision of the IMC.
- 15.8 He indicated with reference to the Applicant's Annual Performance Assessment Report on page 3 of bundle A, that the Applicant's motivation across the quarters was the same and that her motivation lacked detail which were indicators not in support of a cash bonus. He said that the supervisor of the Applicant was supposed to scrutinize the motivation presented by the Applicant. He indicated that the fact that the Applicant's supervisor signed the motivation with a score of 4 meant that the supervisor agreed that the Applicant is eligible for a cash bonus.
- 15.9 According to him, the reference in the Policy that scores might be referred back to the supervisor and the employee for further motivation was the same as what the Respondent did by convening the grievance meeting. See page F35, bundle B. He indicated that the Principal of the College was consulted, and she gave permission for the interaction with the aggrieved employees through the grievance meeting.

- 15.10 Under cross-examination he said that what weakened the Applicant's case at the IMC was that her motivation lacked detail and was the same across the quarters. According to him, the onus was on the Applicant to beef-up her motivation after the IMC reduced her score from 4 to 3. He disagreed with the version that the Applicant did not copy and paste her motivations with reference to page 9 and 15 of bundle A.
- 15.11 It was put to him that it was never the intention of the IMC for the Applicant to beef-up her motivation other than to reduce her score, because the minutes would have reflected such intention. He disagreed and stated that it might have been an omission in the minutes, however, it was never the intention of the IMC to deny the Applicant an opportunity to beef-up her motivation. See page F35 of bundle B.
- 15.12 He accepted the version that it was unfair when the Applicant was not informed regarding the outcome of the IMC either by her immediate supervisor or Plaatjies from HR. According to him, "two wrongs do not make a right", hence management afforded the aggrieved employees an opportunity afterwards to beef-up their motivations which they refused to comply with.
- 15.13 He disagreed with the Applicant's interpretation of par. 9.1.1 on page 19 of bundle A1 regarding the powers of the IMC to take a decision to reduce the score of the Applicant. According to him the Branch Moderation Committee ("the BMC") was held followed by the Central Moderation Committee ("the CMC") also referred to as the Regional Moderation Committee ("the RMC"). He disagreed with the version that the Applicant was not represented by the chairperson of the BMC in the CMC/RMC.
- 15.14 He disagreed with the version that there was no agreement in the grievance meeting of 30 November 2018 for the Applicant to beef-up her motivation. In this regard, he said that the minutes must be read into its proper context by referring to the conclusion part of the minutes which reflected that the aggrieved employees agreed to beef-up their motivations and submit it.
- 15.15 It was put to him that it was never the intention of the grievance meeting to refer the beefed-up motivations to the IMC because the minutes reflected that it would be considered by the Principal of the College and not the IMC. See page B4 of bundle B. He disagreed and stated that the minutes referred to the Principal of the College in her capacity as the chairperson of the IMC.
- 15.16 According to him, the aggrieved employees, including the Applicant, let themselves down by not submitting their beefed-up motivations as agreed to in the grievance meeting of 28 November 2018.

16. **Ms. Tauoa Dieketseng (“Dieketseng”)**, the senior Labour Relations Officer, testified to the following effect:
- 16.1 She was part of the grievance meeting that was held on 30 November 2018. The purpose of the meeting was to address the complaints from the aggrieved employees, including the Applicant.
- 16.2 She indicated that she did not object to the decision of management to convene the grievance meeting. She merely asked for clarity and was satisfied after she was given such clarity.
- 16.3 According to her, the aggrieved employees, including the Applicant, did not comply with the resolution of the grievance meeting to beef-up their motivations. See letter from Ntsieng to the Applicant dated 12 December 2018 under C1, bundle B.
- 16.4 Under cross-examination she confirmed that the resolution of the grievance meeting was for the aggrieved employees to beef-up their motivations. She disagreed with the version that there was no such resolution, and if there was one, that it was unlawful and in contradiction with the policy. In this regard, she referred to the letter from Ntsieng to the Applicant dated 12 December 2018 as reflected under C1, bundle B.
- 16.5 She disagreed with the version that her clarity-seeking-question in the grievance meeting could have been interpreted as disagreement with position of management. She maintained that she sought clarity and was satisfied after she had been clarified.
- 16.6 In re-examination she confirmed that she did not object to the process followed by management and that she merely sought clarity.

Arguments

17. The written closing arguments of both parties are part of the record. I have taken it into account. I do not find it necessary to repeat it here in full. I will briefly summarize it. If I do not refer to a particular argument, it does not mean that I have not consider it.
18. Mr. Cloete submitted in argument that even if the testimony of Ntsieng would be accepted that it was the intention of the IMC to refer the moderated assessment of the Applicant back to add additional motivation, it would still be unfair to the Applicant as such communication did not reach the Applicant and the Applicant could therefore not implement the decision of the IMC to add

additional information. The Applicant was not afforded an opportunity to be heard by the CMC which infringed a right established by the Policy and amounts to unfairness.

