15 August 2021

Enquiries : **Nkhensani Mabunda**
Tel : 012 663 7446
Fax : 012 643 1601
Email : NkhensaniM@elrc.org.za

TO: **Vilana D**
diligentm@gmail.com

TO: **Department of Higher Education & Training**
Qonde.g@dhet.gov.za

Dear Sir/ Madam

RE: ARBITRATION AWARD

CASE NAME: VILANA D vs DEPARTMENT OF HIGHER EDUCATION & TRAINING
CASE NUMBER: ELRC725-20/21GP

I transmit herewith a copy of the Arbitration Award for the above-mentioned matter for your attention and information.

The matter is considered closed by the Council.

We thank you for your co-operation in this regard.

Kind Regards,

General Secretary
Education Labour Relations Council

pp 13/8/21

elrc
EDUCATION LABOUR RELATIONS COUNCIL

OFFICE OF THE GENERAL SECRETARY

All correspondence should be addressed to:

The General Secretary
ELRC
Private Bag X126
Centurion
0046
Gauteng
RSA

Enquiries:

Foca N.O

Tel: 012 663 7446

Fax: 012 643 1601

E-mail: cindyfoca@elrc.co.za

Website: www.elrc.org.za

Physical Address:

ELRC Building
261 West Avenue
Centurion
0046
Gauteng
RSA

ARBITRATION AWARD

Case Number:	ELRC725 -20/21GP
Commissioner:	GRACE MAFA-CHALI
Date of Award:	15 AUGUST 2021

In the ARBITRATION between: -

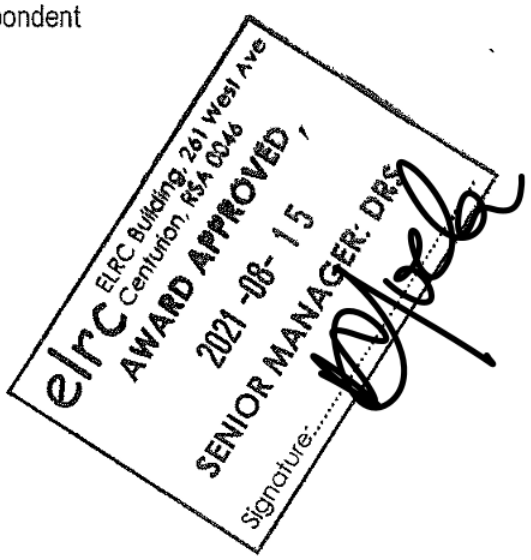
MANDLENKOSI DILIGENT VILANA

Applicant

And

SOUTH WEST GAUTENG TVET COLLEGE

Respondent



DETAILS OF THE HEARING AND REPRESENTATION

1. The matter was set down for arbitration on the 12th July 2021 and 19th July 2021 on the virtual platform, Zoom.
2. The Applicant was represented by PSA official, Paul Thothobolo and the Respondent was represented by Shawn Carney, its Senior IR Officer.
3. The proceedings were recorded on Zoom.

ISSUES TO BE DECIDED

4. Whether the Respondent's failure to pay the Applicant benefits for pay progression in terms of Integrated Quality Management System and the Respondent's failure to pay the Applicant for marking exam sheets amounted to an unfair labour practice in terms of Section 186(2)(a) of the Labour Relations Act 66 of 1995 (The Act).
5. If so, I must determine the appropriate relief.

BACKGROUND TO THE ISSUES

6. The Applicant was employed by the Respondent as a Senior Education Specialist since 15 September 2008. He was put on precautionary suspension on 11 July 2019 pending an investigation into allegations of sexual harassment at the workplace. At the time of the arbitration hearing, the investigations were still underway.
7. As a result of his suspension the Applicant was not assessed for performance in terms of the Integrated Quality Management System (IQMS) for the cycle 2019/2020 and 2020/2021 and was therefore not paid progression pays for those two (2) years. It was common cause that IQMS is regulated by the ELRC Collective Agreement No 5 of 2005.
8. The Applicant was also not informed to participate in the marking of examinations in November 2019 and November 2020 although he was successfully appointed as a marker for those two (2) years.

