



GENERAL PUBLIC SERVICE  
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# ARBITRATION AWARD

Panelist: Ann Marlies Dreyer  
Case No: GPBC2506/2018  
Date of Award: 20 March 2021

## In the ARBITRATION between:

Public Servants Association of South Africa ("PSA") o.b.o Faith Phala  
(Union / Applicant)

and

Department of Justice and Constitutional Development  
(Respondent)

**Union/Applicant's representative:** Asnath Sedipane (PSA)

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**Respondent's representative:** Dan Silawule

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### **Particulars of proceedings and representation**

1. The arbitration hearings were scheduled to take place in Nelspruit at the Department of Justice and Constitutional Development/ The matter was postponed several times, over the course of months, due to the non-availability of subpoenaed document(s).
2. Initially the parties requested that the matter be finalised on the basis of written arguments. Subsequent to the parties providing their written arguments the matter was re-scheduled for the hearing of oral evidence on 11 December 2020. After a final clarification session, on 26 February 2021, the parties agreed to submit, in writing, the undisputed bonus structure.
3. Asnath Sedipane, a Labour Relations Officer from the PSA represented the Applicant. Dan Silawule, employed as the Assistant Director of Employee Relations, represented the Respondent. Both parties submitted written arguments and a bundle of documents. The Applicant's bundle was marked bundle "A", pages 1 to 32. The Respondent bundles were marked bundle "B", pages 1 to 148, and bundle "C", pages 1 to 6.
4. An interpreter was not required and the proceedings were digitally recorded.

### **Issue to be decided**

5. The purpose of this arbitration is to determine whether or not the Respondent committed an unfair labour practice, in respect of benefits, when it lowered the Applicant's performance assessment for the 2016/2017 year of assessment.
6. If the moderation constituted an unfair labour practice, the appropriate relief.

### **Background to the dispute**

7. The Respondent employed the Applicant, Advocate F. Phala, as a Senior Legal Administration Officer at its Regional Office in Mpumalanga.
8. The parties entered into a performance agreement for the period beginning 1 April 2016 to 31 March 2017 ("the performance period"). The Applicant and her Supervisor, Mr Paul Mthimunya, after an assessment of the Applicant's performance, rated her performance rating at one hundred and twenty-seven percent.

9. The Respondent's Moderation Committee subsequently reviewed the Applicant's performance and rating score. The Moderation Committee lowered the Applicant's performance rating to one hundred and thirteen percent.
10. The Applicant unsuccessfully appealed the lowered performance rating. The relief requested by the Applicant was compensation,

### **Survey of evidence and argument**

11. In terms of section 138(7) of the Labour Relations Act 66 of 1995 ("the LRA") I am required to issue an award with brief reasons. Herewith is a summary of the evidence and argument that I regard as necessary to substantiate my findings.

#### **Facts that were common cause**

12. The Applicant's package, in the performance period, was R881 139.00 (eight hundred and eighty-one thousand, one hundred and thirty-nine Rand) per annum, see B10.
13. A performance bonus was defined as a once-off cash amount, see A16. A final, approved performance score between one hundred and fifteen to one hundred and twenty-nine percent merited a four percent annual performance bonus.

#### **Applicant's evidence**

14. The Applicant, a Senior Legal Admin Officer, reported to her supervisor, Mr Paul Mthimunya. The latter was employed as the Industrial Relations Administrator of the Respondent.
15. The performance agreement between the parties, set out in B9 to B31, set out five Key Result Areas ("KRA") with various weightings. The first KRA, set out on B13 had a weighting 30 and related to the investigation and administration of loss control. The second KRA, set out on B14, had a weighting of 20 and related to the promotion of the services charter. The third KRA, set out on B15, had a weighting of 30 and related to public awareness campaigns. The fourth KRA, set out on B16, had a weighting of 10, and related to the effective management and overseeing of equality courts and raising awareness. The fifth KRA, set out on B17, had a weighting of 10 and related to alternative dispute resolution in respect of family matters and restorative justice.
16. Mr Paul Mthimunya assessed the Applicant's performance for the performance period and indicated that he was very happy with the Applicant's performance. During the course of the performance period the Applicant and her colleague continued to perform the work of a late colleague whose responsibilities were divided

between them. Further, when the Applicant's colleague was on sick leave from May until September, the Applicant performed the sick colleague's duties.

