



ARBITRATION AWARD

Case Number:
Commissioner:
Date of Award:

GATW3183-22
Johan D. Stapelberg
19 December 2022

In the ARBITRATION between

PSA obo Jessica Mphiwe & 3 Others
(Applicant)

And

South African Revenue Service
(Respondent)

APPROVED

DETAILS OF HEARING AND REPRESENTATION

- [1] This matter was arbitrated on 04 October 2022 and 06 December 2022 at the CCMA's Tshwane offices.
- [2] The parties were represented as detailed in the cover-page of this award.
- [3] The proceedings were recorded digitally, and afterwards uploaded to the CCMA's database. I also took computer notes, which have been summarised in the body of this award.

PRELIMINARY ISSUES

- [4] None.

ISSUE(S) IN DISPUTE

- [5] Whether the applicants have been subjected to an unfair labour practice in relation to how the remuneration and grading policy have been applied to them since October 2021.
- [6] The basis and manner in which the employer exercised its discretion in determining the grading of the applicants under its remuneration policy is to be evaluated to determine if it was done fairly or arbitrarily and the onus will on the applicants to show that it was the latter and that an unfair labour practice had been committed.

Documentary and Other Evidence

- [7] Both parties submitted bundles of documents. Parties agreed the documents are what they purport to be and both parties may refer to the content but must show relevance in doing so.

PRELIMINARY ISSUES

- [8] None.

SURVEY OF EVIDENCE AND ARGUMENT

- [9] The applicant party called two of the applicants to testify. The respondent also called two witnesses.

Applicants' Version

- [10] Thabane Given Ndhlovu (Mr Ndhlovu), testified that he started with the respondent in February 2017 as a CA Article Clerk. He went on to become a trainee and finished his articles in February 2020. On 01 October 2020 he was appointed as a Grade 5A Auditor doing Specialised Audits. He formed part of a collective

grievance, as he believed he should have been appointed at Grade 5B not 5A. The collective grievance was decided in their favour on 11 December 2020.

[11] The present matter pertains to a second collective grievance, submitted on 19 October 2021 on behalf of the four applicants. The desired settlement is for them to be moved to the latest median of Grade 5B in terms of par 6(d) of the 2016 Placement Protocol of Trainees (PPT).

[12] Par 6d) of the Placement Protocol: Principles to Guide the Implementation Process, which reads: *"When the Trainees become permanent, the same remuneration approach will apply as for all permanent staff i.e. they will be paid at least at the minimum or 80% compa-ratio of the grade in which they are appointed, and as they gain experience and become more proficient in their roles, they will move to the median of those grades and jobs"*. SARS did not in his view comply with this second part and he views the respondent's conduct as an unfair labour practice.

[13] In their second grievance, they asked management how they could gain experience to move to the mid-point (median), but they received no response, hence the dispute.

[14] During cross-examination, Mr Ndhlovu confirmed the dispute is only based on the 2016 PPT. He conceded that the PPT only applies to Trainees and not permanent employees. However, he maintained that in terms of par 6d), since they had gained experience, they had to be placed at the mid-point of their current grade. He disagreed that in 2021 when the grievance was lodged, the fact that he was a permanent employee meant the PPT could no longer apply to him.

[15] The witness agreed that with the first grievance about their grading, the outcome mentioned that "The aggrieved parties should not compare themselves to their peers who have already qualified as CA's". He conceded that the Chairperson disagreed at that time that they had to be placed at the median of Grade 5B, and only granted the regrading. However, he maintained that since they had since gained experience in their roles, they had to be moved to the midpoint.

[16] He conceded that since a qualified CA is not the same as someone who has not yet qualified, SARS has been differentiating in practice in the way Trainees were graded and appointment, though he denied that this was guided by a policy and for that reason in his view such academic incentivising is not allowed.

[17] When asked who decides whether an employee is experienced and proficient, the witness conceded that it is management that decides that. He also conceded that he is not aware of a specific standard that

would qualify him to be paid at the median for Grade 5B and that without a guide from management they have to "use our own guide". He is not aware of anyone in their division for whom management approved their proficiency and experience levels.

[18] It was pointed out that the PPT cannot be read in isolation. The remuneration policy that applies to all permanent staff – including former Trainees who were appointed – also references pay progressions and highlights on p.43 of bundle R, under Policy Provisions, par 2.1d)i) and ii) the concepts of proficiency, experience and employee performance will lead to employees reaching market-related pay bands over time, within budget provisions. The witness said he does not dispute the Remuneration policy but believes it could only start applying after the PPT provisions have been implemented fully.

[19] Katekile Shawn Magagane (Mr Magagane), testified that there is no guidance on when implementation of being moved to the median would be and no time frame created as to when it would be implemented. The respondent was not consistent in that they treated those who passed the SAICA Board exams differently, which was not fair. The PPT means that it is not entirely at the respondent's discretion.

