



ARBITRATION AWARD

Case No: **PSHS588-19/20**

Commissioner: **Zuko Macingwane**

Date of award: **9 December 2021**

In the matter between:

PSA OBO JOHHNA DORATHEY ELIZABETH MARAIS AND 63 OTHERS

APPLICANT

and

DEPARTMENT OF HEALTH - FREE STATE

RESPONDENT

Details of the parties and representation

1. This matter was set down for arbitration before me on 19, 20 and 21 April 2021, 21 June 2021, 29 September 2021 and finalized on 23 November 2021 at the respondent's provincial offices at Bophelo House in Bloemfontein. There has been postponements and rulings issued to that effect. The arbitration was held under the auspices of the Public Health and Social Development Sectoral Bargaining Council (the Council).
2. The dispute concerned an alleged unfair labour practice related to the provision of benefits to employees as contemplated in section 186 (2) (a) of the Labour Relations Act 66 of 1995 (the LRA).
3. The 64 applicants in this matter were mentioned in the name list attached in the 7.11 referral and as reflecting in page 9 of annexure "C" attached to bundle "A1".

4. Only a few applicants appeared in person due to covid-19 regulations and limitations on space and the size of the venue as well as logistical challenges caused by the fact that the applicants are based in different municipalities across the Free State. The said applicants were nominated and mandated by the other applicants. The applicants who appeared in person were Ms. Johhna Dorathey Elizabeth Marais and Mr. Gideon Slabbert,
5. The applicants were represented by Mr. Janjtie Jack, an official of Public Servants Association of South Africa (PSA).
6. The respondent, the Provincial Department of Health in Free State was represented by Mr. Thabang Molise, its Assistant Director: Labour Relations.
7. The proceedings were digitally and manually recorded. Both parties submitted their bundles of documents. The applicants' documents were marked as bundle "A1", "A2", "A3", "A4" and "A5" and "A6". The respondent's bundles were marked as "B1", "B2", "B3" and "B4". A pre-arbitration minute was marked as bundle "C".
8. The parties agreed on record to submit closing arguments in writing on or before 30 November 2021. The applicant submitted its closing arguments on 30 November 2021 while the respondent submitted its closing arguments on 29 November 2021.

Preliminary issues

9. The respondent raised a preliminary issue at commencement of the arbitration that the Council lacks jurisdiction to deal with this matter arguing that this matter is sub judice since there is a matter pending at the Labour Court with issues interlinked with this matter and therefore the Council lacked jurisdiction to deal with this matter. The applicant made its opposing submissions. I found that the dispute did not arise out of or from the same factual matrix. I then issued a ruling on record with brief reasons and assumed jurisdiction.

Issues to be decided

10. I am to determine whether the respondent committed an unfair labour practice as contemplated in section 186 (2) (a) of the Labour Relations Act 66 of 1995. Should I determine that the respondent had committed an unfair labour practice, I must award the appropriate relief.

Background to the matter

11. At the time of the dispute the applicants were holding positions of Admin Clerks.
12. The applicants' submission was that they qualified for the pay progression for 2017/2018 financial year, but the respondent failed to pay, hence they referred a dispute of unfair labour practice relating to benefits.
13. The applicants' expectation was for the respondent to comply and pay the pay progression.
14. The applicants were not paid the pay progression for the 2017/2018 PDMS cycle, as per the applicants by so doing the respondent did not comply with the PDMS policy. The applicants were assessed and scored by their supervisors and according to them were eligible for the payment of the pay progression.
15. 3 of the applicants (Mr. Gideon Slabbert, Ms. Susan Dowd and Ms. Catherina Badenhorst) purported to be qualifying for pay progression since they had 12 years of accelerated grade progression.
16. The applicants felt aggrieved as a result of the developments surrounding the outcome of the said non-payment and lodged a grievance on 7 June 2019. Such a grievance was acknowledged by Mr. Mncube, on behalf of the respondent. The respondent conceded that it did not respond to the grievance. It is as a result of these developments that the applicants referred the dispute for conciliation.
17. The applicants sought a relief of being paid their pay progression for the 2017/2018 financial year and to be compensated for the unfairness to a maximum of 12 months.

Survey of evidence and argument

18. It is not the purpose or the intention of this award to provide a detailed transcription of all evidence placed before me at arbitration, even though all evidence was considered. I have however, summarized the portions of evidence that are relevant to me in making a determination in this dispute. For a full record of all evidence

the parties should refer to the digital recordings of the arbitration hearing which are available from the Council.

