



GENERAL PUBLIC SERVICE
SECTOR BARGAINING COUNCIL



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Panelist/s: Caroline Hlongwane
Case No.: GPBC1876/2022
Date of Award: 24 November 2025

In the ARBITRATION between:

PSA obo Thabo Kgasi

(Applicant)

and

Department of Justice and Constitutional Development

(Respondent)

ARBITRATION AWARD

DETAILS OF HEARING AND REPRESENTATION:

1. This is an arbitration award in terms of section 138(7) of the Labour Relations Act 66 of 1995 ("the LRA"), as amended. Mr Thabo Kgasi ("the Applicant") referred an alleged unfair labour practice dispute in terms of section 186(2)(a) of the LRA against the Department of Justice and Constitutional Development ("the Respondent") to the General Public Service Sector Bargaining Council ("the Council").
2. The matter was scheduled for arbitration before me on the following dates: 11 October 2024, 13 and 26 February 2025, 30 June 2025, 01 July 2025 and 24 October 2025, and the hearing did not take place on 11 October 2024, 13 February 2025, 30 June 2025 and 01 July 2025 due to various reasons that form part of the record. Meaning that the matter properly proceeded as scheduled on 26 February 2025 and 24 October 2025. Based on the submissions made by the applicant's representative on 11 October 2024, the matter seemed to have a long history in that by the time it was scheduled before me, the respondent changed representatives few times and another Commissioner recused herself.

3. The applicant was present, and he was represented by Mr Simon Sono, PSA union official. The respondent was represented by Ms Lungile Ngobese.
4. The applicant's evidence was presented in English, and the proceedings were digitally recorded; and the recordings were sent to the Council. On the last day of the rearing, the parties requested to submit written closing arguments by 31 October 2025 and they both duly complied.

Issue to be decided:

5. I am required to determine whether the respondent committed an unfair labour practice related to benefits against the applicant.
6. Should I find in the applicant's favour, he sought payment of the pay progression from 2016 to 2023 as well as the performance bonus from 2016 to 2023.

Background to the matter:

7. The applicant is employed by the respondent as a Deputy Director in the Directorate: Service Delivery Improvement, and he started working from 01 July 2010 and he earns R64 992.73 per month.
8. The applicant's dispute is in relation to the Performance Management Development System ('PMDS') in that he has not signed performance agreements from 2016 to 2023, this was allegedly due to his former supervisor's lack of co-operation. He has on numerous occasions tried to reach out to his former supervisor's manager, HR, Director-General and he did not get any assistance. The failure to sign the performance agreements has deprived him from getting the annual pay progression, performance bonus and any benefits that comes with the PMDS.

Survey of evidence and argument:

9. The applicant submitted bundle of documents marked as 'A', 'A1' and 'A2' and the respondent's bundles were marked as 'B1' to 'B3' and the contents were purported to represent what they were. At the outset, I wish to indicate that only relevant evidence pertaining to the issue in dispute will be recorded in the award and not all the evidence presented at the hearing.

Applicant's case

10. The applicant only relied on his own evidence, and he testified under oath that his challenges with the respondent started back in 2012/2013 and continued in 2014/2015 financial years with his then supervisor, Ms Emily Mlangeni who was responsible for signing his performance agreement and she would ignore the timelines.
11. She then later endorsed a memo which relieved the two assistant directors who reported to him without his knowledge or proper process being followed and this led to the shifting of all personnel linked to his position and most of his responsibilities became affected. He raised the issue with Ms Mlangeni and requested her to restore the structure to what it was, but nothing changed. As a result, his performance agreement did not align, and he would rely on the previous performance agreements he signed to do his job and still his work submissions were ignored by Ms Mlangeni. He then raised his challenges with HR and asked for assistance because his PMDS were affected.
12. For the 2016/2017 financial year, since Ms Mlangeni was not fulfilling her role on assessments, he decided to assume a proactive role by signing his outdated mid-year and annual review documents of 2015/2016 on 26 April 2016 and he handed them to her. Ms Mlangeni only signed the documents on 26 May 2016, that is, only three working days for the conclusion of the 2016/2017 performance agreement. This process should have been completed at the end of October 2015 and the forms for end of the year review had until June to be completed. At that time, he was already on leave and only managed to get the documents on 08 June 2016 after the deadline for submission of the 2016/2017 performance agreement had passed and he immediately sent it over.
13. Ms Mlangeni then scheduled a meeting for the 29th of June 2016 which was his first day at work after he returned from leave regarding his 2016/2017 performance agreement. The performance agreement he forwarded was similar to 2014/2015 and 2015/2016, his position was that in developing a reliable performance agreement, it should be informed by actual status quo. He then prepared a letter to Ms Mlangeni with factors to be corrected for the realignment of his performance agreement, and his supervisor became angry and did not want to adhere to the request and the meeting ended as she stormed out of the meeting. His intention was to see how the matter should be moved forward. After she stormed out of the meeting, he sent an email to her on 30 June 2016 saying that they needed to find a way forward regarding the situation and that she should have escalated to Mr Mosalanyana, her supervisor and within 30 days Mr Mosalanyana, should have sat with them to re-negotiate the performance agreement as specified by the guideline under Employee Performance Management and Development System (EPMS) of the DPSA or resolve the issue.
14. He was expecting HR to intervene to resolve the issues, especially because there are regulations to deal with disagreements, and nothing happened, to date nothing was done. HR only issued one memo issued in 2017 regarding the non-compliance with the prescripts. HR issued him with a letter three months after the memo

