



ARBITRATION AWARD

Commissioner: **Kuvonakala Pretty Chavalala**

Case No: **PSHS10- 20/21**

Date of award: **18 June 2021**

In the matter between:

PSA obo Nthabiseng Mahlangu

(Union Applicant)

and

Department of Health-Gauteng

(Respondent)

DETAILS OF THE HEARING AND REPRESENTATION

- [1] This is an arbitration award between PSA obo Nthabiseng Mahlangu (hereinafter referred to as the applicant) and Department of Health- Gauteng (hereinafter referred to as the Respondent). The applicant's surname at case referral was Mahlangu and at the time of the hearing she had married and was known by the Sekole surname. The hearing concerned an unfair labour practice dispute referred in terms of section 191 of the Labour Relations Act 66 of 1995, as amended (the LRA). It was held at 45 Commissioner Street on several occasions and it was finalised on the 05 June 2021.
- [2] The applicant was represented by Mr. Bongani Qankase, an official from PSA. The respondent was represented by Mr. Serepo, a Labour Relations official from the respondent.

- [3] The respondent submitted a bundle which was marked Bundle R. The applicant's bundles were marked Bundle A and AB.
- [4] The parties were supposed to submit their written closing arguments in writing by close of business on 11 June 2021 and both parties did so.
- [5] The hearing was held in English and it was digitally and manually recorded.

ISSUE TO BE DECIDED

- [6] I am required to decide whether the respondent demoted the applicant and if so, whether such a demotion amounted to an unfair labour practice. In the event I find that the respondent committed an unfair labour practice, I am required to find an appropriate remedy.

BACKGROUND TO THE ISSUE

- [7] The applicant was employed by the respondent effectively from 01 September 2007. She was appointed at a position of Admin Officer Asset (level 07), stationed at Pholosong Hospital. She is currently at a gross salary of R24740.75 per month.
- [8] The following were common cause issues:
- (a) The applicant is currently stationed at Pholosong Hospital.
 - (b) Before 05 March 2019, the applicant was rendering services at Asset department which is under the Supply Chain Unit at Pholosong Hospital.
 - (c) On 05 March 2019, the applicant was charged with 7 allegations of misconduct as per page 1-3 of Bundle A. Prior issuing of these charges, she was precautionary transferred from Pholosong Hospital to Far East Rand Hospital.

- (d) The applicant attended her disciplinary hearing and she was found guilty of 1 (one) count of misconduct and the sanction was that of final written warning.
- (e) During her disciplinary hearing, the applicant requested that a recommendation be made that she be permanently transferred to Far East Rand Hospital. The chairperson of the disciplinary hearing recommended that the employer may consider the permanent transfer of the applicant to Far East Rand Hospital.
- (f) The applicant was served with the final written warning and she continued rendering services at Far East Rand Hospital.
- (g) The CEO of Far East Rand Hospital sent the applicant back to Pholosong Hospital because HR had not permanently transferred the applicant to Far East Rand hospital.
- (h) Upon return to Pholosong Hospital, the applicant was told to report at Clinical Section as an Admin Officer Core as per page 4 of Bundle A.
- (i) The applicant's performance was reviewed for financial year 2017/2018 and per page 17 of Bundle A and her performance assessed as per page 19 to 26 of Bundle A.
- (j) On 04 September 2018, the applicant was appointed in the disposal committee in her capacity as 'asset manager'.
- (k) ZA Mthembu was reporting to the applicant and his job description appears on page 14-15 of Bundle A. In terms of the said Job description, Mr. ZA Mthembu was reporting to the 'Asset Manager' who is the applicant.
- (l) The applicant as an asset controller in 2017/2018 reported to supply chain manager Mr. Silvester Phooko.
- (m) On the 05 February 2020, the applicant no longer had Mr. ZA Mthembu, recording clerk at Asset as a subordinate.
- (n) As of the 11 February 2020, the applicant was working in the office of clinical manager. The applicant was not contracted in terms of PMDS by the Clinical manager or in the clinical unit.
- (o) The applicant was taken to the Allied unit. She was not contracted in terms of PMDS by the Allied Unit Manager or the Allied Unit.
- (p) The applicant was previously dismissed from the employer's service on 28 February 2017. She referred the dispute to the Council challenging the dismissal.