9. The Applicant prayed that an order be made against the Respondent to pay him progression of 1.5% of his annual salary for 2019 and 2020 performance cycles and for marking of examination benefits.
10. The Respondent disputed the Applicant's claims of unfair labour practice and argued that it has not followed the IQMS in respect of the Applicant and that the Applicant was not informed to participate in marking of examinations as he was on suspension.
11. The Applicant led evidence through one witness. The Respondent also led evidence through one witness. The Applicant submitted documentary evidence in the form of the Bundles marked B1, B2, B3 and B4 and Respondent's Bundle of documents were marked AR1, AR2 and AR3.
12. At the conclusion of the arbitration process on the 19th July 2021, the parties requested to submit their written closing arguments and they were ordered to do so by not later than 26th July 2021. Both parties have obliged. I have considered their closing arguments in my analysis of evidence and arguments to come to my findings.

SURVEY OF EVIDENCE AND ARGUMENTS

APPLICANT'S EVIDENCE

13. The Applicant, **Mandenkosi Diligent Vilana** made an affirmation and testified that he was employed on 15 September 2008 in the position of Senior Education Specialist and earned a salary of R425 000,00 per annum.
14. He was placed on precautionary suspension with pay since 11 July 2019. He was not paid pay progression in terms of the IQMS in the cycle of 2019/2020 and 2020/2021. He communicated with Andre Schlemmer: Deputy Principal Corporate Services about the issue but his response was negative. He also wrote him a letter requesting him to resolve the issue.
15. His pay progression is 1,5% of his annual salary, which would have been payable on his annual salary of R425 685,85 at the end of 31 March 2019, and the following year added to the increased notch payable on 31 March 2020.
16. He has therefore been financially disadvantaged on his remuneration, pension fund and medical aid benefits. It was unfair to disadvantage him due to his suspension and the disciplinary hearing which have not been finalised.
17. Reference was made to his calculations of the IQMS implementation as at 31 March 2019 on Bundle B1.

18. His calculations show that the 1,5% on his annual salary of R425 685,00 would have been R6 385,28, adding that amount to R425 685 would have put him on the new notch of R432 070,00,00 as at April 2019.
19. Furthermore according to his calculations, for April 2019 to April 2020, 12 months period the Respondent owes him an amount of R6 481,05 which is 1.5% on R432 070 putting him to new salary notch of R438 551,00 as at April 2020. For April 2020 to April 2021 the Respondent owes him R 6 578.27 which is 1.5% of R438 551, divide it by 12 months is R548,17 multiply it by 15 months is R8 222,55. The two amounts of R6 481,05 added to R8 222, 55 total amount of R14 703,60. Therefore his new notch as at April 2021 would have been R445 129,00.
20. Clause 6 of Bundle AR2 titled Leave taken during the IQMS cycle should have been implemented in his situation as it was not his fault to complete the 60 days of the IQMS, and in his view this was an exceptional circumstance not of his own making which is equivalent to paid leave like an employee who is on maternity leave, The Development Support Group (DSG) should have sat and decided on his scores as stipulated in the IQMS process.
21. On 28 January 2020 he signed a settlement agreement with the Respondent at the ELRC, as it appears on Page 93 of Bundle AR2, and the Respondent agreed that he shall remain suspended on full pay including benefits.
22. He received an advertisement to apply for marking of examinations for November 2019 and November 2020 and he applied. He received in his mailbox a message from a colleague in February 2021 who told him that his name was on the list of those successfully appointed to go for marking. He did not receive the information about his appointment for marking. He last went for exam marking in July 2019.
23. He then took the matter up with the office of assessment unit but he could not get answers and he requested Mr Schlemmer to resolve it. Mr Schlemmer told him that if he was suspended he would not go for marking. However, in the Personnel Administrative Measures (PAM), submitted as Bundle B3, it is not stipulated that an official cannot mark when on suspension. Reference was made to Chapter E of PAM, Clause 4 titled Public Administration which has the criteria 4,2(a)(b)(c) for appointment of educators for exams related work. He met the requirements set out in the criteria. He saw his appointment with reference to Bundle AR2 Page 8, for November 2019 marking and on Bundle AR2 Page 5 for November 2020 marking when it was sent to him by Shawn Carney on 07 July 2021. Campus Managers are responsible to give out the appointment letters to those appointed for marking.

