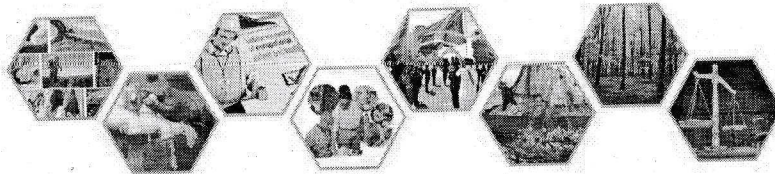




GENERAL PUBLIC SERVICE
SECTOR BARGAINING COUNCIL



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ARBITRATION AWARD

Panellist/s: **GP RAMAKADI**
Case No.: **GPBC192/2019**
Date of Award: 15/06/2021

In the ARBITRATION between:

PSA OBO D SKINNER

APPLICANT

(Union / Applicant)

and

DEPARTMENT OF EMPLOYMENT AND LABOUR

RESPONDENT

(Respondent)

Union/Applicant's representative:

MR A SGUDLA

Union/Applicant's address:

Telephone:

Telefax:

Respondent's representative:

MR T MARABA

Respondent's address:

Telephone:

Telefax:

GP

ARBITRATION AWARD

1. DETAILS OF HEARING AND REPRESENTATION:

The hearing was held at the Department of Labour on the 7th and 8th April 2021. The Applicant was represented by Mr A Sgudla (PSA), and the Respondent was represented by Mr T Maraba (Employee Relations).

2. ISSUE TO BE DECIDED:

The Commissioner is required to decide whether the conduct and or omission of the Respondent amounts to unfair Labour Practice.

3. BACKGROUND TO THE MATTER:

The background facts to the extent that they are not seriously disputed are summarized as follows: The Applicant is the Employee of the Respondent. In 2013 the Applicant and his other colleagues were transferred from their previous Employer(EOH) to the Department of Labour in terms of section 197 of the Labour Relations Act as amended as on going concern. They were graded according to different grades in the ICT structures. The Applicant was put on salary level 6 and was employed as a SAP Analyst. The SAP Analyst post is pitched at salary level 9.

- 3.1 The Applicant wants to be paid for the benefits accrued to the Graded post of salary level 9(SR9).
- 3.2 After exhausting all the internal remedies to resolve the issue with the Respondent, the Applicant escalated the matter to the General Public Service Sector Bargaining Council. (GPSSBC).
- 3.3 The aforesaid conciliation was unsuccessful and the matter was therefore referred to arbitration.
- 3.4 The matter was thereafter scheduled to be heard and set down for a hearing.
- 3.5 Notwithstanding the foregoing, the matter did not proceed on even date because of various reasons.
- 3.6 The matter was eventually set down on the 7th of March 2021, wherein the Commissioner facilitated a pre-arbitration meeting which led to the parties signing a pre-arb minute.
- 3.7 Parties made their opening statements and the Applicant being the *dominis litis* was the first to start.
- 3.8 Parties presented and led evidence on the 7th and 8th April 2021 and the matter was officially closed.
- 3.9 The proceedings were electronically recorded.
- 3.10 The parties' bundles were respectively marked A and B for both the Applicant and the Respondent.
- 3.11 For ease of reference and perusal the pre-trial minute was marked Annexure C for the record.
- 3.12 It is common cause that the Union or Applicant referred the matter to the Bargaining Council in terms of section 186(2)(a) of the LRA as amended.
- 3.13 Following the transfer of the Applicant and his colleagues from their erstwhile employer(EOH) the Applicant was employed as a SAP Analyst.
- 3.14 The post of the SAP Analyst is at salary level 9 and the Applicant is at salary level 6.

4. SURVEY OF EVIDENCE AND ARGUMENT:

A. J.

Applicant's version (D Skinner) 1st witness.