- (q) The dismissal case was found in favour of the applicant and was retrospectively reinstated to her position on the 03 July 2017.
- (r) In terms of the award, the applicant was to be reinstated to her position of asset manager.
- (s) The salary of the applicant did not reduce with her move to East Rand or various units in Pholosong.

[9] The following were the issues in dispute:

- (a) The commission of an unfair labour practice by the respondent. The version of the respondent is that the applicant has not been demoted.
- (b) The position the applicant was holding after her reinstatement is in dispute.
- (c) The reasons why the applicant moved from Clinical to Allied Unit is in dispute.
- (d) The version of the respondent is that the applicant's duties have not changed and they are still of an administrative officer. This version is denied by the applicant.

[10] The applicant sought to be restored to her position as Asset Manager/Controller of Pholosong Hospital.

SURVEY OF THE EVIDENCE AND ARGUMENTS

THE APPLICANT'S CASE

- [11] This is not a *verbatim* testimony of the witnesses but a record of only the salient aspects of the evidence.
- [12] The applicant, Ms. Nthabiseng Maria Sekole (nee Mahlangu) was the only witness in her case. She testified under oath and the summary is as follows:
- [13] She is employed by the respondent since 1st September 2007. In terms of her letter of appointment on Page 9 of Bundle A, she was appointed at a position of Administrative Office Asset (level 7). She was generally responsible for overseeing assets of the Department at Pholosong Hospital. This she did by ensuring that assets are barcoded

and ready for use; monitored the movement of assets, ensured recons and registers are barcoded and submitted on time; managing the attendance register; procuring assets according to the plan; submitting registers monthly and performing assets verification at least twice a year. She was also responsible for disposal of assets. These duties appear on the PMDS forms on page 18. She was assessed on these duties and Mr. Phooko signed as her manager. Mr. Fernandez signed as the next level Manager.

[14] Her job title in terms of PMDS was that of Asset Controller. According to her, Asset Controller and Asset Manager means one and the same thing. The award for her dismissal case referred to her as an Asset Manager.

[15] She is not aware of the letter of appointment for 2017 as appears on page 1 of Bundle R, she never even signed as acknowledgement. What she knows is that she was retrospectively reinstated to her position. She returned to her position as normal until she faced disciplinary proceedings against her on 05 March 2019. Even on the 05 March 2019, the respondent addressed the charges to her as 'ASSET Manager'. She attended disciplinary hearing and on 24 July 2019, the presiding Officer issued the outcome which read as follows: -

'Final written warning in terms of PSCBC Resolution 1 of 2003 Par 7.4 (a)(iii) valid for six months.

(The Employer may, on its discretion, consider permanent transfer of the Employee to Far East Rand Hospital as requested by the Employee in the hearing)

[16] She served her sanction at Far East Rand Hospital under the impression that she would be permanently transferred there. After her sanction she consulted her union and the CEO of Far East Rand Hospital for her transfer. The CEO of Far East Rand Hospital told her that her transfer was not accomplished because HR and HOD were not involved. He sent her back to report at Pholosong.

- [17] On 05 February 2020, upon her return at Pholosong, she was handed a letter on page 4 of bundle A headed 'resumption of duties at Pholosong Hospital'. In terms of that letter, it was *recommended* that she reports at Clinical manager's office. She was required to indicate if she accepts the recommendation by appending her signature. If she did not accept it, she was to state her reasons in writing.
- [18] On 06 February 2020, she replied via her union as per page 5 of bundle A, rejecting the recommendation and stating her reasons. Briefly, her reasons for rejecting were that she holds a position of asset manager/controller in the Supply Chain Unit and that her being sent to clinical unit as administrative officer (core) amounts to workplace bullying and demotion.
- [19] On 11 February 2020 and as per page 11 of bundle A, she received a written instruction to resume duties at the clinical manager's office lest she be held to be insubordinate.
- [20] When she arrived at the clinical manager's unit, she was not given any written duties. She was required to assist the clerk with war room duties and minutes; fetch the clinical manager's laptop from the car; make coffee for clinical manager and bring her cups of ice. The clinical manager would call her from the wards and tell her to bring her tea or ice. She was cleaning the table making sure there is no dust. She was practically a runner for the clinical manager.
- [21] As a result, she was not coping at work. She would wake up and not know what she was going to do at work. She got depressed and was admitted at psychiatric hospital for two weeks. She was also attending sessions with psychiatrist and psychologist. She was diagnosed with depression and she is still on depression medication. Page 27 of Bundle A is her medical certificate where the doctor saw her on 24th February 2020. Page 28-29 is a report by the Psychiatrist. The report indicates the depression diagnosis and the applicant's work challenges. In the report, the psychiatrist recommended that relevant people deal with the applicant's work problems as it is not the duty of clinicians to transfer employees from one unit to the other.