24. When he realised that he was appointed for marking examinations but was not notified, he was hurt as the employer has broken their agreement. He acknowledged that it was within the rights of the Respondent to discipline him, but that should not affect his benefits and not use their position of advantage.
25. He did not apply for marking for new year 2022 as he was not informed about the advertisement and he is not allowed to visit he campus during his suspension.
26. Reference was made to the Memo TE02 of 2020 on Page 09 of Bundle AR1, No 7. The date of Memo is 10 February 2020, which stipulates those lecturers who are on suspension or having disciplinary cases against them are not eligible for appointment. This clause affected him. He was not aware of the Memo until he received it from Shawn Carney on 07 July 2021 and nobody explained to him the content of the Memo. He was not sure if the same Memo was applicable for 2019 marking.
27. He was disadvantaged for not being able to go to marking. Reference was made to Bundle B4, which is a record of the marking sheets for his making for June 2019. They were allocated scripts by the Chief Marker to share in a group of 50 and were paid according to the number of scripts they marked at the marking centre in terms of the tariffs in Bundle B2, Page 4 of Schedule A, at the level in table 2 for N3 and N4 rate. The rate per answer sheet book for 3 hours paper was R53, 80 in July 2019.
28. He prayed that the Respondent be ordered to comply with their agreement and pay back the remuneration he would have received due to his pay progression. Reference was made to Bundle B1 with the calculations, and his annual salary of R425 685,00 would have been adjusted in the year 2019 to R432 070,00, to R438 551,00 and to R444 129,00 respectively for the subsequent years. In total he has lost remuneration to the total amount of R19 444,00. 2019, In 2020 would have been on a salary scale of R 445 125,00. Copies of his pays lips were submitted in evidence on Bundle B4.
29. He has also lost a total amount of R 56 490 ,00 for November 2019, July 2020 and November 2020 marking sessions, which amount he calculated based on the tariffs for June 2019 in accordance with the number of scripts he marked at that time. The tariffs were submitted in evidence on Bundle B2 and mark sheets were submitted in evidence on Bundle B4.

The Applicant closed his case.

RESPONDENT'S EVIDENCE

30. The only witness of the Respondent, **Eldah Busisiwe Statu** testified under oath that she was the Campus Manager and was the Accounting person responsible for the South West Gauteng TVET College campus.
31. The Applicant was the Head of the Department for the Study Programme of National Certificate Vocational and has Senior Lecturers who head each department with their own Lecturers.
32. In 2019 at the middle of the year there were allegations levelled against the Applicant which affected the operations and he was suspended from work. The Applicant was still on suspension.
33. Reference was made to Bundle AR1 Page 6, which is an email from Mr Sekobane, the Academic Manager of the Assessment Unit forwarded to Campus Managers. No 7 of the email was read into record. Usually, towards the national exam for the June semester and also in the second semester towards the November time, applications are opened for lecturers for marking.
34. The document on Page 94 of Bundle AR3, is an email she sent on 11 November 2019 to Mr Khoza and Mr Ntanjana, copied Mr Sekobane after receiving letters of appointment for markers.
35. The purpose of the email was to inform them as requested, of the lecturers who has been appointed for marking but had resigned or no longer working, those not teaching the subjects appointed and those whom have been suspended or have disciplinary issues. She then sent three (3) names as they appear on the email including the Applicant's name.
36. The Applicant would not qualify as a marker because he was on suspension and the email she sent indicated so. She did not sent any communication to the Applicant regarding this communication but only sent it to the Department as they have requested the names. It was the responsibility of the IR office to communicate with the employees who are on suspension.
37. Reference was made to Page 9 of AR1, which is the invitation to lecturing staff to marking national examinations. Point No 7 was read into record and according to its contents, the Applicant would not be eligible for marking. Reference was made to Pages 12 and 32 of AR2, the Collective Agreement No 5 of 2005 dated 31 March 2005, in particular. Bullet No 4. Page 36 of the Collective Agreement was read into record. What is stated on Bullet no 4 was not done as IQMS is done only when the official is on duty as the educator or lecturer must meet on annual basis with their subordinates to measure his or her performance for a particular period of the IQMS.
38. The Applicant was familiar with the IQMS process, and aware that the employee will not be appraised if not on duty. Such employee will not be scored for the IQMS until the employee returns to work, then the performance evaluation process will start again.