19. Mr. Mokhobo submitted in argument that the Applicant failed to discharge the onus, because she refused to beef-up her motivation after she was afforded an opportunity to do so and wanted to be paid a cash bonus against an unconvincing motivation. In this regard, the Applicant unreasonably declined the offer by the Respondent to beef-up her motivation for consideration.

Analysis of evidence and argument

20. I must determine whether the Respondent committed an unfair labour practice when the IMC decided to reduce the Applicants score from 4 to 3 without communicating its decision to the Applicant which resulted in the Applicant not qualifying for a cash bonus as per her original assessment. I must also determine whether the subsequent grievance meeting convened by the Respondent corrected the omission to inform the Applicant regarding the decision of the IMC.
21. Section 186(2)(a) of the LRA states:

“Unfair labour practice means an unfair act or omission that arises between an employer and an employee involving – 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.”
22. It is settled law that an employee who alleges that s/he is the victim of an unfair labour practice bears the onus of proving all the elements of his/her claim on a balance of probabilities. The employee must prove not only the existence of the labour practice, but also that it is unfair. What is fair depends upon the circumstances of a particular case and essentially involves a value judgment. The fairness required in the determination of an unfair labour practice must be fairness towards both employer and employee. Fairness to both means the absence of bias in favour of either.
23. The Court in ***Apollo Tyres SA (Pty) Ltd v CCMA [2013] 5 BLLR 434 (LAC) (“Apollo”)*** held that there are at least two instances where employer conduct relating to the provision of benefits may be subjected to scrutiny by the CCMA or Bargaining Council under its unfair labour practice jurisdiction. The first is where the employer fails to comply with a contractual obligation that it has to an employee. The second is where the employer exercises a discretion that it enjoys under the contractual terms of the scheme conferring the benefit.

24. In **Apollo** the Court confirmed the benchmark for unfairness as follows:

"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".

25. In assessing the fairness of the Respondent's conduct, I have decided to follow the decision of the Labour Court in **Protekon (Pty) Ltd v CCMA (2005) 26 ILJ 1105 (LC)** ("**Protekon**") that reads as follows:

"The commissioner's approach to assessing the fairness of the Applicant's conduct was to look separately at the question whether there was a fair reason for the conduct and the question whether a fair procedure was followed. Although the LRA itself does not prescribe this separate analysis of questions of substance and procedure, as it does for example in relation to the question of the fairness of dismissal (in Section 188), this approach was well established under the general unfair labour practice jurisdiction of the 1956 LRA. (The commissioner referred in this regard to the decision of **WL Ochse Webb & Pretorius (Pty) Ltd v Vermeulen [1997] 2 BLLR 124 (LAC)**). In my view that is an appropriate approach to adopt in considering the fairness of employer conduct in relation to the provision of benefits".

26. The Respondent's Policy under paragraph 9.1 sets out the structure of the Branch Moderating Committee (the BMC) as follows:

"...The Branch Moderating Committee plays a critical role in assessing/moderating the provisional assessment rating of employees on salary levels 1 to 12. Each Head of Component shall present the rating scores (PAR) allocated to employees in that to the Branch Moderating Committee and shall substantiate such scores, especially in cases of below average performance, or in cases where a performance bonus may be granted. The Head of Component must refer back to employees, especially in cases where the Branch Moderating Committee does not accept the PAR."

27. The Policy under paragraph 9.1.1 sets out the powers and functions of the BMC as follows:

"...The Branch Moderating Committee may also disagree with the PAR; in which case the Branch Moderating Committee may refer the PAR back to the employee's supervisor to try and reach consensus on the Branch Moderating Committee's view. If the supervisor or a mediator cannot convince the employee of a change in the rating, the Branch Moderating Committee's rating is forwarded to the Central Moderation Committee. The Central Moderation Committee may confirm the rating which then becomes the Confirmed Assessment Rating (CAR). After receiving written confirmation from the Central

Moderating Committee of the CAR, an aggrieved employee may submit a formal grievance in terms of the Grievance Procedure of the Public Service to the Labour Relations Unit."

28. The Policy under paragraph 9.2 in relation to the 'power and functions of the CMC' states *inter alia* that the CMC shall:

"...the Central Moderating Committee may not change an individual employee's assessment rating, without first referring the issue back to the Branch Moderating Committee and the supervisor who made the initial assessment. The Central Moderating Committee must keep detailed minutes of decisions, in particular if it recommends lowering scores."