- [22] On 29 October 2020 Mr. Fernandez wrote a letter on page 8 of Bundle A headed "agreement to be placed at Allied Unit". She did not sign the letter because she did not agree to be placed at Allied Unit, she was just instructed.
- [23] When she reported at Allied Unit, she was responsible for ordering stock for allied unit, making appointments for patients. She is mainly with assistant director Allied in her office. She assists with meeting arrangements and taking minutes of meetings and controls leave applications for the staff that report to her.
- [24] As an Asset Manager at Supply Chain Unit, she had two subordinates reporting to her, Mr. Mthembu and Mr. Mavimbela. At Allied and Clinical units, she had no subordinates reporting to her. The job description of Mr. Mthembu that appears on page 13 of bundle A was signed by her in her capacity as Asset Manager on 22 September 2017. The 'new' letter of appointment on page 1 of bundle A was signed on 01 July 2017. Even after that letter was populated by the respondent, the respondent still regarded her as Asset Manager. She was not consulted about being administrative officer (core). She was appointed as Admin Officer Asset level 7.
- [25] She has not signed any performance agreement since the last one in 2017/2018 and has since never received performance bonus. There is no growth potential at Allied where she is now because her duties are not defined or even assessed. At Supply Chain as an Asset Manager, the growth possibilities exist as it is a broad unit with many subunits within it.
- [26] The person currently performing her duties in supply chain unit is Mr. Sifiso Motha and she does not know if he is appointed at that position or not.

Cross examination

- [27] She was appointed as Admin Officer Asset level 7 and immediately became asset manager as per her interviews and subsequent documents of the respondent which identified her as asset manager. The administrative officer level 7, asset manager or

asset controller are one and the same thing, it is just the wording. Duties in these three titles are the same.

- [28] She denied that she could be administrative officer in any unit and the respondent could send her to any unit. She stated that experience will majorly count and that she would need to consent to the move.
- [29] She could not refuse to fetch bags or make tea as she had no basis (in the form of contract/job description) to refuse.
- [30] She conceded that she had requested to be transferred to Far East Rand Hospital on a permanent basis at the disciplinary hearing. She did so because the environment was not conducive and she was experiencing sexual harassment issues as it is stated in the presiding officer's report. In her relief she is asking to go back to the supply chain unit because it is all the same, she was never permanently transferred as per her initial request. Further, where she is working now, she is in closer proximity to the CEO and they see each other every day and not even greet, while supply chain unit is a bit far.
- [31] When she was sent back to Pholosong from Far East Rand Hospital, she told Mr. Fernandez that she wants to be sent back to her initial position of Asset manager. Mr. Fernandez told her she is not wanted at supply chain. She took efforts to be contracted, she followed up with Mr. Fernandez. It was not clear who was supposed to contract her because she did not know who her manager was.

THE RESPONDENT'S CASE

- [32] The respondent called 3 (three) witnesses as follows:
- [33] **First witness:** Joshua Fernandes who testified under oath as follows:
- [34] He is employed by the respondent at Pholosong Hospital as a Deputy Director: corporate management. He oversees everything except for Clinical Management and he is part of Executive. Corporate embodies Admin, finance, supply chain, logistics,

kitchen, cleaning, and security. These departments have branches within them. Supply Chain's branches are stores, assets, and procurement. The applicant is under asset management managing assets. The asset management comprises of three people, Mthembu (level 6), Mavimbela (level 2) and applicant (level 7).