Applicants' case

19. In essence Ms. Johna Dorarthey Elizabeth Marais and Mr. Gideon Slabbert's evidence was that they became aware that they were not paid the pay progression at the end of May 2019 and they lodged a grievance on 7 June 2019. They did not receive the reasons why their pay progression was not paid. They only learnt at the arbitration that the reason for their pay progression not to be paid was due to an error in their upgrade. The applicants submitted their record of service, notches and expected payments.
20. They testified that they qualified for the pay progression because they were upgraded from salary level 6 to salary level 7 from 1 April 2010 up to 11 November 2012. It is unfair that they were not paid the pay progression because they performed according to the rules of performance and therefore they were entitled to the 1, 5 percent as per the other employees who attained the same score as theirs.
21. Mr. Slabbert presented evidence that he performed above satisfactory for 12 years cumulatively.

Respondent's case

22. In essence the evidence of Mr. David Paseka Maqina, the Director Labour Relations and Mr. Andisiwe Zuko Goodman Bebula was that the 12 years cumulative performance is not the only qualifying criteria for an employee to qualify for accelerated grade progression. The bulk of the evidence of Mr. Maqina was on the jurisdictional issue which I had already pronounced on it. Part of his evidence was on grade progression based on average performance, not mainly the accelerated grade progression.
23. The evidence of Mr. Bebula, was also that there must be a spreadsheet generated for all officials identified for accelerated grade progression who must have the highest above average scores that have been confirmed and moderated by PMDS and they must be on top of the spreadsheet. A submission should then be generated to approve the listed officials and the individual letters would then be handed over to all the identified officials to communicate that they are the beneficiaries of the accelerated grade progression. Without the said letters and processes having unfolded, one cannot claim pay progression.

Analysis of evidence and argument

24. Section 186 (2) (a) of the Labour Relations Act number 66 of 1995 (the LRA) as amended defines unfair labour practice as an unfair conduct by an employer relating to 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.
25. The applicants' claim is in terms of Section 186(2)(a) of the LRA where the applicants are alleging an unfair labour practice on the part of the respondent relating to provision of benefits to the employees. It was after the respondent had not paid them the pay progression for the 2017/2018 PDMS cycle.
26. In respect of the 61 applicants, it became clear after leading evidence that they did not qualify for pay progression and they expressly conceded on record that they did not possess the requisites for them to qualify for pay progression and therefore their initial argument fell by the wayside.
27. The case of the 3 applicants (Mr. Gideon Slabbert, Ms. Susan Dowd and Ms. Catherina Badenhorst) was that the respondent did not comply with the PDMS policy. The 3 applicants (Mr. Gideon Slabbert, Ms. Susan Dowd and Ms. Catherina Badenhorst) testimony was that they were assessed and performed significantly above expectations in that annual cycle. Their final annual assessment scores made them to be eligible for the payment of the pay progression.
28. The Free State Provincial Government Policy Framework: Performance and Development Management System for Levels 1-12 in clause 7.9.3 regarding pay progression provides that the jobholders on salary levels 1-12 shall be eligible for assessment for pay progression to the maximum notch of the salary level attached to their posts. Only **one** notch progression per assessment can be rewarded to jobholders who perform at least fully effective and only valid notches on the salary scale must be used in the process of progression. Only jobholders who have (a) scored a total score of 90% or higher and (b) have completed an assessment period of at least 12 months in the relevant financial year (on a specific salary notch) in line with the PDMS should be considered for pay progression. Should a jobholder's salary level move to a higher salary level within the period 1 April to 30 June due to for example a promotion, the pay progression (notch increase) is **not applicable** to that jobholder, as the incumbent would already be earning a higher salary than the notch for which he /she have qualified for on 1 July. Jobholders that have reached the maximum notch of the salary level, who qualifies for a notch progression, will not be eligible for a monetary reward, as the maximum notch has already been reached.

29. PSCBC Resolution 3 of 2009- the agreement on a Revised Salary Structure for Employees on Salary Level 1-12 not Covered by an Occupational Specific Dispensation, in clause 3.6.2.12 that talks to accelerated grade progression provides that with effect from 1 April 2010, an employee who has performed above satisfactory for 12 years accumulatively in a specific salary level, shall grade progress from salary level 4 to 5 or from salary level 5 to 6, or from salary level 6 to 7 to 8. Only 30% of the employees per year may be awarded grade progression in this regard.
30. The courts have pronounced that “unfair” implies a failure to meet an objective standard and may be taken to include uninformed, erratic or inconsistent conduct, whether negligent or intended.
31. The duty rests on the applicants to prove that the conduct of the employer amounted to an unfair labour practice. It is the duty of the employer to conduct performance assessments with its employees and provide the employees with the feedback as well as rewards and benefits due them if there are any, in doing so, the respondent must act fairly.
32. The bundles of documents and closing arguments are now a product of record, therefore it will not serve any purpose to repeat what is contained in them. However, I have considered them as well as the evidence led.
33. The 3 applicants (Mr. Gideon Slabbert, Ms. Susan Dowd and Ms. Catherina Badenhorst) could not produce any evidence to prove that they were within the 30 percent of top performers in the financial year of the dispute at hand in line with the policy as mentioned above in paragraph 30, for them to be eligible for accelerated pay progression.
34. The following facts became common cause between the parties:
- (i) 61 applicants did not meet the necessary requirements or did not possess the requisites for them to be eligible for the payment of the pay progression. There was a concession on record by the applicants to that effect.
 - (ii) Mr. Gideon Slabert commenced employment with the respondent on 1 January 1989, Ms. Susan Dowd commenced employment with the respondent on 4 May 1979 and Ms. Catherina Badenhorst commenced employment with the respondent on 1 November 1992 and they are the only applicants who remained as the applicants in this matter.
 - (iii) The applicants were upgraded to salary level 7 on 1 April 2010.