39. She was not precisely sure on the dispute resolution procedure for IQMS if the employee is not happy.

The Respondent closed its case.

ANALYSIS OF EVIDENCE AND ARGUMENTS

40. This dispute was referred as an unfair labour practice related to pay progression and marking benefits in terms of section 186(2)(a) of the Labour Relations Act(LRA). Section 186(2) of the LRA states that "***Unfair Labour Practice*** *means* *any unfair act or omission that arises between an employer and an employee involving –*

(a) 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 a benefit to an employee.* (Own underlining). This particular dispute relates to provision of benefits to an employee. The onus to prove the alleged unfair conduct or omission rests on the employee.

41. Most of the facts in this matter are common cause, and in particular that the Collective Agreement No 5 of 2005 on IQMS for Public FET College Based Educators is applicable to the Applicant and the Respondent for managing developmental appraisals and performance measurement.

42. It was further common cause that the Applicant was put on precautionary suspension on 11 July 2019 pending investigation of some alleged acts of misconduct relating to sexual harassment and he was never subjected to IQMS since his suspension; and consequently not paid any pay progressions for 2019/2020 and 2020/2021 IQMS cycles. The Applicant argued that it was not his fault that he was not assessed in terms of the IQMS and as such his prolonged suspension disadvantaged him financially. The Applicant prayed that the Respondent pay him the salary adjustments of 1.5% of his annual salary and back pays of his salary notch progressions from April 2019 to July 2021.

43. The Applicant referred to the ELRC a dispute against the Respondent challenging his precautionary suspension and the dispute was not adjudicated as it was settled and a settlement agreement was reached on 28 January 2020 that the Applicant shall remain suspended on full pay including benefits

until his disciplinary hearing. As at the time of the arbitration process, the Applicant was still on suspension and disciplinary processes had not yet commenced.

44. The Applicant gave his own testimony. He made reference to Section B, The Implementation Process of the Collective Agreement; Clause 5 (Guidelines on Evaluation and Adjustment of scores) and argued that it must be applicable to him as an exceptional circumstance as his suspension negatively affected his performance evaluation; and therefore he qualified for an adjustment of a score of 2. The Applicant also testified that Clause 6 of the Collective Agreement dealing with leave taken during the IQMS cycle is also applicable to him since he was absent from work during the two (2) IQMS cycles. As a Supervisor he would normally apply Clause 6 towards his subordinates who went on accouchement leave.

45. I however find that Clause 6 is not applicable to the Applicant as argued as he was not on leave. I agree with the Respondent's argument with reference to Chapter J (General Measures) Clause 1.4 of PAM that the leave provisions are not applicable to the Applicant. However, I also find that Clause 1.4, Chapter J of PAM as suggested by Respondent is also an irrelevant clause at it states that an educator shall not be considered to be on leave if she or he must appear as a witness in any misconduct proceedings or in a misconduct investigations. The Applicant was not a witness in any of the mentioned proceedings but was on suspension pending misconduct investigations.

46. The Applicant argued that the prolonged suspension has disadvantaged him in terms of benefits, even though the Respondent signed a settlement agreement with him at the ELRC that he will be paid his benefits for as long as he remain on suspension. It is my considered view that benefits referred to in the settlement agreement would also include any benefits arising out of the implementation of the IQMS as regulated in the Collective Agreement. Collective Agreements once signed by the parties are binding on the signatories and become sources of rights which any of the parties can lawfully claim performance or application thereof.

47. The Respondent argued that the Applicant did not follow the grievance procedure in terms of the IQMS. Applicant could not have followed the Clause 2.7 grievance process of the IQMS as this process is followed when an employee is aggrieved with his or her evaluation. In this instance it is common cause that the Applicant was never even evaluated. The Applicant has however testified that he lodged his grievance with Andre Schlemmer on 02 February 2021. This would not have been a grievance in terms of the IQMS as he just wrote communication to Andre raising his concerns about

non- implementation of IQMS for him.