- [35] The applicant was initially responsible for equipment repairs. That has changed now because they have clinical technicians to assist with repairs of equipment. The technicians use diagnostic tools to assess the level of damage to equipment and it is a technical function. That took a bulk of work from the applicant as far as repairs are concerned.
- [36] The two employees at asset were reporting to the applicant but there arose a conflict between the applicant and Mr. Mthembu and to resolve the conflict, Mr. Mthembu had to also report to the Supply Chain Manager Mr. Phooko. Mr. Mthembu was at level 5, but he progressed to level 6 through years of service.
- [37] When asked what the position of the applicant was, he stated that she was one of the persons to manage assets, and as the senior employee in that branch, she could be viewed as the one managing assets reporting to Mr. Phooko, the ultimate manager. Manager and controller are different. The manager ensures that policies are complied with while controllers oversee the functionality or operational work. Mr. Phooko is the asset manager. The documents that speak to her being asset manager are just wording and it does not mean she is asset manager; he would agree that she is the asset controller.
- [38] There is no post on PERSAL called 'asset manager'. One can only give the person functionality on PERSAL, e.g., Admin officer (stores) or (asset). It is important to note the level at which the admin officer is appointed.
- [39] When applicant resumed at Pholosong Hospital he directed the applicant to work at clinical unit because of rationalisation but there were other issues showing that it would be prudent not to have her in Asset. She has had 3 (three) cases over the years, one culminated into a dismissal and it was beneficial not to have her back there.
- [40] He wrote a letter on page 8 of bundle A headed 'agreement to be allocated duties at Allied Unit'. He wanted to assist the applicant since she had been off ill due to stress.

He wanted to assist her to move to a better environment. The applicant had agreed she would go to allied since she was not happy at clinical unit. She did not want to sign that agreement, she stated that she did not agree because she felt forced but she did report at allied unit where she is still reporting. She stated in her email that she did not like working next to the CEO's office.

- [41] After the applicant's dismissal, a retrospective reinstatement award came forth. She was reinstated not as asset manager but as Admin Officer Asset but on PERSAL it appears as Admin Officer (Core). She went to the asset department to do her job as normal because PMDS is where one gets their job description or functionality. The applicant's appointment as Admin Officer Asset was not proper according to him. The one which state (core) is more appropriate. Someone with more HR years can explain what Core is. He does not believe that the applicant is disadvantaged by being placed at clinical or allied units.

Cross examination

- [42] He conceded that the managers that are managing the Units that fall under him are at Assistant Director Levels and are all on level 9 currently. There is a supervisor in stores by the name of Thabang Mosia who is at level 7 and the applicant was a supervisor in Assets.
- [43] He conceded that the letter for resumption of duties at Pholosong was only a recommendation and the applicant could accept or reject it. She would accept by signing and reject by giving reasons. He conceded that the applicant rejected by giving reasons but he cannot confirm if her rejection reached the CEO.
- [44] He conceded that Dr Magana and later Peter Mathaba obo Ms. Selepe were aware that the applicant would be sent to their units (Clinical and Allied) and they should have prepared duties for the applicant. They would be relevant to answer why the applicant was not contracted in terms of PMDS.
- [45] He stated that the applicant did not accept the move to either clinical or allied and it could have been difficult for her to be contracted without having accepted. He conceded that the letters sending the applicant to clinical or allied did not specify the

duties she would perform and the applicant would not know what she would be accepting even if she intended to accept.

- [46] After reinstatement, the applicant went back to her duties of Admin Officer Asset level 7. She signed a PMDS contract and she was reviewed and scored a 4 (four) and that meant that she was eligible for performance bonus.
- [47] The applicant is a supervisor, not a manager. He conceded that even the charge sheet of 2019 identified the applicant as Asset manager. He conceded that the applicant will not be able to perform her role as appears on PMDS on page 18 of Bundle A in Allied unit.
- [48] He was not aware that there had been an allegation of sexual harassment against CEO by the applicant, nor that the CEO had opened a case against the applicant. CEO is the one who took the decision that it would not be prudent to put the applicant back in asset after her disciplinary hearing case, he only had to implement it. He does not know if the applicant was consulted on that decision.
- [49] He conceded that opportunity for applicant's career growth exists better in Assets under Supply Chain than where she currently is.
- [50] No one has been appointed to do the duties previously done by the applicant. Mr. Sifiso Motha who is a level 7 financial controller has been delegated to assist with those duties.
- [51] Supervisor is responsible for PMDS evaluation.
- [52] **Second witness:** Dr Nthabiseng Mainah Makgana testified under oath and the summary of her evidence is as follows:
- [53] She is employed by the Respondent, working at Pholosong as Medical Manager, Clinical Services reporting to CEO.
- [54] The applicant worked in Clinical Unit as Administrative Officer. She was responsible for stats especially mortuary stats, scribing, duty roasters, assisting in preparation for presentation and reports and war room meeting minute-taking.

