



ARBITRATION AWARD

Panellist/s: T J SONO
Case No.: GPBC 437/2020
Date of Award: 23 August 2020

In the ARBITRATION between:

PSA OBO PL APHANE

(Union / Applicant)

and

DEPARTMENT OF TRADE INDUSTRY AND COMPETITION

(Respondent)

Union/Applicant's representative:

ARCHIE SIGUDLA

Union/Applicant's address:

Telephone:

Telefax:

Respondent's representative:

TSHEPO MOTHAPU

Respondent's address:

Telephone:

Telefax:

ARBITRATION AWARD

DETAILS OF HEARING AND REPRESENTATION

1. This matter was set down before me on the 3rd of August 2020 at the offices of the GPSSBC 260 Basden Avenue Lyttelton Centurion. Mr Archie Sigudla, an official from PSA, represented the applicant, Mr PL Aphane. Ms Tshepo Mothapo, an employee of the respondent, represented the respondent, Department of Trade Industry and Competition. The applicant submitted bundle of documents into the record and it was marked bundle A. The respondent submitted bundle of documents into the record and it was marked bundle B. Both parties admitted that the documents in the bundles were what they purported to be and also admitted their contents. It was agreed that parties will submit the closing arguments by 10 August 2020. I have received the closing arguments from both parties. The proceedings were digitally recorded.

ISSUE TO BE DECIDED

2. I must determine whether the applicant has complied with the requirements of the Performance Management System by submitting his performance agreement on time. If the applicant met the deadline, I must determine whether the respondent acted unfairly by not granting him his pay progression cycle 2018/2019. If I find the respondent's conduct to be unfair, I must determine the appropriate relief.

BACKGROUND

The following facts are not in dispute between the parties

3. The applicant is employed by the respondent, Department of Trade Industry and Competition (dtic) as a Deputy Director: Middle East and Asia (ITED). The applicant started working for the respondent from April 2014. The applicant lodged a dispute of unfair labour practice-benefits with the council (GPSSBC) wherein he alleges that he signed his performance agreement on the due date, 31 May 2018, however, he was not paid his pay progression.
4. The applicant prays that he be paid his pay progression plus his 1% for the cycle 2018/2019, whereas the respondent prays for the dismissal of the unfair labour practice referral.

PRELIMINARY ISSUES

5. None

SURVEY OF EVIDENCE AND ARGUMENT

6. It is not the purpose or the intention of this award to provide a detailed transcription of all the evidence placed before me at arbitration. Even though all the evidence was considered, I have only referred to the portion of the evidence that I find to be relevant in making a determination in this dispute.

APPLICANT'S CASE

7. The applicant, Mr L Aphane, testified under oath and stated that he is employed by the respondent **dtic** as a Deputy Director: Middle East and Asia (ITED). The applicant stated that he joined the respondent in April 2014. The applicant indicated that he is reporting to his manager, Mr Darel Hudson. The applicant testified that he received a letter (p21A of bundle A) from Ms Marianne Jacobs, Chief Director: Human Resource and Learning Center which was informing him that he didn't comply with the Performance Management Policy by not concluding and submitting his (the applicant) performance agreement by 31 May 2018. The applicant indicated that the letter invited him to provide reasons and evidence in case he met the due date. I was surprised to receive this letter and I immediately wrote an email to Ms Jacobs asking about this letter. I have provided some evidence to them that I have submitted on time.
8. The applicant testified that he received an email (p6 of bundle A) from Dr Anusha Naidoo (Dr Naidoo) who promised to deal with his (the applicant) matter personally. The applicant testified that he received another email (p6 of bundle A) from Dr Naidoo who indicated in the email that he (the applicant) complied with the due date, the matter will be referred to the DG for a decision and that he will be advised of the outcome before 30 September 2018. The applicant indicated that he didn't receive any outcome. The applicant testified that he received a letter from Ms Jacobs in November 2019, informing him (the applicant) that his non-compliance with the PMDS legislation and regulatory prescripts has resulted in him forfeiting his cash ward and/or pay progression in respect of 2018/2019 performance management cycle. The letter indicated that the conclusion of all processes on the Performance Management Development System (PMDS) remains dual responsibility between the employee and the manager (p21B of bundle A, was read into record).

