



GENERAL PUBLIC SERVICE
SECTOR BARGAINING COUNCIL



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ARBITRATION AWARD

Panellist/s: Seretse Masete
Case No.: GPBC1192/2019
Date of Hearings: 29/08/ 2020 25/11/2020 and
09/12/2020

In the ARBITRATION between:

PSA obo L WEST _____
(Union / Applicant)

and

GAUTENG DEPARTMENT OF JUSTICE AND CONSTITUTIONAL DEVELOPMENT _____
(Respondent)

Union/Applicant's representative: Sean Vermeulen of PSA
Union/Applicant's address: 28 Melle street Braamfontein

Telephone: _____
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Respondent's representative: Sethupi Ledwaba

Respondent's address: Pretorius Street Pretoria.

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Particulars of proceedings and representation

1. The matter was held virtually on 29 August and face to face on 09 December 2020 at Pretoria Magistrate court. The case was also scheduled to sit on 25 November 2020 but the employer representative did not show up without advancing a reason and it was postponed.
2. The Applicant **Lelanie West, (employee)** was represented by **Sean Vermeulen of PSA** and the respondent, **Department of Justice and Constitutional Development (employer)**, was represented by its Labour Relations officer **SF Ledwaba**.
3. The proceedings were in English and digitally recorded.

Issues to be decided

4. I have to decide whether or not the conduct of the respondent by not paying the employee performance incentives in terms of the Performance Management and Development system (**PMDS**) after being assessed constituted an unfair labour practice.
5. I must determine the appropriate relief, if I find that the conduct of the respondent constituted an unfair labour practice pertaining to promotion.

Background to the dispute

6. The **employee** submitted her performance reviews for 2017/2018 financial year and was assessed and qualified for payment of performance incentives. Her salary was **357590-05/annum** at the time of the dispute.
7. The employer kept her in the dark and she only realised in December 2018 that other employees were paid their performance incentives.
8. She challenged the conduct of the employer and sought to be paid performance incentives like the other employees who qualified.
9. The employer rejected the employee's allegations citing that she failed to exhaust all the internal processes.
10. Both parties shared the bundle of document which was submitted to me as well and was marked **Bundle A, (the Bundle)**.

The employee's submission

The employee, Lelani West, testified under oath that:

11. She worked on her reviews and submitted them well in time to her supervisor. Her supervisor assessed her and they both agreed with a rating of 4 which made her qualify for a once off performance bonus. She became aware in December 2018 that she was not paid a once off performance bonus when other employees were paid. She could not appeal to the appeal committee because the moderating committee did not give her any feedback. After lodging a grievance in December 2018, Labour relation office wrote to her informing her that she did not exhaust internal mechanism. She could not appeal because she was never given any feedback by the moderating committee, no results of her reviews and she was never told to submit any additional motivation. **It was further put to her that the employer has not made any decision to pay as yet. She was further told to let the power that may be to make a decision. When ending the cross-questioning, the employer representative indicated that a decision for making payment has not yet made by the employer.**

Survey of evidence and arguments

The employer's Submission

The witness of the employer Thembinkosi Nhlapho, testified under oath as follows:

12. He is a court manager managing all the administrative duties of the court. He was the chairperson of the moderating committee. **Page 10 to 23 of the bundle** was an annual performance instrument for 2017/2018. Page 21 of the bundle is the final score of the employee. Supervisor and the employee agreed on the rating of 4. Moderating committee said **insufficient motivation** and gave 3 rating and one notch. The final rating was a 4, see page 11 of the bundle. Motivation is important to show the achievement of the employee. **Page 40 paragraph 9.5(vii)** says follow all formal process in the case of dissatisfaction. **Paragraph 10.2(ix)** provides that if not satisfied with the score, the review must be returned to the supervisor for additional information. He confirmed that the appeal is lodged after submitting the additional motivation by the employer. The DG or delegated authority has a final say. **The applicant was not sent the letter to submit additional motivation.** There was no communication to the employee at that time (December 2019) because she submitted a grievance.

