

ARBITRATION AWARD

Panelist: RG Pieterse _____
Case No.: GPBC641/2021 _____
Date of Award: 15/05/2023 _____

In the ARBITRATION between:

PSA obo L Mbense _____

(Union obo Applicant)

and

Department of Education _____

(Respondent)

DETAILS OF HEARING AND REPRESENTATION

- [1] This is the award in the arbitration between PSA obo L Mbense, (hereinafter referred to as the Applicant) and the Department of Education, (hereinafter referred to as the Respondent) that was held on 04/03/2022; 04/05/2022; 21/06/2022; 22/06/2022; 14/09/2022; 08/11/2022; 09/11/2022; 24/01/2023 and 04/04/2023.
- [2] The arbitration was held under the auspices of the General Public Service Sectoral Bargaining Council (GPSSBC) in terms of section 191 of the Labour Relations Act 66 of 1995 as amended (LRA) and the award is issued in terms of section 138(7) of the LRA.
- [3] This award is not intended to be a verbatim transcript of the evidence led at the arbitration but rather a determination with brief reasons for such determination.
- [4] Evidence relevant to the determination or to support any of the elements of fairness as required may be referred to. This however does not mean that I failed to consider other evidence or ignored such evidence in coming to my decision.
- [5] The Applicant was represented by Mr Moloena, an official from PSA, and the Respondent was represented by Mrs Emily Magadla.
- [6] Parties were directed to submit written heads of argument.

ISSUE TO BE DECIDED

- [7] The issue is whether the Respondent committed an unfair labour practice relating to benefits by not by not contracting the Applicant for the PMDS cycle during the financial year 2020/2021 thus denying the Applicant benefits and to whether the Respondent committed an unfair Labour practice relating to disciplinary action short of dismissal when it implemented leave without pay against the Applicant.

BACKGROUND TO THE ISSUE

- [8] The Applicant went on maternity leave in 2009 and returned in June 2010.
- [9] before going on maternity leave the Applicant was performing the duties of personal assistant (PA) to the district director, Poppy Thabethe.

- [10] Upon her return from maternity leave, the Applicant was placed in auxiliary services (office service pool) for the period of eight months reporting to Mrs Bridget Mpshe.
- [11] In 2018, the Applicant was charged with two charges relating to absenteeism and at the conclusion of the hearing she was found guilty, and the chairperson issued the sanction of final written warning and counselling through the EAP.
- [12] In his findings, the chairperson found that the Respondent representative acted out of his powers when implementing leave without pay against the Applicant due to the situation she was in which was caused by the Respondent.
- [13] The Respondent followed the outcome of the disciplinary hearing and implemented the sanction of final written warning, and the Applicant was referred to EAP.
- [14] The Respondent further persisted with the already implemented leave without pay even after the findings of the chairperson.
- [15] In the beginning of the financial year 2020/2021, the Applicant was placed to work in HRM. The Applicant was not contracted for PMDS and during the two assessment periods in line with PMDS policy the Applicant was not assessed.

SURVEY OF EVIDENCE AND ARGUMENT

APPLICANT'S CASE

L Mbense

- [16] The Applicant testified that she was appointed in the Department of Education as a PA to the District Director, whereupon her return from maternity leave in 2010, she was verbally instructed that she would not be working in the office of the District Director, she would be placed where she would have light duty work.
- [17] The Applicant further testified that she reported to Ms. Bridgette Mpshe and also stated that from that point onwards, she was moved from one unit to another with no intention of permanent placement and in the process, she did not have a contract that entails her duties and therefore was not contracted and thus could not be evaluated.