9. The applicant stated that he signed off his performance agreement on time and that he received a confirmation to that effect (p22 of bundle A). The applicant referred to a document (p15 of bundle A) to indicate that he complied with the PMDS. The applicant referred to an email (p14 of bundle A) from the APAT team to indicate that, following a review on his matter by the APAT team, the APAT team promised to forward his (the applicant) matter to the DG for a decision. The applicant referred to an email (p13, bundle A) to indicate that he was informed that he didn't comply with the due date, the matter was concluded and should he remain unhappy with the outcome, he should escalate the matter via grievance process.
10. The applicant referred to audit trail (p17 of bundle A) to indicate that he signed off his performance agreement on 31 May 2018. The applicant testified that 90% of employees who failed to comply with the due date received the non-compliance letter (p 21 of bundle A) including his colleague Ms Dikeledi Tshepe. Dikeledi didn't ask the HR about this letter, she just left it and then when the time for pay progression comes, she received pay progression.
11. Under cross examination. The applicant conceded that if the performance agreement assessment is referred back by the manager, the signing of date is automatically reversed. It was put to the applicant that the audit trail (p13 of bundle B) indicates that he signed off his performance agreement on 01 June 2018. The applicant reiterated that he signed off his performance agreement on due date, 31 May 2018. The applicant stated that his manager, Mr. Darel Hudson, didn't sign off his (the applicant) performance agreement on the same day, 31 May 2018.
12. Ms Dikeledi Tshepe (Ms Tshepe), testified under oath and stated that she is employed by the respondent as an Assistant Director: Middle East (ITED). Ms Tshepe testified that she reports to her manager, Mr Darel Hudson. Ms Tshepe indicated that the APAT system is a system that employees use to submit their performance agreement. Ms Tshepe testified that she signed her performance agreement for the first time on the 30th May 2018 and it was referred back. I signed it off again on 31 May 2018. She stated that she signed her performance agreement for the last time on 01 June 2018. She indicated that after signing off, you get a confirmation from the APAT system
13. Ms Tshepe testified that she received a non-compliance letter for failing to submit her performance agreement on due date, 31 May 2018. She testified that after receiving the non-compliance letter she went to the APAT training center to enquire about the letter. She stated that she was informed that it was her responsibility to ensure that her manager signs her performance agreement off. She testified that she left the matter like that with a view that she was not going to be paid. She indicated that she

didn't make any representation as indicated in the non-compliance letter. She stated that she received her pay progression

14. Under cross examination. Ms Tshepe stated that she didn't receive any letter confirming her pay progression payment.

RESPONDENT'S CASE

15. Dr Anusha Naidoo (Dr Naidoo) testified under oath and stated that she was employed by the respondent as a Director: Talent and Performance Management. I was responsible for all matters connected to performance management. At the present moment, I hold a portfolio of Director: Human Resource Planning, Strategy and Information Management. She testified that performance management recites in her portfolio. She testified that she has been in the position for more than 10 years with the respondent.
16. Dr Naidoo testified that the penalty for non-signing of performance agreement is disciplinary action and forfeiting of performance bonus and pay progression. Dr Naidoo stated that APAT system is an automated performance agreement templet. The way the system works, the employee would take the performance agreement say from 1 April, the employee will then sign off his performance agreement. The manager will have the opportunity to sign off the performance agreement. Both the employee and manager will then meet and sign off the performance agreement. Every transaction that takes place on the system is captured on the audit trail.
17. Dr Naidoo testified that there are no restrictions on the APAT system, an employee can log on at any time and capture the performance agreement. Dr Naidoo testified that incase where an employee is found to have not complied, that employee will receive a letter of non-compliance. Then the employee will get the opportunity to state his case of the story. The PMDS unit will then investigate the matter. When the matter is conclude, certain employees will pass the test for compliance while others will not pass the test for compliance. Dr Naidoo testified that every case was dealt with on its own merits.
18. Dr Naidoo referred to the audit trail (p13 of bundle B) to indicate that the audit trail is an output report, meaning that when a transaction is concluded on the APAT system an output report is generated. For us to get an output report, the employee and employer must have made an input. The transaction made by the employee on the APAT system will come exactly the same on the output report called the audit trail. The audit trail is 100% accurate. The audit trail records the exact time and date when the employee

and manager log on it, as it is with the last paragraph referred to (p13 of bundle A). Dr Naidoo indicated that there were similar cases on non-compliance and that the same sanction applied in terms of s16A of Public Service Act and/or ss 71 &72 of Regulations.

19. Under cross examination. Dr Naidoo stated that she is the author of the email (p6 of bundle A). Dr Naidoo stated that both the applicant and his manager signed off the applicant's performance agreement on 1 June 2018. When referred to the email (p6 of bundle A), Dr Naidoo stated that in effect the applicant signed off his performance by due date but it was referred back by his (the applicant) manager. Dr Naidoo stated that an employee will get an email (p22 of bundle A) after a transaction and sign off has taken place.

ANALYSIS OF EVIDENCE AND ARGUMENT

20. The Council derives its jurisdiction to arbitrate benefits dispute from section 186 (2) (a) of Labour Relations Act 66 of 1995 as amended, which reads "unfair labour practice means an unfair act or omission that arises between an employer and an employee involving unfair conduct by the employer relating to benefits of employee"
21. It is a trite that the onus to establish existence of a decision that constitute an unfair labour practice as provided in section 186 (2) of Labour Relations Act 66 of 1995 as amended, rest on the applicant to prove the claim on balance of probabilities. In **Department of Justice v Commission for Conciliation, Mediation and Arbitration and Others**, the court stated that "An employee who complains that the employer's decision or conduct in not appointing him constitutes an unfair labour practice must first establish the existence of such decision or conduct. If that decision or conduct is not established, that is the end of the matter. If that decision or conduct is proved, the enquiry into whether the conduct was unfair can then follow. This is not one of those cases such as dispute relating to unfair discrimination and dispute to freedom of association where if the employee proves the conduct complaint of, the legislature requires the employer to prove that such conduct was fair and lawful and, if it cannot prove that, unfairness is established. In cases where that is intended to be the case, legislation has said so clearly. In respect of item 2 (1) (b) matters, the Act does not say so because it was not intended to be so.
22. In this case the applicant had to show that the conduct or decision of the respondent is one that falls within the definition of unfair labour practice. The applicant had to prove the existence of unfair labour practice on the balance of probabilities that the respondent's failure to pay his pay progression and/or performance bonus was unfair. It must be taken into

cognizance that what is fair depends upon the circumstances of a particular case and essentially involves a value judgment.