48. The Respondent's witness Busisiwe Statu testified that IQMS is only conducted when an official is on duty and that it was not done with the Applicant as the official must be present at work; and further that such employee will not be assessed for IQMS until the employee returns to work. It is not clear form her evidence what happens then to the lost years when the employee has not been evaluated. The witness has not made reference to the IQMS policy provisions to support her assertions. When she was shown the settlement agreement signed by the Applicant and the Respondent that he will be on suspension with full pay and benefits, she responded that if the agreement came to her knowledge at that time she wrote the communication to Khoza in November 2019, she would have ensured that the agreement is complied with and would have referred it to Labour Relations Department. The Applicant's version to the witness in this respect was very irrelevant as the settlement agreement was only signed in January 2020 after she has sent the communication to Khoza. She was open and frank that she was not 100% conversant with all IQMS provisions. Her testimony was largely on the process for appointment of markers.

49. The Respondent submitted and argued that the Applicant was not at work since July 2019 but on suspension; that it was impossible to subject him to the IQMS process and therefore he was not entitled to the pay progression for the period that he is on suspension until he returns to work. It was further submitted and argued by the Respondent that the investigation process was prolonged as it was done by an external service provider, and there were challenges with the COVID-19 lockdown, which submission was totally rejected by the Applicant who held a view that the Respondent was deliberately delaying the investigation process in order to frustrate him and deny him his benefits. The Applicant argued that the disciplinary hearing should have been completed by the time the arbitration process took place since he was able to refer the dispute to the ELRC and the matter has reached the arbitration process already. He believed that it was not impossible for the Respondent to conclude the investigation.

50. A copy of the internal email communication between the Respondent's representative Shawn Carney and Rina Moshwane (HR official) was presented in evidence. In the communication Shawn requested clarity on IQMS policy provisions pertaining to this matter and Rina indicated to Shawn that where an employee is on suspension from their duties due to a pending investigation, such employee will not be rewarded notch progression whilst the case is pending and pay progression will

only be implemented after the case has been finalised and the outcome of the case recommend as such.

51. This documentary evidence is regarded as hearsay evidence and inadmissible as the author of the email has not been called as a witness to confirm the contents of the email. The Respondent relied on this email communication but even if it was to be admissible, upon scrutiny of the contents of the Rina's email, it can be noted that there is no reference to any IQMS policy provisions to support the averments she made therein.

52. The Respondent argued that it has complied with the Collective Agreement 5 of 2005 on IQMS and Memorandum TEO3 of 2020. It is however my considered view that the there is no IQMS policy provisions prohibiting the employee on suspension to be subjected to the IQMS process and not be rewarded for the notch pay progression. I suppose that the signatories of the Collective agreement may have not anticipated a precautionary suspension to take such a prolonged time as investigations are normally concluded as reasonably as possible. I am however not empowered to make any determination on the fairness or otherwise of the precautionary suspension as it is not the dispute before me.

53. The Applicant argued the Respondent denied the Applicant an opportunity to mark even before the Memorandum TEO3 of 2020 came in operation and the Applicant was not informed of its contents by the Campus Manager until he became aware of it on 07 July 2021 from Shawn Carney on service of bundle of documents for the arbitration process. It was further argued that PAM was the source of document giving the guidance and directives on marking of examinations and the Respondent failed to provide evidence of resolutions or statute which disqualified the Applicant from marking examinations.

54. The Applicant also argued that Collective Agreement 5 of 2005 on IQMS as well as the ELRC settlement agreement were sufficient to support his pay progression claim.

55. The Respondent on the other hand argued that I must reject the Applicant's evidence as he was untruthful in some of his responses which damaged his credibility because his evidence was unreliable and improbable. Furthermore the Respondent argued that its witness was honest in her testimony which was consistent and her evidence was corroborated by documentary evidence on IQMS policy and Examinations Marking Guidelines.

56. It is clear that the process of IQMS involves a number of participants and it starts with the employee undertaking a self-evaluation of his performance, then followed by a performance evaluation and scores allocation with the Development Support Group (DSG) and the moderation process. I am cognisant of the fact that the Applicant testified that one of his suspension conditions was that he must not be on campus premises and therefore it was impossible for him to come to campus for any processes even if he wished to do so.