- [18] The Applicant further testified that her pension and pay progression has been negatively affected by the employer's unfair conduct.
- [19] The Applicant further testified that, at some point, she would come to work and do nothing and that it contributed to her medical condition.
- [20] The Applicant testified that in 2019 she requested to be moved to HRM where she can find something that she can do, and a meeting was held where it was verbally agreed for her to be moved to the HRM unit which was managed by Mr Makhalimela. She worked at HR from 2019 to June 2021. In the HR unit there was no post on salary level 7 (as the Applicant was on salary level 7). There was only work for salary level 5 and during her time in the HR unit, she was doing level 5 work, whilst remunerated for salary level 7.
- [21] The Applicant testified that although Mr Makhalimela supervised the HR unit, she was never contracted. She testified that Mr Makhalimela indicated that he does not know how she ended up in his unit and that he won't be able to contract or evaluate the Applicant.
- [22] In respect of the leave without pay, the Applicant testified that the ESS in 2017 was fairly new and it had problems. She testified that the leave forms would replace the ESS if it did not work well.
- [23] She testified that in 2017 she encountered problems with the ESS and assumed that it is approved instead, it was hanging or pending in the system. The Applicant testified that she was not supposed to be charged as the money was recovered and that this constitutes double jeopardy.
- [24] During cross-examination, the Applicant conceded that she requested to be moved from auxiliary to HR as she had nothing to do at auxiliary and HR had a lot of work. She conceded that there was no post for level 7 at HR and only one post at level 5. She further conceded that her movement to HR was not a formal transfer and there was no paperwork for her movement. During cross-examination, she submitted that she is not sure for which level she was going to be contracted as her salary level was salary level 7 and she was performing salary level 5 work at HR. She further conceded that for the whole period, she was working at HR, she was receiving a level 7 salary whilst performing salary level 5 work. She also conceded that by receiving salary level salary, she was not prejudiced in any way. She further conceded that she never lodged any grievance with the Labour Relations Department during the 2020/2021 PMDS cycle nor with the PMDS unit. She agreed that she was aware of the grievance procedure.

RESPONDENT'S CASE

Mr J Makhalimela

- [25] The witness testified that he was in the JN district THRS conditions of service from 2005 and he is now at the Ekurhuleni South District office from 1 November 2022.
- [26] He testified that Ms. Busi Mabele informed him that the Applicant came to the HR unit to learn work. She did ask to supervise the Applicant as he was level 8 and the Applicant was level 7.
- [27] The witness testified that he did not know where the Applicant came from as there were no formal documents in place for her movement from Finance and Administration.
- [28] During the PMDS 2020/2021 cycle, the Applicant asked him to contract her. She was formally appointed to Finance and Administration. He was only contracting level 7 employees at HR under conditions of service. He testified that the Applicant's level 7 is supervisory work, and at HR she was not doing supervising work, she was doing level 5 work.
- [29] The witness testified that he could not contract the Applicant at level 5 because of the duties she was doing, whilst she was paid on salary level 7. It was not possible because of the different levels.
- [30] During cross-examination, the witness stated that he was never told about the appointment of the Applicant at the conditions of service, but he was informed that the Applicant is there to learn and the Applicant was capturing leaves only. The witness further denied that the Applicant reported to him and that he was not responsible for any leave or reports, and he distanced himself from anything that had to do with the Applicant. He mentioned that the Applicant was placed in his unit without his involvement. He further alluded that the history of the Applicant had been moved from one unit to another and does not know the reason for that.

Ms. N Masango

- [31] She is a PMDS Deputy Chief Education Specialist at Tswane West District Office since September 2021.
- [32] The witness testified that she was part of the grievance meeting that was held with the Applicant on 23 April 2021 and she confirmed that the minutes were a true reflection of that meeting. The witness explained the PMDS process from the performance agreement on the KRA's that PMDS is not only

rewards but also development. She testified that contracting is in April, mid-term review in September, and the final assessment in March the following year. The witness testified that an employee cannot do a mid-term review having not done contracting, same with a final assessment.

- [33] The witness testified that an employee who is transferred on the same salary level must enter into a new performance agreement for the new post or position within one calendar month of the transfer with the new supervisor.
- [34] The witness testified that an employee who does not comply with the requirements due to her own doing shall not qualify for any performance rewards.
- [35] The witness testified that in 2020/2021, the PMDS unit never received any documents for the Applicant. They also did not receive any grievance to resolve from the Applicant during the 2020/2021 PMDS cycle.
- [36] During cross-examination, the witness stated that the PMDS unit never failed to resolve the Applicant's PMDS issues during that period. She testified that the PMDS unit never received any documentation nor any scores of PMDS for the Applicant. She testified that during the PMDS cycle 2020/2021, the Applicant was reporting to HR. She conceded that the relationship between the Applicant and Ms. Mpshe was broken, and they did not have a great working relationship. She conceded that she knows about the Applicant's health condition and that the employer is aware, but she cannot disclose on record. She conceded that the supervisor is responsible for ensuring that performance agreements are submitted.