- 4.1 He testified that he was transferred to the Department in 2013 whilst he was working for EOH as a SAP Analyst.
- 4.2 He testified about various SAP Analysts with different job titles and different salary levels with him.
- 4.3 He testified that he became aware of the different salary scales were his counterparts were paid progression.
- 4.4 He testified that he is not familiar with the recruitment and selection proceeds as he was transferred not promoted.
- 4.5 He further testified that the requirements of a SAP Analyst are a three (3) year qualification in ITC and a SAP FCO Certification.
- 4.6 He testified further that he wanted to be pitched at SR9 and the Respondent must rectify his job grade.

2nd Applicant witness: Ms Engela Cronje.

- 4.7 She testified that she knows the Applicant (MR D Skinner) as a SAP Analyst for finance.
 - 4.8 She also confirmed that there are nine (9) SAP Analysts working for the Respondent on different salary levels.
 - 4.9 She also testified that the qualification requirements for the post of SAP Analyst is a three (3) year qualification in ITC aspect of the job profile.
 - 4.10 She also testified that there are three ICT structures confirmed in 2015, 2016 and 2018.
 - 4.11 She further testified that the job profiles approved with the said structures for ICT SAP Analysts have the same requirements.
 - 4.12 She confirmed that there are three (3) Analysts on SR9, 4 on SR11 and two on SR6 and one of the two, included the Applicant.
 - 4.13 She testified that the SAP Certification is not a prerequisite to the post of a SAP Analyst.
 - 4.14 She further testified that since the transfer, there was never an appointment transfer of a SAP Analyst that was adhered by the Department but only one for a Deputy Director.
 - 4.15 She is of the view that the qualification of Mr Skinner is equivalent to the requirement or the post.
 - 4.16 She testified that she is still refusing to sign the job profile because its generic and not specialising.
 - 4.17 She testified that the Minister needs to upgrade Mr Skinner (Applicant) from SR6 to SR9.
 - 4.18 She testified further that an upgrade requires the job profile requirements and a budget.
 - 4.19 The witness further testified that the qualification in Financial Management is equivalent to the qualification in ICT for one to be appointed.
 - 4.20 She testified that she was only placed into structure by 5th of March 2018.
 - 4.21 She testified that there is a job profile that is guiding the functions performed by Mr Skinner.
5. RESPONDENTS CASE: Mr Simon Nkhabelane (Witness).

- 5.1 He testified that he is the Director Management Advisory Services.
- 5.2 He further testified that his duties include training and Development, and also organisational Developments.
- 5.3 He testified that initially the Respondent had a triple "P" arrangement
- 5.4 The triple P arrangement and the Department would enter into public, private partnership with Siemens EOH whereby they were outsourcing ITC services from them.
- 5.5 The Respondent later transferred EOH employees in terms of section 197 of LRA as a going concern.

- 5.6 The EOH employees were taken with their salaries which were not standardized.
- 5.7 He further testified that the Department had no proper structure to accommodate all of them since ITC positions were less than their employees.
- 5.8 He further testified that in terms of section 197 LRA, the employees transferred should not be in less favourable conditions than they were previously.
- 5.9 He also testified about the Public Services Act which implores the Department to employ candidates who meet the inherent requirements of the post.
- 5.10 He further testified that the Applicant does not meet the requirements for the post of SAP Analyst.