when he was still within timeframes of submitting. He was referred to pages 18 to 19 of bundle A which he identified as the letter from HR regarding the outstanding performance agreement for 2017/2018 which was forwarded to him by Ms Mlangeni via email. He told her that he was still within the stipulations of the DPSA because four months prior to that he wrote to the Deputy Director-General for Corporate Services regarding his challenges with the performance agreement.

15. For the 2017/2018 cycle, he was obligated again to engage Ms Mlangeni, he was referred to pages 28 to 30 of bundle A which he identified as an email he sent to Ms Mlangeni on 16 May 2017 regarding his performance assessment and he suggested that they work at other provisions that could be applicable to his situation. The email led to Ms Mlangeni scheduling a meeting which materialised and he raised the same issues he raised in 2016. For performance, it is normally the supervisor and the employee meeting, and HR was never involved. During the meeting, Ms Mlangeni presented an expectation that he should submit a mid-term review and annual assessment forms for 2016/2017 and also the 2017/2018 performance agreement, he then told her that her requests were improper because there needs to be an agreement fully signed by both parties which she did not sign any as per departmental performance management policy.
16. He could not identify his areas of performance from the OPS plan because his post was subjected to a job evaluation and some of his roles were taken away by Ms Mlangeni. Because of him raising her non-compliance to policy, the mood of the meeting changed to become argumentative from her, and it ended abruptly. Thereafter, Ms Mlangeni sent him an email stating that he would submit his performance agreement to HR with comments that they did not agree on the contents as your performance agreement was not aligned to the 2016/2017 OPS Plan.
17. He was also referred to pages 21 to 27 of bundle A, and he stated that he was seeking intervention from Ms Mlangeni's supervisor, Mr Mosalanyana because Ms Mlangeni was wrong to ask for a performance agreement when there was no performance assessment. He did not get any response from Mr Mosalanyana. He was referred to page 32 of bundle A1 which he identified as an email from him to his supervisor, the chief director, HR and ER and no one responded.
18. He was also referred to pages 34 to 35 of bundle A1 which he identified as the circular for signing the performance agreements for 2017/2018, the circular also dealt with the procedure to be followed when dealing with disputes emanating from PMDS processes, it was surprising that Mr Adams who failed to deal with his issues was elaborating on these issues.
19. He was further referred to page 12 of bundle A2, Item 7, and he stated that it took him two full years to receive a performance payment for 2015/2016 as he only received it in 2018. After realising that his PMDS payment were only done after 2 years, he became concerned, he then resorted to request a face-to-face engagement with the Director-General, and he referred to Page 48 of bundle A1 which he identified as the response from

the office of the DG on 27 March 2018. Mr Adams only responded on 29 May 2018, two days before the last day of the signing of the performance agreement. Unfortunately, after the 29th of June 2018, he did not get any response or communication from the DG's office to date.