57. I have noted that the suspension has taken two (2) years as at the time of this arbitration hearing. It becomes very unfair on the Applicant not to receive his benefits due to the prolonged suspension if there is no legal and fair justification for such. A person on precautionary suspension would be entitled to his or her full pay with full benefits. The Respondent could not also give certainty with regard to any sooner possible initiation of the disciplinary processes. It is my considered view that, as the Applicant was on suspension with no evidence of performance, and it was not his fault that he was on prolonged suspension, the Respondent could have uplifted the conditions for him to access the workplace on a particular day with very strict monitoring for the evaluation process as it has powers to do so. The DSG could allocate a default score based on his suspension as ***"exceptional circumstances"*** provided in Clause 5 of the IQMS policy. The clause does indicate that the exceptional circumstances must be recorded in the assessment instrument serving as compelling evidence on the allocation of the score during the evaluation.

58. I find that under the circumstances, I have no reason to reject the Applicant's evidence in so far as his claim for IQMS is concerned. His evidence was clear and has been supported by documentary proof which was not disputed by the Respondent. The Respondent's witness has not in any way assisted to support its defence that the Applicant could not be subjected to IQMS as she was on suspension. Although her evidence was consistent, she could not show precisely the basis of the defence in particular with reference to contractual provisions, policy provisions or collective agreement. In fact she was eventually honest and conceded under cross-examination that she was not conversant with the provisions of the IQMS. On that basis, I cannot find her evidence reliable and I reject in this regard.

59. Consequently, I find that the Applicant has been able to discharge his onus of proof that the Respondent has committed an unfair labour practice against him in failing to him pay progression during his period of suspension.

60. Now that I have made a finding that the Applicant was subjected to unfair labour practice by the Respondent on pay progression, I must now determine what amounts are due to him in terms of the salary notch annual adjustments. The Applicant claimed that he was entitled to 1.5% of his annual salary. The Applicant submitted Bundle B1 with IQMS calculations of salary notches for the year cycle 2019/2020 and 2020/2021 as well as the back pays. The Respondent has not specifically challenged the Applicant's calculations as submitted in the form of documentary evidence and in terms of law of evidence, I will accept it as such since its uncontested. I will therefore order the pay progressions as such based on the Applicant's annual salary of R 425 000,00 as claimed.

61. Regarding the benefits of marking national examinations, it is the Applicant's testimony and also a common cause issue that the Applicant successfully applied to participate in the marking of national examinations for November 2019 and November 2020. There is documentary evidence in Bundle AR1 Pages 1 to 8. The Applicant testified that after his suspension from work he never received any communication to inform him that he was appointed as one of the officials for marking until he received a note in his post box from a colleague friend giving him such information. His evidence was consistent with the evidence of the Respondent's witness.

62. The Applicant argued that nobody informed him about his appointment for the marking of examinations and he took the matter up with Andre Schlemmer and asked him to resolve it but Andre told him that he could not go for marking if he was on suspension as he cannot be at work. He presented the Personnel Administrative Measures (PAM) of 1999 and argued that his appointment as a marker is in terms of the PAM and it does not prohibit him to mark when he was on suspension.

63. He referred to the Examination Instruction No TE24 of 2019. Page 4 concerning the remuneration for national examination-related work. It shows that the 3hr paper he marked in November 2019 for NSC, N3 and N4 was paid at R53.80. He was however not certain of the 2019 and 2020 examination rate of payment.

64. The Applicant furthermore referred to Chapter E, Clause 4 of PAM (Criteria for the Appointment of Educators for examination-related work) which sets out the criteria for the appointment of educators for exam-related work and argued that the Clause 4 makes no exclusion to employees on suspension for appointment and that the MEMO TE03 of 2020 issued on 10 February 2020 titled: Invitation to apply to Mark 2020/21 TVET College Examinations, specifically No 7 providing that lecturers who are under suspension or have pending disciplinary cases against them are not eligible for

appointment is against PAM provisions on criteria for appointment. He argued that he met the criteria as clearly set out in Clause 4.2 (a)(b)(c) hence he was appointed for marking. He furthermore argued that PAM regulates their terms and conditions of employment and cannot be superseded by an internal memo/circular.

