



ARBITRATION AWARD

Case Number: GAJB 1144-22

Commissioner: Lungile Matshaka

Date of Award: 30 March 2022

In the **ARBITRATION** between

PSA obo S Naidoo

(Union/Applicant)

and

Gauteng Enterprise Propeller

(Respondent)

Union/Applicant's representative: _____

Union/Applicant's address: _____

Telephone: _____

Telefax: _____

E-mail: _____

Respondent's representative: _____

Respondent's address: _____

Telephone: _____

Telefax: _____

E-mail: _____

DETAILS OF HEARING AND REPRESENTATION

1. This is an award following an arbitration hearing held on 15 March 2022 in terms of section 186 (2) (a) of the Labour Relations Act (LRA), No. 66 of 1995, as amended, at the Offices of CCMA in Johannesburg. Ms. Y Ralawe, PSA official represented the Applicant, whilst the Respondent was represented by its General Manager, Mr. V Mulaudzi.
2. The proceedings were digitally recorded, and witnesses gave evidence under oath. The parties were enabled to submit closing arguments in writing.

ISSUE TO BE DECIDED

3. I am required to decide whether the Respondent's conduct constituted an unfair labour practice by not placing the Applicant at D3, and if it so, her salary should be rectified from D1 to D3 maximum level as well as reverting to Manager Finance's designation.

BACKGROUND AND SURVEY OF EVIDENCE

4. The Applicant was appointed as an Assistant Manager Finance on 9 November 2005. According to the Respondent's representative, Mr. Mulaudzi, on 8 April 2014 the Respondent revised its organizational structure and the Applicant's position of Assistant Manager Finance was changed to Accountant / Financial Accountant position and such was communicated to the Applicant.
5. On the other hand, according to the Applicant, the former CFO in July 2013 proposed that the Applicant's position be upgraded to a Financial Management position with effect from July 2013, but the CFO was suspended at the same year (2013) and later resigned.
6. In the above regard, what came to light in the Applicant's version, is that her position of Financial Management was downgraded, and the two Financial Accountant positions were created. On the other hand, the Applicant, according to the Respondent and as per the letter dated 09 January 2015, was migrated to the new staff establishment as an Accountant without change in the salary level and conditions of employment with effect from 8 April 2014. Notably, what was stressed in the said letter was the confirmation of her changed position from Assistant Manager Finance to Accountant.

7. In pursuing the matter further, the Applicant referred an unfair labour practice to the CCMA on 26 November 2019 and the matter was heard on 6 January 2020 which resulted in settlement agreement

where the Applicant was paid a salary difference of D1 to D2. This had the effect of her being paid at the entry level of an Assistant Manager's level as other newly appointed Assistant Managers paid at D2.

8. Not being satisfied with the agreed situation, afterwards the Applicant referred the second unfair labour practice where she alleged that her position of Assistant Manager D2 was graded at Manager level D3. She therefore wanted to be paid at Manager level backed from the date of job grading.
9. On the other hand, the Respondent prays that the matter be dismissed as reliable evidence was not produced by the Applicant.

Applicant's evidence

10. The Applicant's evidence was to the effect that:

10.1 She was appointed on 09 November 2005 as an Assistant Finance Manager. She testified that her job was profiled as a manager. She referred to the proposed structure of 2013 which she had an opportunity which she discussed with the then CFO (Chief Financial Officer). Her discussions with the latter led her to believe that she was earmarked, or her job was upgraded to the level Manager Financial Management.

10.2 However, what then transpired was the suspension of the CFO for three (3) months and thereafter he resigned.

10.3 In the end two posts of accountants were created. Having noted that her position has been downgraded from an Assistant Manager to Financial Accountant, she then referred an unfair labour practice.

10.4 As an outcome of this process she is seeking that her position be stated as a manager's job, that it be graded as a manager on a D3 level and be remunerated whatever is due to her from 2013 to the present.