20. The same challenge he had in 2017/2018 continued in 2018/2019. He referred to page 37 of bundle A1, paragraph 5.3(i) to (iv), and he stated that this means that he had lost yet another cycle because of the situation beyond his control. His worry was that if the respondent and HR did not respond it means that they have decided that he should remain on the same salary level. What they failed to consider was that the performance assessment or agreement was also dependent on his supervisor.
21. He started raising the financial implications he suffered since 2015 through memos and a remedial process and there was no response he received to date.
22. For 2019, 2020, 2021, 2022 and 2023 cycles, because of the interim change of top management and a new DG and DDG came in and he forwarded the memo to the DDG which was acknowledged on 19 March 2021. He met with Sakhephi Khoza informally as instructed by the DDG, Connie Mameja and in August 2021, he met with Mr Mtshweni who introduced himself as a mediator, but Ms Mlangeni did not attend. Mr Mtshweni promised to meet with his supervisor, and he gave him feedback stating that she would not participate in the mediation as she was not prepared to meet with him or work with him in her directorate. He then wrote an email on pages 51 to 52 of bundle A1 which he did not get any response.
23. He wrote another email to Mr Mtshweni requesting a mediation update and he did not get any response, the DDG also did not communicate with him. In February 2022, he coincidentally met Mr Mtshweni in the corridors and he would ask him if there was any update and he kept on saying that he must not worry because his recommendations as they agreed in September 2021 still stood but did not say whether he submitted the report or not. He wrote again to Mr Mtshweni and did not get any response and on 20 July 2022, he went to Mr Mtshweni's office who was busy on the computer, he explained he has been asked by Mr Masango, the Organisational Relations Director to complete and submit the report about his issue before the end of the day. He was disappointed because it did not look Mr Mtshweni did anything since the intervention meeting.
24. In September 2022, he was told by Organisational relations officials that the report has been forwarded to the Chief Financial Officer, and later it would be taken to the DG which he found it strange. His union then advised him to lodge a formal and he lodged a grievance on 22 September 2022 which was acknowledged but he did not get any response. He then submitted a formal dispute to the Council in December 2022. Because of how his issue was handled, he was hospitalised from 02 to 31 October 2023 as per page 54 of bundle A1.
25. For every year since 2016/2017 when all employees were committing themselves, fulfilling their roles, get to be capacitated through training and workshops, he missed on trainings, and he also could not go to any of the

workshops. He was deprived to be rewarded with performance incentives of pay progressions, performance bonus of a 1% to 18% for personnel on level 11 to 12; he is, therefore, asking for the maximum of 18% as provided and calculated by the Incentive Policy Framework be considered each year from 2016/2017. He tried his best to ensure that before the beginning or end of a deadline of a financial year from April 2016 that he reminded the respondent of the transgression the respondent has put on him but they decided not to correct it, he included all relevant structures that have the relevant authority to intervene, but they decided not to.

26. He does not have any correspondence from HR engaging his supervisor, Ms Mlangeni and he have never been subjected to any disciplinary hearing regarding the non-compliance with the prescripts.
27. During cross-examination, he was referred to page F16 to F19 of bundle A which he identified as the half yearly review form for 2015/2016, and he confirmed that he submitted the document to Ms Mlangeni who assessed him. He was rated a 1 and he was not given the reasons why he was rated a 1.
28. He confirmed that he signed the form on 26 April 2016, however, he should have signed it in October 2015 because his supervisor did not create any formal sitting to do the rating. He submitted the performance agreement on his own accord and when he submitted it, he already signed it and after the supervisor signed, she submitted it back to him. He did not agree with the rating given by his supervisor.
29. When he received the performance agreement back, he was already on leave and when he returned, he wrote a motivation for an objection stating that the form should be looked at together with the performance management document. His supervisor took the forms as they were to HR, when an employee is rated a 1, there should have been an intervention identified. In October 2016, the moderation committee returned the forms and stated that there was a problem which needed to be fixed.
30. When he was asked as to what was wrong with the moderation pack submitted for moderation, he stated that there was no agreement when it comes to the rating, he rated himself a 3 and the supervisor rated him a 1, so, there was no agreed score.
31. He prepared his performance agreement for 2016/2017, but it only had his signature because that financial year also had its own challenges.
32. He was referred to pages H21 to H23 of bundle A1 which he identified as his leave forms which he submitted on 09 May 2016, and he submitted his performance agreement on 08 June 2016 when he came back from leave. His supervisor did not give reasons for not signing his performance agreement, she just stormed out of the meeting when he was explaining the policy requirements. He told his supervisor that the arrangement to remove his subordinates from his supervision had to be corrected and the structure to be restored so that they

could re-negotiate the performance agreement. This was because his performance agreement was not aligned with the directorate of the department.