29. The Policy under paragraph 9.3 in relation to 'disagreements over ratings and assessment' states *inter alia* the following:

"...In the event of any remaining disagreement over the performance assessment of an employee, involving the employee and/or his/her supervisor, the employee may within five days of being informed of the decision of the Central Moderating Committee, follow the formal grievance rules of the Public Service...If the above processes ultimately fail to resolve the disagreement or grievance, the employee is entitled to seek redress through other means available in law."

30. The Respondent's 'Performance Management and Development Manual ("the Manual") confirms in paragraph 6.3.3.1 that the BMC and IMC *may refer back scores to the supervisor and employee for further motivation in an event where the Branch or Institutional Moderating Committees do not agree with the allocated scores.*

31. The Applicant's case is premised on the facts that her supervisor, Lecoko, approved her assessment which made her eligible for a cash bonus, and that the process followed by the Respondent in reducing her original assessment score from 4 to 3 was not in line with the Policy. Also, the grievance meeting did not address the complaints of the aggrieved employees.

32. In the converse, the Respondent argued the Applicant failed to discharge the onus, because she refused to beef-up her motivation after she was afforded an opportunity to do so and wanted to be paid a cash bonus against an unconvincing motivation. The omission by the Respondent to inform the Applicant regarding the outcome of the IMC was remedied by affording the Applicant an opportunity to beef-up her motivation and resubmit her assessment to the IMC for consideration.

33. It is settled law that when faced with two irreconcilable versions as referred to above, one must make findings on (a) the credibility of factual witnesses; (b) their reliability and (c) the probabilities. I have observed all the witnesses and found them to be reliable and credible witnesses. The conflicting versions will be decided on the probabilities.
34. The Respondent had a difficult case to defend, because of the inherent and serious systemic challenges flowing from the poor management of the performance management system. This became evident through the evidence of its witnesses. It is quite interesting to note that despite these systemic challenges, the Respondent did not call a witness from HR to explain or clarify why things happened in the way it did during the 2017/18 performance cycle.

The role played by the Applicant's supervisor

35. It all started with the performance assessment of the Applicant, which was approved by her immediate supervisor, Lecoko. It is common cause that the Applicant qualified for a cash bonus based on her 2017/18 performance assessment. I am satisfied that the Applicant's expectation of receiving a cash bonus was reasonable given the fact that her supervisor without any reservations approved her ratings.
36. The first signs of the systemic challenges referred to above, are apparent from Lecoko's evidence, namely that she was not trained at the time on how to properly conduct the assessment of her subordinates. She was obviously referring to HR section responsible for performance management.
37. Whilst it might be so that she did not receive training, the fact of the matter remains that she failed to assess the Applicant and simply accepted on appearance the motivations of the Applicant. This, in my view, amounted to negligence and not incapacity per se. Had she at least enquired into the motivations submitted by the Applicant, the matter could have been resolved differently.
38. It follows that when she went to the IMC to present the Applicant's case; she had no clue of the veracity of the motivations contained in the Applicant's assessment report. How fair was this towards the Applicant as well as the process? In my view, it was not fair.
39. The evidence of Dieketseng show that even within the same section, i.e., Labour Relations the left hand did not know what the right hand was doing. This became apparent when she 'sought clarity' from her supervisor in front of aggrieved employees. Clearly, not the appropriate time to do so given the specific circumstances.

40. I am therefore not surprised that the Applicant interpreted the conduct of Dieketseng as challenging or objecting to the process followed by Mokhobo to conduct the grievance meeting in relation to the Policy. Whilst Dieketseng denied this, her conduct at the end of the day exposed not only the systemic challenges of the performance management system but also the seemingly inherent contradictions within sections. It shows that there was a total lack of coherence regarding the implementation of the Respondent's Policy on performance management.
41. Ntsieng was an impressive witness. However, he had to justify the almost impossible. I agree with Ntsieng that the best person to comment about the performance of a jobholder is the immediate supervisor who works with the jobholder on a daily basis. In my view as referred to above, the Applicant's immediate supervisor, Lecoko, must take the blame for failing to properly assess the Applicant's performance. See page F49 of bundle B which clearly outlined the responsibilities of the supervisor.
42. In fact, the evidence by Ntsieng that the Applicant's motivation lacked detail and that the activities were duplicated in the quarters were the issues that should have been picked up by Lecoko during the quarterly assessments of the Applicant. She failed to do so. It was hypocritical of Lecoko to agree with the IMC's decision that the Applicant's score should be reduced whereas she sanctioned it initially. The only precedent that has been created was for the supervisor not to do her job properly.