Mr M Mali

- [37] Mr Mali is a School Liaison Officer in the District Office. He controls and manages absenteeism at schools and in the district office. He stated the different kinds of leaves and further explained that, before an employee goes on leave, they engage with the supervisor first. He testified that once leave is granted, the employee can then go on leave. He testified that the employee cannot go on leave first and then apply for leave afterwards with the exception of sick leave only.
- [38] He testified that in 2017/2018 he was allocated the third floor in the district to manage absenteeism. He testified that he discovered high absenteeism from the Applicant and no leave forms for absence from work. He then engaged Ms. Bridget and gave her five days to respond and to receive those outstanding leave forms. He testified that leave forms were never submitted or received.

- [39] The witness testified that the Applicant would be absent without applying for leave or informing her supervisor and that the Applicant would be absent for many days.
- [40] The witness testified that he later received a letter from Mr Makhalimela to implement leave without pay for the days that came from the audit finding.
- [41] The witness testified that he investigated and made an audit and the leave reconciliation which appears on pages 1 and 2 of bundle R and then the recommendations were made that the Applicant should be charged for absenteeism. He further testified that his reconciliation of leave of absence of the Applicant was conducted utilizing an electronic leave application system called the ESS, physical leave application forms and the leave book. He testified that if the system indicates pending or hanging, it means that the leave is not approved, or the Applicant submitted leave late. He testified that the reconciliation is accurate because he used both the physical and the system and the leave book.
- [42] The witness testified that there was a disciplinary hearing where the Applicant was given a final written warning.
- [43] The witness testified that implementing leave without pay is within his line function as he controls and manages absenteeism for any employee in the Department, hence Mr Makhalimela gave him the function to implement leave without pay for the Applicant.
- [44] During cross-examination, the witness answered that the system was a pilot in the Department during 2017/2018. He confirmed that he relied on the system to conduct his audit as well as the leave book and physical leave forms. He conceded that the ESS had issues at that time but recently it is working perfectly.

ANALYSIS OF EVIDENCE AND ARGUMENT

- [45] It is common cause that the Applicant was working in HR during 2020/2021.
- [46] Mr Makhalimela testified that he was informed by Mrs Busi Mbele that the Applicant is now working in the HR department.
- [47] He further testified that he did not know where the Applicant came from as she was originally from Finance and Administration.

- [48] He further testified that the Applicant did ask him in 2020/2021 to contract her but he could not do it as she was level 7, and she was not doing level 7 work, she was doing level 5 work.
- [49] He also testified that the Applicant was not reporting to him, and he distanced himself from anything that had to do with the Applicant, yet he was the person who instructed and issued a letter to Mr Mali to implement leave without pay for the days that came from Mr Mali's audit finding.
- [50] It is impossible to think that the Applicant was working in the HR department without any supervisor to report to. Mr Makhalimela was a level 8, and he is the only person who could have supervised and contracted the Applicant, irrespective if the Applicant was doing level 5 work and irrespective of whether the Applicant arrived there without any paperwork from Finance and Administration. There were other avenues for Mr Makhalimela to deal with those issues.
- [51] It is my view that the Respondent was looking for all kinds of excuses not to contract the Applicant and that cannot be correct, nor can it be fair towards the Applicant. The Applicant worked during the period of 2020/2021 and ought to have been contracted.
- [52] In respect of the audit finding of Mr Mali, I am satisfied with the audit findings and evidence of Mr Mali and I accept that implementing leave without pay is within his line function, hence he was implementing leave without pay for the periods mentioned in his evidence.
- [53] In respect of the days that the Applicant was absent, it is my view that leave was not approved for her and the Respondent correctly deducted money for the days (absent without leave).

AWARD

- [54] In the premises, I make and deliver the following award:
- [55] The conduct of the Respondent by not contracting the Applicant for the PMDS cycle of 2020/2021 was unfair and constitutes an unfair labour practice in terms of section 186(2)(a) of the Labour Relations Act.
- [56] The Respondent is ordered to contract and assess the Applicant for the PMDS cycle 2020/2021 by no later than the 16th of June 2023.



Panellist: RG Pieterse