33. He confirmed that the operational plan of the directorate is informed by the plan of the department, however, his performance agreement was not aligned with the department's plan because in 2014, they shifted his post, and the supporting structure was no longer reporting to him. Ms Mlangeni ignored his work submissions, and he was not given tasks to do that is why his performance agreement was out of line. After the shift, he did not know the role of his job, and he had nothing to rely on other than the 2015/2016 performance agreement and there was no change in his situation. He stated that he made lots of submissions regarding his situation and he forwarded emails to raise the challenges he was having and those who requested more information, after his respond, they never came back to him or made any intervention.
34. When he was asked if he submitted any performance agreement for 2017/2018, he stated that he did not submit any performance agreement, but he forwarded an email to his supervisor highlighting the issues of 2015/2016 and 2016/2017 for something to be done. After he sent an email to his supervisor, she responded and they had a meeting the following day unfortunately, she left the meeting with no resolution because she disagreed with his proposal.
35. He confirmed that he also did not sign the performance agreement for 2018/2019 and that he did not submit any performance review. He made a submission to the office of the DG through the DG's administration office, unfortunately, the email got misplaced and Mr Romeo Adams took two months to respond. He referred to page 16 of bundle A which he identified as the correspondence between him and Katekani Baloyi who is the PA to Corlia, and he attached all the necessary documents. He also referred to page 15 of bundle A which he identified as his follow-up email to Ms Baloyi a month later who forwarded his email to Corlia. These are the attempts he made in 2018 to the highest level of the department.
36. The first attempt to draft the performance agreement was in 2016/2017 and in 2018/2019 he was trying to re-negotiate his position. He could not write something he did not know; as there was no basis of the content. Again for 2019/2020, 2020/2021, 2021/2022 and 2022/2023 financial years, there was no performance agreement form submitted because his performance agreement was never aligned since 2015 to date.
37. When he was asked if he went on leave since 2016 to 2023, he said 'No', he never took leave as an entitlement since December 2015, he took leave by force. He referred to page 44 of bundle A1, and he stated that his leave days were squeezed between 17 May 2016 to 28 June 2016 because he was about to forfeit them. He also referred to page 46 of bundle A1 which he identified as the death certificate and he stated that when his father passed away, he submitted a request for family responsibility leave and it was not approved, and he was forced to go to the office while preparing for his father's funeral. He was always on duty for all those financial years, and he lost 240 days of his leave.

38. When he was asked how the situation with the current supervisor was, he stated that the situation is still the same, in September 2025, the DG wanted to meet with him because they wanted to utilise his position, but nothing came out of it.
39. When he was asked if it was the assistant directors' request to be shifted from his supervision or his supervisor's decision, he stated that he only became aware about the assistant directors' shift when he went to sign his performance agreement and the supervisor already made comments, he does not know whether they requested, or they were just shifted.
40. During re-examination, he stated that his dispute is based on the period from 2016/2017 financial year to date.
41. When he stated that the structure had to be restored, he was referring to the removal of the assistant directors from his supervision which he found to be improper.
42. In respect of the performance assessment, when the form was submitted, there was no explanation, but the original was sent to HR for moderation purposes, the normal process would have been that a date had to be scheduled five (5) days prior to the sitting between him and his supervisor for the rating discussion. And when the rating is a 3, no explanation is required but for 4 and 5, an explanation is required; the same applies when the rating is 1 and 2, the supervisor would explain what measures he/she took to support the employee.
43. When he was asked if HR or the moderation committee or the DG reached out to him, he stated that no one reached out to him regarding non-performance and no action was taken against him. He reached out to everyone including the DG, and if he does not get help from the DG, he is out of options.

Respondent's case

44. The respondent relied on the evidence of Mr Jan Barnard and Ms Siziwe Bulelwa Kenqu, and they both testified under oath.
45. The first witness was **Mr Jan Barnard** who testified about the performance management system and when he was asked which performance management was used in 2016 to 2018, he stated that in 2016, the signing of the performance agreement was made compulsory, and according to the new amendment, in the event that the employee and the supervisor do not agree on the performance agreement, the manager in line must appoint a mediator who will meet with the relevant parties and draw up the performance agreement which the parties will be required to sign within two weeks.
46. When he was asked as to under what circumstances was the performance bonus paid in 2016, he stated that for an employee to get bonus, the performance agreement must be signed and there must be a mid-term

review. Moderation became compulsory but in the policy from 2017 onwards, they did not make it compulsory. There is a prescribed process which an employee must comply with, and performance bonus is informed by the performance agreement, therefore, it is difficult to say whether an employee will get performance rewards without proper assessment.

47. When he was asked about the notch, he stated that pay progression is also not automatic and it is informed by performance management system which must be followed by the departments; if there is no performance agreement, there is no performance rewards, the same applies if it is not signed on time and there are no valid reasons, and this is regulated by the Public Service Regulation. If there were valid reasons for not signing, the delegated authority will explain that there were valid reasons and the DG signs off on condonations as the delegated authority if there were valid reasons.
48. During cross-examination, he stated that he does not personally know the applicant, but he was briefed about the proceedings. He is from the policy section, and he was never responsible to confirm whether the documents were submitted or not.
49. When he was asked as to what should happen if the supervisor does not sign the performance agreement signed by the employee, he stated that there should be an escalation to the Chief Director and to the DDG and then to the DG. The DDG is supposed to appoint a mediator who will draft the performance agreement and the employee and the supervisor will be required to sign it within two weeks. At some point, it would have to be escalated somewhere and there should be an intervention.
50. His concern was that if there is no document submitted, one is prohibited from paying any performance rewards. Performance agreement is a line management function and if the escalation was done and somewhere along the line communication was broken, an employee must escalate to the Chief Director, and it boils down to disciplinary action, but it is for the Chief Director to make that call.
51. The second witness was **Ms Siziwe Bulelwa Kenqu** who testified that she is employed by the respondent as the Director since September 2023 to date. The post the applicant is occupying reports to her, and she is supposed to sign the applicant's performance agreement, but she has not signed any performance agreement with the applicant; she signed with everyone else for 2023/2024 financial year.
52. When she was asked why she never sat down with the applicant regarding the performance agreement, she stated that at that time, she had a side bar meeting with the applicant who told her that she should speak to Labour Relations regarding his matter; she then requested Labour Relations to give her a report of the applicant's case and how far it was and if it would be finalised anytime soon, and she did not get any feedback. She then told them that she could not do anything on her side without that information. After some time, she reached out to the applicant again and he still gave her the same response; she could not answer to any of