- [55] After her precautionary transfer, applicant was to report at clinical unit but she only reported about 6 weeks later as she was booked off for mental health issues. She did not give the applicant full functionality because she understood the applicant's medical condition. The applicant would offer to carry her bag after she, the witness had an ankle operation. She would also wipe the table willingly as it was dusty often because of constructions that were underway. She would ask the applicant for tea or ice only when she saw the applicant standing up to get for herself. The applicant was not obligated to do any of those.
- [56] The applicant was admitted for mental health issues even before reporting at her unit and this shows that her mental state was not as a result of her unit.
- [57] She did not contract the applicant because the applicant had not accepted to be moved to Clinical Unit.

Cross examination

- [58] There was a need in the clinical Unit for administrative support. The unit normally runs with two administrative clerks, a level 7, and a level 5. They only had a level 7 at that time. The applicant was recommended to her unit by the CEO.
- [59] She conceded that the letter of instruction on page 7 does not give the applicant an opportunity to accept or decline. She knew that the applicant did not accept to be transferred to Clinical because she asked and was verbally informed. She did not see any letter, she just assumed that the applicant did not accept. She could not comment of what policy allows her not to contract the applicant if she did not accept transfer to her unit.
- [60] The letters on page 27 and 28 of bundle A were shown to the witness and she conceded that the applicant was first consulted by that specific psychiatrist on 24 February 2020 and diagnosed with depression as a result of work stressors. She conceded that her assumption that applicant might have seen other health workers prior the 24 February 2020 does not hold water as there is no shred of evidence backing that assumption.

- [61] **Third witness:** Constance Khonangaye Selepe testified under oath and the summary of her evidence is as follows:
- [62] She is employed by the respondent at Pholosong and she is a manager at the Therapeutic and Medical Services, formerly known as Allied.
- [63] The applicant started working for her unit in November 2020. Joshua Fernandes asked her if she would have a space for and Admin personnel and she responded in the affirmative. The applicant was assisting with collecting Stats, minute taking, reports compilation leave management and completing of most HR documents. She would say that the applicant was doing administration similarly at Asset unit, save to state that they administered different documents.

Cross examination

- [64] She could not say as a fact what the applicant's duties in Asset unit were. She conceded that the duties of the applicant as appear on page 18 of bundle A were mainly not administrative but were mainly asset management. She conceded that the applicant was not performing any of these duties at allied unit.
- [65] She conceded that the applicant was not contracted in terms of PMDS. She had informed that applicant to sort it out with Joshua Fernández. She conceded that the failure to contract the applicant has disadvantaged the applicant.

ANALYSIS OF THE EVIDENCE AND ARGUMENTS

- [66] In terms of section 185 of the Labour Relations Act, every employee has a right not to be subjected to unfair labour practice. Unfair Labour Practice has been defined in Section 186(2) as any unfair act or omission that arises between an employer and an employee involving inter alia an unfair conduct by the employer in relation to demotion. Section 186(2), by implication, permits an employer to demote an employee, provided that this is done fairly.
- [67] One of the primary objects of the LRA is to give effect to and regulate the fundamental rights conferred by section 23 of the Constitution including the right to fair labour practices enshrined in section 23(1).

- [68] Although the LRA is silent on the question of onus to prove an unfair labour practice, it is generally accepted that he or she who alleges an unfair labour practice (in other words the employee) must prove the allegation.
- [69] Employees who complain of unfair demotion must prove that they have actually been demoted. The respondent disputed that it had demoted the applicant. I will firstly address the question of whether the applicant was demoted.
- [70] Most of the substantial issues became common cause during narrowing down of issues. It was common cause that before the alleged action of the respondent, the applicant working at Asset Unit, performing such duties as appears on Page 18 of bundle A. She was undisputedly responsible for the management of assets. It was common cause that her job title at appointment was Administrative Officer, given functionally of 'Asset' at a level 7. It is common cause that the applicant was the most senior official at Asset unit and it was common cause that there were two officials that reported to her. Importantly, the respondent admitted that the applicant had been moved to clinical Unit and later Allied unit.
- [71] It should be noted that demotion does not occur merely because the employee is placed in a post involving slightly different work, especially when that work falls within the scope of the employee's duties. The mere fact that an employee's title is changed is not necessarily proof of a demotion; something more is required. The change in the employee's position in the organisation must also entail a loss of benefits or a lowering of the employee's status. The employee's prestige, status and even work-duties may also be less.
- [72] Clearly, a comparison must be done in order ascertain whether a demotion had occurred. While the overall onus in Unfair labour practice disputes lies with the applicant, the evidentiary onus will from time to time move depending on what issues are in dispute and the allegations made by either of the parties. The respondent, having admitted that it moved the applicant to the two different units, had the evidentiary