Non-adherence to the Respondent's Policy and Manual

43. The Validation and Moderation Meeting held on 31 July 2018, which was chaired by the Principal, Prof. Phutsisi seems to constitute the IMC with reference to paragraph 6.3.2.2 of the Manual as reflected on page F33 of bundle B. I say this because it is the only moderating committee which is chaired by the Principal of the College. The other moderating committees are either chaired by the Regional Manager (RMC) or the Deputy Director-General (BMC) or the Director-General or delegated Senior Manager (CMC). Secondly, the minutes of the Validation and Moderation Meeting referred to above also stated that the next phase that was scheduled to be held in August 2018 was the RMC. See last paragraph on page E11 of bundle B.
44. Ntsieng's acceptance that the Respondent failed to inform the Applicant regarding the decision of the IMC to reduce her score is clear evidence of the non-adherence to the Respondent's own Policy and Manual. Lecoko also admitted that she was not consulted in terms of paragraph 9.1.1 of the Policy, i.e., to try and reach consensus with the Applicant regarding the decision of the IMC to reduce the Applicant's score. It is also undisputed that Plaatjies did not inform the Applicant regarding the outcome of the IMC which is in violation of the Policy.

45. Moreover, the decision of the IMC to reduce the Applicant's score was in violation of the Policy. The only power the IMC had in terms of the Policy and Manual was to refer the assessment back to the supervisor and jobholder, in this case the Applicant for reconsideration. It follows that the decision by the IMC to reduce the score of the Applicant was unfair and amounted to an unfair labour practice because it was taken arbitrary and in violation of the Respondent's Policy.
46. Ntsieng's assumption, shared by Lecoko, that he thought Plaatjies from HR informed the Applicant is proof of the total lack of coherence which plague the Respondent at the time. It is difficult to comprehend why the Respondent did not call a witness from HR to explain the performance management operations, especially in light of the fact that Plaatjies had resigned. Absent such evidence, the probabilities favour the Applicant's version that it was never the intention of the IMC to give her an opportunity to improve her motivation but to reduce her score arbitrarily.

The grievance meeting

47. I am unconvinced that the grievance meeting of 28 November 2018 addressed the concerns raised by the aggrieved employees, because by that time the RMC was already held in August 2018 according to the minutes of the IMC. See page E11 of bundle B. In other words, by the time the grievance meeting was held it was too late to inform the next level of moderation of the outcomes of the 'beefed-up' motivations. Put differently, the omission to inform the applicant about the outcome of the IMC was a *fait accompli* which rendered the grievance meeting with no purpose and without any realistic outcome for the aggrieved employees despite its noble intention as portrayed by Ntsieng.
48. Even if I am wrong in this regard, the fact remains that the power to confirm the 'changed rating' of the IMC rests with the CMC. In other words, the Policy does not allow the IMC to confirm its own recommendations.
49. In this regard, the performance management system (PMD) is highly regulated and peremptory in nature, e.g., par. 9.2.1 of the Policy which is dealing with the power and functions of the CMC states *inter alia* that "...the Central Moderating Committee may not change an individual employee's assessment rating, without first referring the issue back to the Branch Moderating Committee and the supervisor who made the initial assessment. The Central Moderation Committee must keep detailed minutes of decisions if it recommends lowering scores." [my emphasis]
50. Considering the aforesaid, I am satisfied that the Applicant's decision not to comply with the outcomes of the grievance meeting was reasonable.

51. At the end of it all, the probabilities favour the version that the decision of the IMC to reduce the Applicant's score was arbitrary and in violation of the Respondent's Policy. Secondly, the omission to inform the Applicant of its decision prevented the Applicant from making an appropriate and informed response in relation to the outcome of the IMC. It follows that the confirmation of the outcome of the moderation as per correspondence dated 12 December 2018 by Ntsieng was similarly unfair and amounted to an unfair labour practice for the same reasons as referred to above.
52. Taking into consideration the above, I find that the Applicant has discharged the onus to prove that the Respondent has committed an unfair labour practice in relation to benefits by its decision not to pay her cash bonus for the 2017/18 performance cycle.
53. The Applicant is seeking compensation as relief. It is common cause that on 1 April 2017 the Applicant earned R203 988.00 per annum. Having regard to section 193(4) read with 194 of the LRA, I consider compensation as a solatium in the amount of R16 999.00 (equal to one month's remuneration) to be just and equitable.
54. Accordingly, I make the following award and order:

Award

55. The Respondent, the Department of Higher Education and Training, committed an unfair labour practice relating to benefits as contemplated in section 186(2)(a) of the LRA by not paying the Applicant, Mokgantsho Mokhethiea, the cash bonus for the assessment period 2017/18.
56. The Respondent, the Department of Higher Education and Training, is hereby ordered to pay the Applicant, Mokgantsho Mokhethiea, within 30 days of the date of this award compensation in the amount of R16 999.00 (sixteen thousand nine hundred and ninety-nine rand).
57. Interest will accrue on the amount in the preceding paragraph, in accordance with section 143(2) of the LRA, should the Respondent fail to pay the Applicant as stated.
58. No order as to costs is made.



WILLIAM RICHARD PRETORIUS
GPSSBC PANELIST