the applicant's frustrations because she was never involved. When she was asked if there was a hand over from Ms Emily Mlangeni, she stated that Ms Mlangeni mentioned in a report that there was a dispute involving one of the employees.

53. When she was asked about the applicant's day-to-day work, she stated that outside of the performance agreement, the applicant is not given any work, and she does not give him work because she does not have any performance agreement signed with him.
54. When she was asked about the applicant's presence at work, she stated that the applicant has an office in their floor, sometimes he is there, and sometimes he is not there. She cannot account to his comings and goings. There is an attendance register where her and the rest of the employees sign but the applicant does not sign.
55. During cross-examination, she stated that she initially acted in the position from December 2022 to August 2023, that is, for 9 months and she confirmed that she took the full responsibilities of the director when she was acting.
56. When she was asked what she meant when she said that the applicant's position reports to her, she stated that by virtue of the applicant not being functional in the unit, her response is that the post reports to her; consequently, the applicant reports to her.
57. When she was asked as to why she did not sign the performance agreement with the applicant, she stated that she engaged him on a formal setting for the signing of the performance agreement and he indicated that he was prohibited from signing the performance agreement. She followed up with labour relations vigorously formally via email asking for a report regarding the applicant's case and she engaged with Mr Magwaza who called her to give her an update on the case, and she informed him that all she wanted was a status report of what has happened in writing, and she was never given any report. She also engaged the Labour Relations Director, Mr Rodney Zitha.
58. When she was asked if she got any advice from Labour Relations or HR of how to move forward, she stated that she forwarded the applicant's response to Labour Relations current Director, Mr Silawu to seek guidance and he just indicated that it is not acceptable that the performance agreement is not signed, he did not advice. She also engaged the Acting DDG who opted to call a meeting between her, the applicant and Mr Terence Raseroka and the applicant attended the meeting, but he disputed how the meeting was called as there was no one from HR, Labour Relations or a union representative. The aim of the meeting was for the DDG to hear the applicant out, not in a hearing set up. She was then tasked to involve relevant people, and she invited the applicant, and Labour Relations and she also mentioned that the applicant could be represented if he wished but the applicant declined the invitation of the meeting. The current situation is not because on lack of trying but the applicant's refusal to sign the performance agreement.

59. She disputed that she did not do any intervention because she engaged Labour Relations. She also disputed that she failed the applicant in anyway because she engaged him and they had discussions.
60. During re-examination, she stated that she does not know what more effort she could have done.

Analysis of evidence and argument:

61. Section 138(7) of the LRA provides that the Commissioner must issue an award with brief reasons. It is therefore not my intention to provide a detailed record of all the evidence that was placed before me. Even though all evidence was considered including the written closing arguments submitted by the parties; I have only referred to the salient points that I found to be the most pertinent to deciding this matter. However, it should not be construed that I overlooked some of the evidence submitted in these proceedings as I have considered all the submissions.
62. Section 186(2)(a) of the LRA defines an unfair labour practice as any unfair act or omission that arises between an employer and an employee involving *inter alia* the conduct by the employer relating to benefits. The meaning of benefits was largely dealt with in the case of *Apollo Tyres (Pty) Ltd v CCMA and others [2013] 5 BLLR 434 (LAC)* the court concluded that-
- '... the better approach would be to interpret the term "benefit" to include a right or entitlement to which the employee is entitled (ex contractu or ex lege, including rights judicially created) as well as an advantage or privilege which has been offered or granted to an employee in terms of a policy or practice subject to the employer's discretion. In my judgment "benefit" in s 186(2)(a) of the Act means existing advantages or privileges to which an employee is entitled as a right or granted in terms of a policy or practice subject to the employer's discretion.'*
63. In the present case, the applicant stated that the benefit in question related to the pay progression increase awarded to employees in terms of the respondent's Performance Management and Development System (salary levels 1-12) which is governed by the Public Service Regulations ("the PSR") as well as the performance bonus for the financial years from 2016 to 2023.
64. The policies, regulations and frameworks regulating performance management and incentives between the parties were not in dispute and for the purposes of this award, these include the Performance Management and Development Policy, clause 6.2.1, which requires that all employees must enter into performance agreements by 31 May of each performance cycle, in order to qualify for performance incentives.