23. The applicant claims that he was prejudiced by the action or conduct of the respondent because he submitted his performance agreement on due date, 31 May 2018. However, he was not paid his pay progression and/or performance bonus. On the other hand the respondent contended that he (the applicant) forfeited his pay progression and/or performance bonus because he failed to comply with the PMDS legislative and regulatory prescripts by not submitting his performance agreement on time. Dr Naidoo's uncontested testimony was that the penalty for non-signing of performance agreement by due date is disciplinary action and forfeiting of performance bonus and pay progressing. Dr Naidoo further indicated that the penalty was in line with s 16A of Public Service Act and/or ss 71 & 72 of Regulations.
24. The applicant referred to the audit trail (p 17 & 18 of bundle A) to prove that he submitted his performance agreement on due date, 31 May 2018. The respondent's version was that the audit trail (p10-13 of bundle B) indicated that the last time both the applicant and his manager signed off the applicant's performance agreement was on 1 June 2018. Dr Naidoo testified that the audit trail is an output report, meaning that when a transaction is concluded on the APAT system an output report is generated. She testified that the transaction made by the employee and his manager on the APAT system will come out exactly the same on the output report called the audit trail. She also testified that the audit trail is 100% accurate and it records the exact time and date when the employee and the manager log on the APAT system.
25. Throughout the proceedings, the applicant reiterated that he signed off his performance agreement on time (31 May 2018). Under cross examination, Dr Naidoo conceded to be the author of the email (p6 of bundle A). The applicant referred to the email to indicate that Dr Naidoo confirmed that he (the applicant) submitted his performance agreement on due date. Dr Naidoo stated that in effect the applicant signed off his performance agreement on due date, 31 May 2019 but it was referred back by his (the applicant) manager. Dr Naidoo testified that both the applicant and his manager signed off the applicant performance agreement on 1 June 2018.
26. Under cross examination, applicant conceded that, if the performance agreement is referred back by the manager, the date of sign off is automatically reversed. In determining whether the applicant signed off his performance agreement on due date, 31 May 2018, I find the applicant's version to be farfetched. I have noted that there was no evidence against Dr

Naidoo's testimony in respect of the accuracy of the audit trail. I am convinced based on the evidence presented before me that both the applicant and his manager signed off the applicant's performance agreement on 1 June 2018. Dr Naidoo was consistent in her testimony and I find the respondent version to be more probable.

27. The applicant challenged the respondent's inconsistency in respect of the application of penalties to employee who failed to submit their performance agreement on time (31 May 2018). The evidence was led through Ms Dikeledi Tshepe (Ms Tshepe) to this effect. The applicant testified that 90% of employees who didn't submit their performance agreement on time received the non-compliance letter. The applicant testified that Ms Tshepe received the non-compliance letter after failing to comply with the due date. He further testified that Ms Tshepe didn't ask anything from the HR in connection to the non-compliance letter. He indicated that Ms Tshepe just left the letter, however she received her pay progression.
28. On contrary, Ms Tshepe testified that upon receiving the letter she went off to the APAT training center to enquire about the letter. Ms Tshepe testified that the last time she signed off her performance agreement was on 1 June 2018. She testified that she received her pay progression in spite of her late submission. Dr Naidoo testified that there were similar cases of non-compliance and the same sanction applied. Dr Naidoo testified that incase where an employee is found to have not complied, that employee will receive a letter of non-compliance. Then the employee will get the opportunity to state his case of the story. The PMDS unit will then investigate the matter. When the matter is conclude, certain employees will pass the test for compliance while others will not pass the test for compliance. Dr Naidoo testified that every case was dealt with on its own merits.
29. The evidence shows that both the applicant and Ms Tshepe enquired about their non-compliance letters. It is the applicant evidence that his matter was investigated by the APAT team. There is no evidence before me to indicate that the respondent's decision to deal with non-compliance cases differently was irrational, bias or grossly unreasonable. An arbitrator should be careful not to intervene too readily in dispute regarding benefits unless bad faith or improper motives such as unfair labour practice are present.
30. In light of the above I am satisfied on the balance of probabilities that there was indeed no substantive unfairness and for this reason an unfair labour practice relating to benefit was not committed. I see no unfair labour practice that was committee by the respondent.

AWARD

31. I found that on balance of probabilities that the respondent committed no unfair labour practice as intended in section 186 (2) (a) of Labour Relations Act 66 of 1995 as amended.
32. The application for unfair labour practice is dismissed.
33. The applicant is not entitled to the relief sought



Name: TEBOGO SONO
(GPSSBC) Arbitrator