10.5 In cross-examination it came out clear that there was a proposed structure of 2014. It also came to light that the approved structure by the Chief Executive Officer on 8 of April 2014 was outcome of the proposed one.

10.6 What also became evident, the Applicant relied on the proposed structure to pursue her case. It further came to light that in terms of settlement agreement recorded at the CCMA under case GAJB 27995-19, the parties agreed that the Respondent shall implement the Applicant's adjustment of salary package as per letter dated 11 November 2019.

10.7 I will certainly reflect on the abovementioned settlement agreement in my analysis.

10.8 The Applicant further conceded that the Respondent's document (*R1 page 2*) that reflects its approved organizational structure is in line with the letter dated 09 January and addressed to the Applicant under subject entitled: **Migration to the new Staff Establishment of the Gauteng Enterprise Propeller**.

11. The Applicant's witness, Ms. Ledwaba, confirmed her position as a Business Analyst. She started at the Respondent's employ in 2006 as HR Assistant and after two (2) years she took over her present position. She further confirmed that her involvement with the regards to the regrading of the Applicant's position started from 2016 to 2017. She further confirmed that she knows the document (reflecting GEP PAY SCALES 2012 / 2013) included in the Respondent's bundle. When the document was introduced, no further information was furnished to the staff.

12. She testified that in 2012 the new CEO (then) opted for their jobs to be profiled. When the Applicant's job was profiled, she was supposed to be at D3. She expressed her view that justice wasn't done in the Applicant's case in that she demoted to the position of an Accountant.

13. She insisted that their point of departure is that the Applicant was demoted from the Assistant Manager's to that of an Accountant. Notably, the structure made provision for two (2) positions of accountants. Yet, the Applicant is still doing operating in two (2) positions all by herself.

14. In cross-examination Ms. Ledwaba conceded reluctantly that the proposed document reflecting the Applicant's position as Manager: Financial Management on the finance structure cannot be legitimate or final as it has no signature, unofficial and handwritten and scratched.

Respondent's case

15. The Respondent opted not to make submissions in its closing arguments and not to call any witness. They were as follows:

15.1 The Applicant was appointed as an Assistant Manager Finance on 9 November 2005. On 8 April 2014 the Respondent revised its organizational structure which was approved by the Board. The position of Assistant Manager Finance was changed to that of an Accountant / Financial Accountant, and such was communicated to her as per letter dated January 2014.

15.2 The organizational structure of the Respondent was reviewed and approved on 24 May 2016 and 27 May 2017. The Applicant's position remained as an Accountant with three positions of Officer Accounts reporting to Accountant / Financial Accountant.

15.3 It is further submitted that all positions as per approved organizational structure of 8 April 2014 were graded by 21st Century on 23 December 2016 structure. The position of Accountant was graded at D1, and all positions of Assistant Managers were graded at D2.

15.4 The Applicant referred a case of unfair labour practice to CCMA on 26 November 2019. The matter was heard on 6 January 2020 which resulted in settlement agreement where the Applicant was paid a salary difference of D1 to D2. This means that she is being paid at D2 entry level which is an Assistant Manager level as other newly appointed Assistant Managers.

15.5 It further submitted that the Applicant referred another unfair labour practice (present dispute) to CCMA where alleged that her position of Assistant Manager D2 was graded at Manager level D3. She therefore wanted to be paid at Manager level backdated from the date of job grading.

15.6 In support of case, the Respondent noted that the Applicant produced a proposed organizational structure of 2013 and an unsigned job grading job profile. It has also been noted that she alleges that her line manager at the time communicated to her that her position of Assistant Manager D2 was graded at D3. Yet she failed to have her previous line manager to come and testify as her witness.

15.7 She further failed to produce signed placement letter as a Finance Manager which confirms her placement into the position after the job grading.