65. The next document to consider is the Public Service Regulations of 2016 (PSR), as promulgated by way of GN R877 contained in GG 40167 of 29 July 2016. This current version of the PSR (at that time) came into operation on 1 August 2016. The PSR would of course apply to all Government Departments, and not just the respondent. Clause 72 of the PSR, provides that all employees must enter into a performance agreement within two months of the beginning of any financial year. In addition, clause 72(7) provides that no employee shall qualify for performance rewards, including pay progression, if the employee has not signed such a performance agreement as prescribed.
66. The next policy of relevance is the 2017 Incentive Policy Framework for Non-Occupation Specific Dispensation (OSD) employees on salary levels 1 to 12 and employees covered by OSDs, issued by the Department of Public Service and Administration (the 2017 Framework). It also applies to all Government Departments. The 2017 Framework appears to have been issued pursuant to clause 73 of the PSR. It does appear to supplement what is contained the PMDP in the Department itself, and thus needs to be considered. In terms of the 2017 Framework, the performance cycle remains 1 April to 31 March. However, the 2017 Framework now defines pay progression as follows: *'... progression to a higher notch within the same salary level/scale, limited to a single notch per pay progression for non-OSD employees and the number of notches provided for in the respective OSD for OSD employees.'*
67. In April 2018, the Department of Public Service and Administration issued a determination and directive relating to the performance management and development of employees (the 2018 Directive). The 2018 Directive came into effect on 1 April 2018. It is recorded in clause 1.5 of the 2018 Directive that: *'National and Provincial Departments are expected to review/amend their PMDS policies to align them to the PSR and this Determination and Directive'*.
68. The 2018 Directive continued to make the signing of performance agreements compulsory for any employee to qualify for any kind of performance reward. The performance management cycle must still be linked to a financial year, with performance agreements having to be concluded for each performance management cycle and be signed and submitted by 31 May. Further, the 2018 Directive does provide some elaboration on the issue of the conclusion of performance agreements in clauses 7.4 and 7.5, which read:
- '7.4 An employee who does not comply with the requirements in paragraphs 7.1, 7.2 and 7.3 above, shall not qualify for any performance rewards, i.e. pay progression and performance bonus ...*
- 7.5 Employees are discouraged from amending a PA or an agreement of a similar nature in the last quarter of the performance cycle (i.e. 1 January to 31 March), unless changes to the employee's job description, job grade, organisational structure of the department or its functions or amendments to the objectives and priorities result in significant changes to the content of the job of the employee.'*

69. In addition, Clause 6.1 of the Employee Performance Management and Development System guideline (“EPMDS”) provides that the performance agreement is the cornerstone of performance management at the individual level, and all employees must enter into and sign performance agreements before the end of the first quarter of the new cycle. Departmental and component performance measures should inform the development of the individual employee’s performance agreement. The performance agreement format applies to all levels in the department, and the contents must reflect the department’s strategic and annual operational plan, component business plans and the employee’s job description, job role and actual activities and responsibilities.
70. The performance agreement, especially the workplan, should be re-negotiated if the employee has not been in the job role for three months or more for any reason, unless this absence was built into the original agreement. The performance agreement without a completed and attached workplan should be regarded as invalid and of little use in the performance management process.
71. Clause 5.3 of the Performance Management Policy of 2014, page 8 deals with the annual performance assessment as follows:
- (i) Employees shall only be assessed on the basis of a signed performance agreement and finalised mid-term review for the performance cycle.
 - (ii) Where an employee, failed to have signed the performance agreement on the agreed date as stated in 5.1, such an employee shall be assessed at the end of the performance cycle (however forfeits the right to any performance incentive)
 - (iii) Finalised performance assessments shall be submitted to the relevant offices for moderation no later than 30 June of each performance cycle.
 - (iv) Disagreement between the supervisor and the supervisee on performance assessment shall be dealt with by the next level supervisor and the next level supervisor shall make a final decision when dissatisfaction continues. The process must be dealt with before presented to moderation.
72. It was common cause that the applicant had been concluding the annual performance agreements with the respondent and the performance agreement for 2015/2016 financial year formed part of the documentary evidence before me. The applicant testified that it was informed by the performance agreement he signed in 2013/2014. The applicant conceded that he was supposed to sign performance agreement annually and be assessed annually in addition to the bi-annual reviews, but no performance agreement was signed, and he was never assessed from 2016 onwards because there were disagreements between the applicant and Ms Mlangeni, his former supervisor. The disagreement emanated from a memo dated 19 May 2014 and endorsed by Ms Mlangeni on 11 June 2014 where he was allegedly shifted into an undefined work environment. The memo suggested a removal of the subordinates from his supervision without his consultation and knowledge;

this affected the function of his position. Despite the alleged shift, in 2015/2016, he prepared his performance agreement in accordance with 2014/2015 performance agreement, which was signed by him and his former supervisor. In 2016/2017, he prepared his performance agreement in accordance with 2014/2015 agreement again, which he signed but his former supervisor did not sign, and she allegedly ignored his request for re-negotiation of the performance agreement following the changes on the structure.