burden to discharge that the applicant's duties, status, and prestige at those units were not less.

- [73] The respondent firstly submitted and argued that the correct post title of the applicant was Administrative Officer and she is still Administrative Officer. The respondent submitted that it serves the applicant better to be placed at a functionality of *Core* because she is able work at other Units while the functionality of *Asset* limited her to only work at Asset Unit. The applicant submitted that Asset was her speciality and field of experience. The respondent did not state what instigated this change which was allegedly for the benefit of the applicant. The applicant was not consulted on it and it was not denied that she did not see the 'new letter of appointment' appointing her at a functionality of *Core* after the unfair dismissal. It was also not denied that the applicant was reinstated per award to *the position she held prior her dismissal*. During submission of the evidence and even during arguments, the respondent did not once submit how the change actually benefitted the applicant. The submission of the respondent that the change to functionality of *Core* was to the applicant's benefit is not probable and is thus rejected.
- [74] Secondly, the respondent argued that the applicant's salary had not changed, this is not denied by the applicant. It is trite that a demotion can occur without a reduction in salary. That the salary remained the same does not oust the possibilities of demotion.
- [75] Thirdly, the respondent submitted that the duties of the applicant that she performed in the two units were administrative in nature. This was an unfortunate attempt by the respondent to reduce the essence of the applicant's position and duties to a mere English interpretation of the word *administration*. This was unfortunately done in total disregard of the PMDS review and assessment reports. The applicant and the managers of Clinical and Allied units all testified on the duties of the applicant. Clearly, the applicant did not perform most, if not all of the duties she performed while at Asset Unit. The duties that she performed at the Clinical and Allied units were clearly inferior in comparison to those that she performed at the Asset Unit. Over and above them being inferior, the duties she performed at Clinical unit had the effect of demeaning the applicant. Moving from a position of supervising a unit to making tea is clearly

degrading. The applicant suffered emotionally because of work stressors. The respondent attempted to submit that the applicant was already depressed when she arrived at the Clinical Unit. No shred of evidence was submitted by the respondent in support of this contention. The applicant submitted undisputed medical evidence, including the psychiatrics' report which indicated the depression diagnosis because of work stressors.

[76] It is my finding that the evidence give overwhelmingly supports that the applicant was demoted.

[77] I now turn to the question of whether the demotion was fair. The submission by the applicant was that the demotion was without just cause. She argued that was being submitted to bullying as there was bitter history of events between her and the CEO. She had made allegations of sexual harassment against the CEO and the CEO had opened a criminal case against her.

[78] The respondent submitted that the CEO is the one that decided that the applicant be removed from the Asset unit as it would be prudent to do so. The respondent's submission was that it was necessitated by the fact that the applicant had had few cases against her over the years. It is common cause that the applicant was dismissed in 2017. She challenged the dismissal and the commissioner found the dismissal to have been unfair and reinstated her with full back pay. This award was not reviewed and the applicant was reinstated to her position. Seven charges were levelled against the applicant in 2019 and the applicant was found guilty of one (1) charge and the sanction was a final written warning valid for 6 months. The final warning was issued and the final warning has expired. None of the presiding officers in these cases indicated that the applicant should not return to asset or that it would be prudent if the applicant did not return to asset. They were both aware of the fact that she was working at asset department and the evidence before them was that she was "asset manager". This begs the question, what influenced the CEO's decision that it will not be prudent that the applicant work at asset although presiding officers who intrinsically dealt with

the applicant's case did not think so? This question was for the respondent to answer but it failed to do so in its evidence.