6. ANALYSIS OF EVIDENCE AND ARGUMENT:

Legal Framework

- 6.1 I have had the benefit of listening to the evidence presented to me.
- 6.2 It is common cause that the Applicant is employed as SAP Analyst. This assertion stems from clause 1.2 of the pre-trial minute signed by both parties on the 7th March 2021.
- 6.3 It is also common cause the Applicant is presently at salary level 6 and the post of SAP Analyst is at salary level 9.
- 6.4 The Applicant referred his case to the GPSSBC in terms of section 186(2) of the Act.
- 6.5 Section 186(2) (a) of the Act provides that an 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 reasons relating to probation) or training of an employee or relating to the provision of benefits to an employee.*
- 6.6 I have deliberately excluded sections 186 (2) (b) (c) and (d) as they are not going to form part of this award.
- 6.7 The Applicant, since inception of its employment in 2013 (after the transfer to the Department) has had an issue.
- 6.8 This issue has persisted and despite several and numerous steps or attempts for the parties to resolve same, it has remained unresolved and to date hence the current proceedings.
- 6.9 A brief pause at this juncture is necessitated to understand the meaning of unfair Labour Practice in terms of section 186(2) LRA.
- 6.10 One fundamental question that is important that is in relation to the issue in dispute. The Respondent is of view that the Applicant does not hold the relevant qualification to be a SAP Analyst.
- 6.11 But what is highly baffling about this issue is why did the Respondent allow and appoint the Applicant to assume the duties of a SAP Analyst sans the required skills, expertise and the necessary competence
- 6.12 The assertions are contained in a copy of a pre-trial minute which the party signed and agreed that going forward it will indicate issues that are common cause and issues that are in dispute.
- 6.13 A copy of a pre-trial minute marked Annexure "C" was tendered and presented as evidence about parties' agreement and disagreement.
- 6.14 It constitutes *prima facie* the principles that parties agree and disagree on.
- 6.15 The LRA does not expressly provide what a benefit is.
- 6.16 Various debates have ensued about the correct interpretation of benefit because benefits form part of remuneration package.
- 6.17 In Apollo Tyres South Africa (PTD /LTD V CCMA and others (2013) 34 ILJ 1120 (LAC) (21 February 2013), the LAC held that a benefit should be interpreted to include only benefit to which the employee is entitled.
- 6.18 It is trite that employees who wish to claim that the employer committed an unfair labour practice by denying them their benefits do not need to prove a right if they challenge the fairness of the employer's conduct. There is an obligation on an employer who demands that the benefit must be able to show that there was a valid reason for excluding the employee from the benefit.

- 6.19 The Applicant's position was job evaluated and Graded and his salary was pitched at SR9.
- 6.20 I think in my view, for the Applicant to perform duties as per the new Graded 9 position and still be paid at the level of salary level 6 is unfair. This conduct by the employer is unfair and my concern is fortified by the pre-trial minute that both parties signed and agreed that the employee is employed as a SAP Analyst.
- 6.21 The Respondent did not have proper ITC structure and this resulted in them having an egg on their face because the system was not well structured, and it created a fertile ground for disillusionment as the Applicant was prejudiced by the Respondent
- 6.22 It is the responsibility of the Department to make sure that they put their ducks in a row.
- 6.23 It is my view that the Respondent's only way to justify not appointing the Applicant is after the introduction of the Public Service Act. However, that cannot be used as a justification because at the time they want to refer to the Act as a recourse the proverbial horse had already bolted.
- 6.24 I intend to make a few comments about the appropriate test for review in disputes of these nature.
- 6.25 In *Sidumo and Another v Rustenburg Platinum Mines LTD and Others* 2008 (28) ILJ 2405 (CC); 2008 (2) BCLR 158 (CC) (5 October 2007). *Navsa, AJ held that in the light of the constitutional requirement (in s 33 (1) of the constitution) that everyone has the right to administrative action that is lawful, reasonable and procedural fair, and that 'the reasonableness standard should now suffuse s 145 of the LRA'. The majority of the Constitutional Court set the threshold test for the reasonableness of an award ruling as the following: Is the decision reached by the Commissioner one that a reasonable decision-maker could not reach?*
- 6.26 Furthermore, in the case of *Cusa v Tao Ying Metal Industries and Others* 2009 1 BLLR 1 (CC); (2008)29 ILJ 2461 (CC) (18 September 2008) the court held *that it is clear that a Commissioner is obliged to apply his or her mind to the issue in a case. Commissioners who do not do so are not acting lawfully and/ or reasonably and their decisions will constitute a breach of the right of administrative justice.*
- 6.27 I have got no doubt in my mind that the Applicant's qualifications are not in line with the requirements for him to be appointed at the level, but I am worried why the employer employed him to such responsibilities without compensation equivalent to the position.

7.AWARD:

I therefore make an order in the following terms:

- 7.1 The Respondent is ordered to pay the Applicant his benefits which accrued as at the time he assumed the responsibilities of an SAP Analyst from December 2016 to date.
- 7.2 There is no order as to costs.

GP RAMAKADI

Name:

(Council name) Arbitrator