The committee rated her 3 because more motivation was needed. Page two of the bundle was a **grievance received** by the **employer on 21 December 2019** where the employee complained that she performed outstandingly and her supervisor rated her 4 but that was changed by the moderating committee. The employer responded on **26 April 2019** that internal processes were not exhausted. **On 16 May 2019**, PSA wanted the outcome of the performance assessment. **21 May 2020**, assessment was sent to the employee. The employer did not receive any additional motivation after the **21st of May 2019**.

13. The moderating committee signed the assessment on the 3rd of August 2018. **Those with insufficient information, were written letters somewhere before 16 December 2018**. The policy does not indicate when should everything be finalized. Confirmed that the employee was not given a letter to submit additional information. It was put to him that nothing prevented the committee to issue out a letter. If the official knew of the outcome or if others were paid, he could lodge an appeal even without having received a letter.

2nd witness of the employer, Tsakani Kay Zungu, testified under oath as follows:

14. She is a personal assistant for the Area court manager. She was the scribe for the moderation committee making sure that all assessments were submitted. She was the one who gave the employee her performance assessment as requested. The whole process was finalised in January 2019. At the end the spread sheet is sent to the regional offices. The employee's assessment was finalised in August 2018 but was given her assessment in May 2019.

3rd witness of the employer, testified under oath as follows:

15. The last witness did not show up and the respondent closed its case.

Analysis of the evidence and arguments

16. **Section 138(7)(a)** of the **Act** requires me to issue an award with "brief reasons". I therefore will only concentrate on the summary of the submissions relevant to my findings. It is common cause that
- (a) the employee completed her 2017/2018 reviews and submitted in time.
 - (b) She rated herself a score of 4 and her supervisor agreed with her.
 - (c) Other employees were paid their once of cash bonus in December 2018.
 - (d) The employee was not paid her cash bonus.

- (e) Letters to submit additional motivation were written and given to those employees whose motivations were insufficient.
- (f) The employee did not lodge an appeal.
- (g) The employee was not given any letter telling her to submit additional motivation, **and disputed issues are;**
- (h) The employee did not qualify for a cash bonus payment.
- (i) The employee did not submit additional information.
- (j) The employee did not comply with the policy as she failed to exhaust all the internal processes.
- (k) It is only the director general or his/her delegated person who has the final say of approving payment incentives.

17. Having considered the evidence led and the closing arguments of both parties, as well as the case laws quoted by the employer, I am also bound to consider what the policy provides. In order for me to decide objectively on the matter, I need to look at what the **Performance management policy (Policy)**, pages **27 to 42**, of the bundle provides in terms of how the process should be conducted. There is no way where the Policy contradicted the case laws quoted by the parties or vice versa. I therefore agree with the employer that all internal mechanisms should be exhausted before lodging a dispute. I further agree that if the moderating committee is not satisfied with the reviews of the employee, it should seek for additional motivation. On page **40 paragraph 7.7(VII)** of the bundle, the policy provides that the moderating committee **shall** return the performance assessment with reasons back to the **supervisor** in the case of where they have found the appraisal rating to be unacceptable and request for a review with **additional information**. The employer witness, Mr Nhlapho confirmed that the employee's assessment reviews were not returned to her after the moderating committee realised that she needed to submit additional motivation. The second witness of the employer Ms Zungu, testified that the assessment reviews were only returned to the employee the following year in May 2019 after she (employee) requested them. My take is that the first mistake committed by the moderating committee here, was to contravene **paragraph 7.7(vii) mentioned above** which required the moderating committee to return the assessment back to the supervisor, this was common cause. The moderating committee waited for the employee to request the assessment back and as testified by the employer's first witness, **Mr Nhlapo**, the employee was not given any update on her assessment. The reason by the employer that it could not issue out a letter for additional motivation to the employee because the Labour relations told the moderating committee that she(employee) has lodged a grievance on the matter, does not add up. The final signing off of the employee's assessment reviews, was done on **03 August 2018, see page 21 of the bundle**, and the said grievance was lodged on **27 December 2018**. It cannot be correct that the moderating committee was stopped by the employee's grievance to issue out a letter of additional motivation to the employee. The moderating