ANALYSIS OF EVIDENCE AND ARGUMENT

16. As a point of departure, section 186(2)(a) defines "Unfair Labour Practice" as any unfair act or omission that arises between an employer and an employee involving unfair conduct by the employer relating to the promotion, demotion, ... or training of an employee...'

17. According to A van Niekerk et al (**Law@work, 3rd Ed, 2014**) from the terms of the definition, it seems that specific unfair labour practices mentioned in subsections (a) to (d) are a *numerus clausus* and that the list is closed. In particular, the use of the word 'involving' in the preamble to the definition (rather than the word 'including') would suggest that the list is limited to those practices specifically mentioned.

18. As starting point, in terms of section 186(2)(b) of LRA unfair labour practice means any unfair act or omission that arises between an employer and employee involving the unfair suspension or any other unfair disciplinary action short of dismissal in respect of an employee.

19. John Grogan (**Dismissal Discrimination and Unfair Labour Practice 1st Ed, 2005**) makes the point that to fall within the terms of section 186(2)(b), the disciplinary action against an employee short of dismissal must be disciplinary both in nature and intent. He goes on to say that action is 'disciplinary' if it is aimed at correcting errant behaviour for which the employee is responsible.

20. Turning to the present case, it is common cause that following the revision of the organizational structure approved by the Board on 8 April 2014, the Applicant's position of Assistant Manager Finance was changed to Accountant / Financial Accountant, and such was communicated to her as per the letter dated 9 January 2016 (A Bundle page 63).

21. It is further common cause that the organizational structure was reviewed on 24 May 2016 & 24 May 2017 and the Applicant's position remained as Accountant / Financial Accountant with three (3) positions of Officer Account reporting to her.

22. I have already alluded to a settlement agreement entered between the parties that effectively concluded that 'the Respondent shall implement the Applicant's adjustment of the salary package as per the letter dated 11 November 2019'.

23. The said letter addressed to the Applicant with the subject "**Adjustment of Salary Package**" had this to say:

"Following the formal complaint, you lodge with the Acting Chief Executive Officer, I am pleased to advise that approval has been obtained to adjust your annual package from R751 387.08 to R769 048.85. Further, note that your position as Financial Accountant will remain as per the approved organizational structure as GEP is undergoing reconfiguration process.

Your arrear salary from 01 January 2013 to 31 October 2019 will be paid with the November 2019 salary run.

...

Kind Regards

Vincent Mulaudzi (Signed)

General Manager: Corporate Support and Administration

Date: 11/11/2019"

24. In her formal response dated 13 November 2019, the Applicant pointed out that – *"I am still applying my mind to the proposed offer. My undertaking will be known to you by end of business day, 19th November 2019, as I am seeking Professional advice on this matter".*

Yours sincerely

T Naidoo (Signed)

25. No correspondence has been included about the Applicant's final response, suffice to note that soon thereafter an unfair labour practice dispute was lodged with the CCMA that resulted into a settlement agreement dated 06 January 2020 under Case Number GAJB 27995-19

26. Interestingly, the said settlement merely endorsed that *"The Respondent shall implement the Applicant's adjustment salary package as per letter dated 11 November 2019"*.

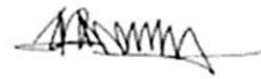
27. I must accept the Applicant's submission that the Applicant has referred a second referral (present matter) on the same alleged unfair labour practice matter under a different case number (GAJB 1144-22).

28. What the purports to be a dispute cannot stand, as it is based on unauthentic documentation. Further, on a balance of probabilities and taking what has been presented before this tribunal into account, I can only conclude that the Applicant has failed to discharge onus of proving that the Respondent's conduct constituted an unfair labour practice.

AWARD

23. I therefore find that the Applicant has failed to discharge the onus of proving that Respondent's conduct has led to unfair labour practice in relation to the position of the Applicant in terms of the configured organizational structure of the Respondent.

24. The matter is hereby dismissed.



Signature: _____

Commissioner: **Lungile Matshaka**

Sector: **Economic Sector**

APPROVED