65. The Applicant used his marking records for June 2019 to base his claim of R56 490,00 for November 2019 and November 2020 on tariffs submitted in evidence as B2, Page 4. He also included a record of the marking sheets for June 2019 which according to him he claimed at the tariff of R 53,80 per scripts for 350 scripts in the total amount of R18 830,00 multiply by three marking session for November 2019, July 2020 and November 2020. Although the Applicant claimed three (3) exam sessions, there is no documentary evidence to support his appointment for July 2020 marking but only for November 2019 and November 2020. It cannot therefore be concluded that he was also appointed to mark the July 2020 examinations in the absence of proof of such appointment.

66. The Respondent led testimony of its witness Busisiwe Statu who testified on email communications from Tiisetso Sekobane, Academic Manager of the Respondent to Campus Managers (presented in documentary evidence AR1). It is evident from the list of officials attached thereto that the Applicant was one of the officials listed thereto to mark in both years. As the correspondence directed her as Campus Manager to submit names of those who had resigned, left campus or suspended from work. She then sent communication on 11 November 2019 to Khoza and Ntanjana copied Khoza informing them of the three (3) as they appear there including the Applicant advising them that he was suspended from the College. She never communicated with the Applicant on this matter since it's usually Labour Relations Department that deals with employees on suspension.

67. It has been proven that the Applicant was appointed to mark examination for November 2019 and December 2019. It is not in dispute that as he was on suspension the Campus Manager Busisiwe Statu did not inform him of this appointment as he was on suspension and on 11 November 2019 as directed he communicated with Khoza that the Applicant was on suspension and that he never went to marking. The Applicant argued that he was financially prejudiced as he could not attend to marking since the Respondent did not inform him of his appointment and cannot be blamed as it was the Respondent that put him on prolonged suspension.

68. I have found the witness's evidence Busisiwe Statu clear on the marking of examinations in that she understood the examinations application process and the information expected from her as the

Campus Manager. Her evidence was also supported by documentary evidence to a large extent which was also in agreement with the Applicant's testimony in most material respects; except that the Applicant argued that the Respondent did not have powers to override the PAM in so far as disqualifying him to marking merely due to his suspension when it's not one of the criteria in PAM. Even though she could not give concise answers regarding the ELRC settlement agreement signed by the Applicant and the Respondent, I found her evidence relevant and reliable in respect of the marking of examinations for which the Applicant was successfully appointed.

69. Circulars or instructions given by the department are no doubt binding on the authorities under the Act, but cannot have primacy over the law. The instruction has not added the additional criteria excluding educators who are on suspension to marking examinations as argued by the Applicant, but ensured that appointed officials are those who are at still at work. Logically the categories of officials mentioned in the Memo for example those medially boarded, on paid accouchement leave, left campus, suspended from duty or dismissed from service by college or government department cannot operationally at all be able to render the marking of examination services.

70. It is common cause that the Applicant was still an employee of the Respondent whilst on suspension but no longer at work as at November 2019 and still at November 2020. It must therefore be recognised that duties performed in respect of marking of public examinations are work-related and remunerated for "***actual work done"*** in respect of specific categories in accordance with the applicable tariffs and I cannot be able to order the Applicant his claim of R56 490,00 as it is very speculative since it is only based on the work he did in June 2019.

71. It is therefore my finding, based on the above and on the balance of probabilities that the Respondent has committed unfair labour practice by failing to implement the pay progressions to the Applicant for the IQMS cycle 2019/2020 and 2020/2021, and not committed unfair labour practice in not paying the Applicant benefits for marking examinations for November 2019 and December 2020.

AWARD

72. I find that the Respondent, South West Gauteng TVET College, committed unfair labour practice by failing to implement the pay progressions to the Applicant Mandlenkosi Diligent Vilana for the IQMS cycles of 2019/2020 and 2020/2021.

73. The Respondent, South West Gauteng TVET College is hereby ordered to implement the pay progressions for the IQMS cycles of 2019/2020 and 2020/2021 period to the Applicant, Mandlenkosi Diligent Vilana at 1.5% notch increase on his salary of R425 000, 00 per annum.
74. The pay progressions for the IQMS cycles of 2019/2020 and 2020/2021 period plus the back pays payment due on the effective date being from 1 April 2019, less PAYE, pension deductions, and other lawful deductions, must be implemented and payment made by the Respondent to the Applicant by no later than 31 August 2021.

Grace Mafa-Chali: ELRC Panelist