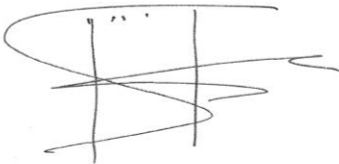
committee knew four months before the grievance that the employee's motivation was insufficient. The employer's reasons are therefore not acceptable. The version by the employer that the employee did not qualify and that she failed to submit additional information, is therefore rejected.

18. The employer further argued that the employee failed to exhaust all internal processes as provided for by paragraphs **7.5(iv)** (employee to follow all formal processes) and **7.7(X)** (lodging an appeal if not satisfied). An employee cannot follow any process in case of dissatisfaction if she/he did not know whether the moderating committee has accepted her assessment or not. People do not just complain if there is no matter to complain about. There was no process to follow because the moderating committee did not tell her that her motivation was insufficient, and it (moderating committee) did not return her assessments until she requested for them which is contrary to **Paragraph 7.7(vii)** of the policy. This is supported by **paragraph 7.7(VIII)** on the same **page 40 of the Bundle, which** provides that the Moderating Committee **shall** review the submitted additional motivation and if results remain unacceptable, the supervisor and the employee **shall** refer the matter to the appeal committee through HR. The employer representative mentioned this in his closing arguments but he did not realise that this paragraph indicated that an appeal should be lodged after the additional motivation. One should remember that the Moderating committee never requested an additional motivation from the employee, this was confirmed by the employer's witnesses. This is clear, that the matter should be appealed after the sequence of returning the assessments back to the supervisor for additional motivation, see **paragraph 7.7(vii)** above, and after the employee has submitted additional motivation and the results remain unchanged, **it is only then**, that she could lodge an appeal with the appeal committee. The argument by the employer that the employee should have lodged an appeal in May 2019 after she was given her assessments on 21 May 2019 (**and only after she requested for them**) is not acceptable. The employer is bound to follow its own policy and leads by example. The shifting of blame by the employer to the employee is not justified. The employee therefore did not fail to exhaust all internal processes but the moderating committee of the employer. **Paragraph 9.5 (vii), of the policy, see paragraph 12 above**, following the formal procedure, does not only bind the employee, but the employer as well.
19. The issue that it is only the Director general and or his/her delegate who makes a final decision, does not have a bearing on this matter. It is correct that these authorities have a final say, but this happen after the Policy has been complied with and both parties, employee and the moderating committee, having been brought on board. The Director general for instance, may not make a decision while the moderating committee is still making assessments, like returning the assessments because the motivation is insufficient and so on.
20. The employer representative, Mr S Ledwaba, did not turn up when the matter was initially scheduled on the 25th of November 2020. There was no reasons advanced as to why he could not show up.

One employee of the employer, Ms O Chauke sent someone to submit her sick note. That sick note did not have any bearing because she stated categorically that she was not going to represent the employer but Mr S Ledwaba. The employer must therefore pay the cost for that postponement (**without reasons**) on 25 November 2020.

Award

21. The employer, **Department of Justice and Constitutional Development**, committed an act of unfair labour practice pertaining to benefits against the employee, **Lelanie west** as per **Section 186 (2)(a) of the Act**.
22. The employer is ordered to pay the employee and amount of **R14063-60** ($357590-05 \times 4\%$) which is equivalent to 4% of the employee's annual salary.
23. The money must be paid to the employee on or before the 15th of February 2021, failing which interests will accrue.
24. The employer is ordered to pay the cost of the postponement that took place on 25 November 2020.



Seretse Masete

Date 21/01/2021

GPSSBC Panellist