- (iv) The performance of the 3 applicants mentioned above was significantly above expectations in the 2017/ 2018 PDMS cycle.
- (v) All 64 Clerks are Senior Clerks.
- (vi) The dispute is about the non-payment of the pay progression for the PMDS 2017/2018 financial year.
- (vii) All applicants were not paid the pay progression for the 2017/2018 PDMS cycle.
- (viii) The respondent did not issue the outcome of the grievance.
- (ix) The cash bonus is no longer in dispute.

35. The crux of the matter is whether the applicants did satisfy Resolution 3 of 2009 and whether the 3 applicants (Mr. Gideon Slabbert, Ms. Susan Dowd and Ms. Catherina Badenhorst) were within the 30 percent of top performers in the financial year 2017/ 2018. Whether the respondent was fair when it did not pay the pay progression of 1.5 percent for the financial cycle of 2017/2018. Whether paragraph 3.6.2.12 of the PMDS policy that talks to the accelerated grade progression is futuristic or not considering that the Resolution came into effect from 1 April 2010. Whether the implementation of the said Resolution has a retrospective effect or not. Whether the reasons provided by the respondent for not paying pay progression for the PMDS financial year 2017/2018 were justified and fair or not. The applicants sought payment of the pay progression.

36. It is the applicants' case that by not paying the pay progression the respondent did not comply with the PDMS policy. The applicants were assessed and performed significantly above expectations in that annual cycle. According to them their final annual assessment scores made them to be eligible for the payment of the pay progression. The applicants also provided their calculations. The bulk of the evidence led by Ms. Marais was irrelevant because it mainly focussed on the grade progression model while he later conceded that she did not qualify. On the other hand, Mr. Slabbert's evidence did not assist much in the bone of contention, regarding the pre-condition related to being part of the 30 percent top performers.

37. I am not persuaded by the version of the applicants in this regard in their evidence led and in closing arguments. In any event the 3 applicants (Mr. Gideon Slabbert, Ms. Susan Dowd and Ms. Catherina Badenhorst) conceded that they performed significantly above expectations in the cycle, but could not convincingly rebut the pre-condition related to being part of the 30 percent top performers. They appreciated that the discretion to pay progression was on the respondent regarding the accelerated grade progression and that for one to be eligible for the pay progression s/he must be part of the 30 percent of the top performers per year who may be awarded grade progression.

38. The 3 applicants (Mr. Gideon Slabbert, Ms. Susan Dowd and Ms. Catherina Badenhorst) could not provide cogent evidence that they possessed all the requisites, in particular the 30 percent threshold of top performers for the pay progression to be paid to them, and that the said pay progression was due to them. This occurred despite Mr. Bebula, the respondent's second witness having presented a compelling version when he was at pains explaining and testifying that there must be a spreadsheet for all officials identified for accelerated grade progression who must have the highest above average scores that have been confirmed and moderated by PMDS and they must be on top of the spreadsheet. A submission should then be generated to approve the listed officials and the individual letters would then be handed over to all the identified officials to communicate that they are the beneficiaries of the accelerated grade progression.
39. The applicants neither adduced evidence nor present any submissions to prove their argument that the application of the Resolution is with retrospective effect, despite having promised to do so and to provide case law and the relevant authority to that effect.
40. It is my considered view that retrospectively does not find expression in the Resolution because if it was applicable, it would have been expressly stated in the applicability of the said Resolution.
41. It is therefore my considered view that on a balance of probabilities the respondent did not commit an unfair act or omission against the applicants when it did not pay the pay progression to the applicants. Such did not constitute an unfair labour practice.
42. It follows that the applicants failed to discharge the onus to prove that they qualified and were legible to be paid the pay progression and possessed the necessary requisites for them to be eligible for the payment of the said benefit. Therefore, the respondent did not commit an unfair labour practice as contemplated in section 186 (2) (a) of the LRA.

Award

43. I find that the applicants failed to discharge the onus to prove that the act or omission committed by the Department of Health-Free State, the respondent to them amounted to an unfair labour practice.
44. The applicants' case is dismissed.
45. The applicants are not entitled to any relief.

A handwritten signature in black ink, appearing to be 'Zuko Macingwane', written over a horizontal line.

Zuko Macingwane