[20] During cross-examination, Mr Magagane was asked what his level of proficiency was that entitled him to a salary increase. He responded that there was no explanation or indication from management about what is considered proficient, so they (the applicants) based it on their own interpretation. He was unable to dispute that there is no policy document that sets out what the expected levels of proficiency are that would warrant a move to the median.

[21] He conceded that he is not aware that there are many SARS employees scoring beyond 90% on the performance scores, yet this does not entitle them to increases. He also conceded that while an accountant and a CA (Chartered Accountant) can be on the same NQF level, one may not be referred to as a CA, nor can one perform the functions of a CA without being a CA. He was unable to comment on whether this distinction is a fair ground for discrimination.

Respondent's Version

[22] Alice Ann Boyd (Ms Boyd / Alice), Lead: People Management, Specialised Audit since August 2020 testified. She has worked for the respondent since 2012. When she joined the Specialised Audit in August 2020, she got to know the applicants – she was also involved in their grievance process.

[23] The applicants were part of the SARS Training programmes. These are for CA's, Learnerships, and Graduates. The CA Program is to get CA's employed at SARS. It is more expensive, and exams paid for by SARS. CA's are on grade 5B. The graduates' program does not cover the same fees and benefits, and

graduates are placed at grade 5B, as the applicants were. When Trainees become permanent the normal remuneration policies that apply to permanent staff apply to all. Once permanent, employees who are former trainees are no longer governed by documentation that is applicable to prospective employees.

[24] Regardless of performance scoring for others in the applicants' position being above 70% or even as high as 90% this does not automatically entitle one to be placed at the median in terms of earnings in a grade.

[25] During cross-examination, the witness said that the pay progression policy differentiates between permanent staff and graduates, contractors, and so on. When Trainees become permanent the same applies. She herself with 10 years' experience has not been moved to the median and it also does not apply to anyone else in that manner. Regarding applicant's claim, the company policy makes it clear no expectations should be held – SARS policy does not say that one will necessarily move to the median over time – there is no guarantee. P.52 of A – par 6(b) makes it clear that trainees and learners cannot have such an expectation.

[26] Some employees have over 30 years' experience and still cannot claim that their experience entitles them to be moved to the median for their grade, much less the applicants with only 2 years permanent employment.

[27] Aletta Elizabeth Krige (Ms Krige / Ilze), a Specialist: Remuneration and Benefits for the past 12 years testified that she is involved in policy design, guidance on policy and appointments – broadly speaking a Remuneration Manager and consultant and also involved in policy provisions, including having drafted the remuneration policy. She referred to the Human Capital and Development Internal Policy Remuneration. Under the Purpose, they have not defined what high performance or exceptional performance are. These things are dependent on the respondent's agreement with organised labour, the extent to which across the board increases may negate this approach, and budgetary constraints. Performance is also evaluated relative to others. While there is an intention stated for pay progressions, it depends on available funds.

Closing Arguments

[28] Parties submitted closing arguments which have been duly considered but will not be repeated herein, except to say that the applicant maintained they were subjected to an unfair labour practice and sought to be awarded payment at the median of their grade, retrospectively from October 2021; whereas the respondent maintained that no unfair labour practice had been committed and that the respondent exercised its discretion fairly and reasonably.

ANALYSIS OF THE EVIDENCE AND ARGUMENT

[29] Based on the evidence and argument presented to me, I find that the applicants have failed to show that they had a right or expectation either in law or contract to be moved to the median or midpoint of their grade's pay scale. The applicants also failed to show that the respondent's failure to award same was a capricious or arbitrary decision.

[30] The applicants sought to interpret the PPT as something which bound the respondent in an isolated way – disconnected from its remuneration policy. This approach does not make logical sense and is on its own likely to cause anomalies and unfairness. The PPT only applied to the applicants while they were trainees, and it gave a snapshot of what to expect going forward – in the event that they become permanent employees. It also specified that when that happened the remuneration policy that applies to all permanent employees would apply to them as well. The content is not disconnected from the remuneration policy. Both documents reference proficiency and experience playing a role in pay progressions over time. Neither set a specific timeline, which is to say management retains a discretion – even if this is also limited by factors such as budgetary constraints and negotiations with organized labour.

[31] The undisputed fact that some employees with 10 and 30 years in a particular role have not yet reached the median of their grade, and that budgetary constraints and agreements with organized labour on across the board increases also play a logical role, makes sense and shows a reasoned, non-arbitrary way of determining pay progressions to all permanent employees – which would include former Trainees. The applicants with barely 2 years' experience have no basis for claiming an unfair labour practice has been committed.

AWARD

[32] I find that the applicants failed to prove that they have been subjected to an unfair labour practice.



Johan D. Stapelberg
CCMA COMMISSIONER