[79] In *Aries v CCMA & others* (2006) 27 ILJ 2324 (LC) the Court held that there are limited grounds on which an arbitrator, or a court, may interfere with a discretion which had been exercised by a party competent to exercise that discretion. The reason for this is clearly that the ambit of the decision-making powers inherent in the exercising of discretion by a party, including the exercise of the discretion, or managerial prerogative, of an employer, ought not to be curtailed. It ought to be interfered with only to the extent that it can be demonstrated that the discretion was not properly exercised. The court held further that an employee can only succeed in having the exercise of a discretion of an employer interfered with if it is demonstrated that the discretion was exercised capriciously, or for insubstantial reasons, or based upon any wrong principle.

[80] It is my finding that the decision to demote the applicant was exercised capriciously and for insubstantial reasons. I find that the demotion of the applicant was unfair. I believe that the decision to demote the applicant was motivated by bad faith because of the bitter relationship that exists between her and the CEO. The applicant has for a long time been subjected to injustices, dating back to the dismissal which was found to be unfair.

[81] I now turn to the question of relief.

[82] It was undenied that the applicant suffered emotionally and mentally because of the demotion. Since the financial years 2017/2018, the applicant did not sign any PMDS as a direct result of this demotion. She testified that she has since not received any performance bonus as a result and this was not denied. She indeed could not because she was not contracted in terms of PMDS, this being the tool the respondent would use to assess her performance. Clearly, the applicant has also potentially suffered financially because of the demotion.

[83] I have already dealt with the mental and emotional suffering as per the psychiatrist's report.

[84] The applicant seeks 12 months' compensation and to be restored to the same terms and conditions of her position as an Asset Manager/ Controller. The applicant argued that the position of either manager or controller is just a question of semantics because these words are synonyms. The respondent submitted that PERSAL does not have a post by the name of Asset manager/controller and this was not denied.

[85] In terms of Section 193 (4) of the LRA an arbitrator appointed in terms of this Act may determine any unfair labour practice dispute referred to the arbitrator, on terms that **the arbitrator deems reasonable, which may include** ordering reinstatement, re-employment, or compensation (my emphasis).

[86] In *South African Post Office Limited v Soman N.O. and Others*, Cele J stated:

"[22] The compensation that an employee, who has been unfairly dismissed or subjected to unfair labour practice, may be awarded is not aimed at making good the patrimonial loss that she has suffered. The concept of loss or patrimonial loss may play a role to evince the impact of the wrong upon the employee and thus assists towards the determination of appropriate compensation, but compensation under the LRA is a statutory compensation and must not to be confused with a claim for damages under the common law, or a claim for breach of contract or a claim in delict. Hence, there is no need for an employee to prove any loss when seeking compensatory relief under the LRA.

[23] Compensatory relief in terms of the LRA is not strictly speaking payment for the loss of a job or the unfair labour practice but in fact a monetary relief for the injured feeling and humiliation that the employee suffered at the hands of the employer. Put differently, it is a payment for the impairment of the employee's dignity. This monetary relief is referred to as a solatium and it constitutes a solace to provide satisfaction to an employee who is constitutionally protected right to fair labour practice has been violated. The solatium must be seen as a monetary offering or pacified to satisfy the

hurt feeling of the employee while at the same time penalising the employer. It is not however, a token amount hence the need for it to be "just and equitable" and to this end salary is used as one of the tools to determine what is "just and equitable".

- [87] It is my finding that an amount of R49 481.50 equivalent to two (2) months' salary as solatium would be just and equitable under the circumstances. The amount is calculated as follows: $R24740.75 \times 2 = R49481.50$.
- [88] There is absolutely no reason why the applicant should not be restored to the position she held prior her demotion.

AWARD:

- [89] The respondent has demoted the applicant and such a demotion amounted to an unfair labour practice.
- [90] The respondent is ordered to restore the applicant to the Asset unit to perform the asset controller duties and responsibilities on the same terms and conditions of her position as an Administrative Officer with the functionality of Asset at level 7 with immediate effect.
- [91] The respondent is ordered to pay the applicant an amount of R49 481.50 equivalent to two (2) months' salary (subject to the allowable statutory deductions) as solatium to her bank account. The amount must be deposited to her account on or before the 31 July 2021.
- [92] There is no order of costs.



K.P Chavalala