73. On 26 October 2017, the DDG: Corporate Services, Mr Romeo Adams signed Circular No 82 of 2017 which its purpose was to give guidance on the process to be followed when dealing with disputes emanating from PMDS processes, this was in line with Regulation 72 of the Public Service Regulations. The Circular stated that if both the employee and his supervisor do not sign the performance agreement/performance review/assessment, due to a dispute relating to the content of the document, a person shall be appointed within one month after the expiry of the due date for submission, to consider the dispute. The person appointed to resolve the dispute shall within one month of his or her appointment consider the dispute and make a recommendation. The employee and his or her supervisor shall sign the performance agreement/performance review/assessment as recommended, within two weeks of receipt thereof, failing which the agreement/Review/Assessment shall be deemed to have been signed from the date of the recommendation. If the mediation process fails, an employee may consider formal grievance in terms of the Public Service Grievance Procedure.
74. In respect of the applicant's PMDS status for 2016/2017 onwards, he wrote various memorandums and emails to the Head of HR, his former supervisor, his former supervisor's manager, the DDG and DG; this was after he had a discussion with his former supervisor on 18 May 2017 as well as an engagement with his supervisor's manager which according to him lacked objectivity between them.
75. There were various requests for the submission of the outstanding performance agreements by HR and the DDG but none of the performance agreements were submitted as requested. The applicant although conceded that the assessment is only between an employee and his supervisor, he demonstrated that he sought assistance from Ms Mlangeni's supervisor, HR, office of the DDG and DG. There was also an attempt to mediate between the applicant and his former supervisor but the mediator, Mr Mtshweni informed the applicant that Ms Mlangeni did not want to participate in the mediation.
76. It is common cause that in terms of the policy, the applicant's employment was dependant on the performance agreement which is signed and followed by assessments. This omission although both parties contributed to it deprived the applicant of a potential salary increase and the further benefits enjoyed by other employees for the past few years. The last time the applicant got to benefit was in 2015/2016 period and the performance bonus was allegedly only paid two years later in 2018.

77. Reference was made several times by the applicant on how disputes ought to be dealt with when there are disagreements as outlined above. However, the respondent, who expected the applicant to comply, failed to do so itself. Although the applicant failed to submit the performance agreement from 2017/2018 onwards, he was reaching out to Ms Mlangeni prompting her to re-negotiate the performance agreement. His failure to submit the performance agreements doing was a direct consequence of the respondent's conduct. The respondent on the other hand, could not demonstrate the efforts on its side to resolve the issues between the applicant and Ms Mlangeni.
78. After considering both parties' evidence, I find that the applicant has succeeded in discharging the onus that the respondent committed an unfair labour practice within the meaning of section 186(2)(a) of the LRA when it failed to intervene when there were disagreements between him and Ms Mlangeni about the performance agreement and/or re-negotiation of the performance agreement for the following financial years, that is, 2016/2017, 2017/2018 and 2019/2020, 2020/2021, 2021/2022 and 2022/2023. This as demonstrated above had a direct impact on his pay progression, performance bonus and any other benefits he could have qualified for had there been an intervention.

Relief

79. The applicant sought to be awarded compensation for notch progression for all performance cycles not assessed. In the case of the *Minister of Safety & Security v SSSBC (citation omitted)* the court noted that an arbitrator's powers in an unfair labour practice dispute are wider than those in an unfair dismissal dispute. For this reason, I find that awarding the applicant a notch progression for all the performance cycles where there was no signed performance agreement and the applicant was not assessed, that is, 2016/2017, 2017/2018, 2018/2019, 2019/2020, 2020/2021, 2021/2022 and 2022/2023 is ***"just and equitable under the circumstances"***.
80. The respondent is therefore, ordered to adjust the applicant's salary to the notch he should have received from 2016 to 2023. It must be noted that although the applicant submitted that his salary was R64 992.73, there was no payslip submitted to confirm the amount, therefore, the calculation below was informed by the applicant's payslip for May 2016 and his notch according to the mentioned payslip was R794 145.00 per annum, and his gross salary as R54 666.06 which was increased by 1.5% or R9 839.88 to R64 505.94 after the pay progression, therefore, based on this information, the 1.5% increase will be calculated as follows:

80.1. 2016/2017: $R64\ 505.94 \times 1.5\% \div 100 = R967.58$

$R967.58 \times 12 = R11\ 611.06$

$R794\ 145.00 + R11\ 611.06 = R805\ 756.06$

$R805\ 756.06 \div 12 = R67\ 146.33$

80.2. 2017/2018: $R67\ 146.33 \times 1.5\% \div 100 = R1\ 007.19$

$R1\ 007.19 \times 12 = R12\ 086.33$

$R805\ 756.06 + R12\ 086.33 = R817\ 842.39$

$R817\ 842.39 \div 12 = R68\ 153.53$

80.3. 2018/2019: $R68\ 153.53 \times 1.5\% \div 100 = R1\ 022.30$

$R1\ 022.30 \times 12 = R12\ 267.60$

$R817\ 842.39 + R12\ 267.60 = R830\ 109.99$

$R830\ 109.99 \div 12 = R69\ 175.83$

80.4. 2019/2020: $R69\ 175.83 \times 1.5\% \div 100 = R1\ 037.63$

$R1\ 037.63 \times 12 = R12\ 451.56$

$R830\ 109.99 + R12\ 451.56 = R842\ 561.55$

$R842\ 561.55 \div 12 = R70\ 213.46$

80.5. 2020/2021: $R70\ 213.46 \times 1.5\% \div 100 = R1\ 053.20$

$R1\ 053.20 \times 12 = R12\ 638.40$

$R842\ 561.55 + R12\ 638.40 = R855\ 199.95$

$R855\ 199.95 \div 12 = R71\ 266.66$

80.6. 2021/2022: $R71\ 266.66 \times 1.5\% \div 100 = R1\ 068.99$

$R1\ 068.99 \times 12 = R12\ 827.99$

$R855\ 199.95 + R12\ 827.99 = R868\ 148.51$

$R868\ 148.51 \div 12 = R72\ 345.70$

80.7. 2022/2023: $R72\ 345.70 \times 1.5\% \div 100 = R1\ 085.18$

$R1\ 085.18 \times 12 = R13\ 022.22$

$R868\ 148.51 + R13\ 022.22 = R881\ 170.73$

$R881\ 170.73 \div 12 = R73\ 430.89$

81. The above amounts when added are equivalent to the total amount of R86 905.16 difference the applicant would have received for the pay progression if the performance agreements had been signed.

82. In respect of the performance bonus, the applicant has submitted that he should be awarded the maximum bonus, unfortunately, there was no evidence led suggesting that the applicant got full bonus before there were disagreements between him and his former supervisor. It was common cause that his bonus for 2015/2016

after he objected to the results, the moderation committee concluded a performance rating on his name which resulted in him being paid R37 404 (gross) on 21 December 2016. While I am cognisant of the fact that the difference between 2015/2016 financial year and the financial years thereafter was that the applicant then signed the performance agreement and that he did not sign any for 2016/2017 onwards; I am of the view that because nothing had changed regarding the removal of all personnel who used to report to him and it was undisputed that the change had an impact on his performance agreement, and because there was no intervention by the respondent despite the applicant reaching out to all relevant people, I, see no reason why same should not apply for the 2016/2017, 2017/2018, 2018/2019, 2019/2020 and 2020/2021 financial years.

83. For these reasons, the bonus will be calculated as follows:

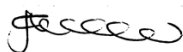
83.1. $R37\,404 \times 5$ (number of financial years from 2016 to 2021) = R187 020.00

84. The above amounts when added are equivalent to R273 925.16 (Two Hundred and Seventy-Three Thousand Nine Hundred and Twenty-Five Rand and Sixteen Cents). It must, however, be noted that the above amounts are not conclusive and are subjects to correction by HR and are exclusive of any other benefits the applicant ought to have received during the above financial years.

Award:

I therefore make the following order:

85. The applicant, Thabo Kgasi has discharged the onus that the respondent subjected him to an unfair labour practice in terms of 186 (2) (a) of the LRA (benefits) for the following financial years, that is, 2016/2017, 2017/2018, 2018/2019, 2019/2020, 2020/2021, 2021/2022 and 2022/2023.
86. The respondent, Department of Justice and Constitutional Development is ordered to pay the applicant, Thabo Kgasi an amount equivalent to R273 925.16 (Two Hundred and Seventy-Three Thousand Nine Hundred and Twenty-Five Rand and Sixteen Cents), subject to correction by HR as per paragraph 84 above within 15 days after receipt of the award.
87. The respondent is ordered to pay the applicant, these monies by no later than 31 December 2025.



Name: Caroline Hlongwane
(Council name) Arbitrator