17. In the circumstances the Applicant and her supervisor agreed that she not only met the performance result areas, she exceeded them, as per the assessment on B44 to R81. The Applicant and Mr Mthimunye agreed that her overall performance score, taking into account the additional work and the late hours the Applicant worked, was one hundred and twenty-seven percent.

18. The minutes of the moderation committee, on B82 to B86, indicated that,

- a. in terms of the first KRA, there was 'no indication of improvement' and 'not sufficient evidence';

The Applicant stated that she found it strange that the moderation committee assumed a knowledge of the work she performed without consulting her supervisor. During the performance period the Applicant performed these tasks alone, given the two absent colleagues. Loss control was not predictable as one could not state in advance how many losses would occur. The Applicant's task was to close the files, which she did,

- b. in terms of the second KRA, the 'motivation indicates what is expected';

The Applicant was not sure that the moderation committee meant as she far exceeded the set targets.

- c. in terms of the third KRA, the 'motivation was not extra-ordinary.

This KRA, as per the Applicant, was an 'issue' for years as it was performed jointly with other departments in order to save costs. Public education was not a one man show and included various issues, some of which were not the Applicant's specialty.

19. The moderation committee failed to involve the Applicant's supervisor during this process and later asked the Applicant to provide additional motivation. The Applicant expressed the view that the supervisor ought to have been informed of the request for additional motivation as he was best placed to provide same given that he had agreed on the performance score. The Applicant excelled in her work, and continued to perform all the work, even though her department was absent to colleagues for a period of at least five months during the performance period.

20. The Applicant was concerned about the composition of the moderation committee as the committee, which was approved by the Regional Head, Mr MD Mhlanga, also appointed Mr MD Mhlanga as the Chairperson of the moderation committee. His appointment to the moderation committee was an anomaly as, the moderation committee had to make recommendations to the Branch / Regional Head.
21. The duties and process of the moderation committee, see paragraph 7.7 on A26, specifically stated that the moderation committee had to return the performance assessment with reasons back to the supervisor when they found the appraisal rating unacceptable and to request additional information. The moderation committee failed to involve the Applicant's supervisor when it reduced the Applicant's performance score, from one hundred and twenty-seven percent to one hundred and thirteen percent.
22. The moderation committee, when it lowered the Applicant's performance score, failed to follow the process and in so doing misread or perhaps over extended their assessment of the Applicant's performance and departmental procedures. The result was a miscarriage of justice.
23. Under cross-examination the Applicant maintained her position that her performance exceeded the standard KRA's and that the moderation committee was improperly constituted and acted outside of its duties.

#### Applicant's argument

24. The Applicant submitted written, heads of argument as well as closing arguments, which form part of the documentary record of this arbitration. I have perused their written argument, which is briefly summarised hereunder.
25. The Respondent acted unfairly when the Moderation Committee lowered the Applicant's performance score. The Moderation Committee was improperly constituted and failed to follow the Respondent's procedure. The Moderation Committee did not justify the lowering of the Applicant's performance score.
26. The Applicant not only performed well, she over achieved on her KRA's and was therefore entitled to a performance bonus.

#### Respondent's evidence

Bongi Masilele ("Masilele")

27. The Respondent employed Masilele as a Deputy Director responsible for development, performance management and employee health at its Regional office.

28. The requirements, for being appointed to a moderation committee, included a knowledge of the performance management development policy as well as occupying a level higher than the employee being moderated. The memo on B148 approved the appointment of moderation committee officials on levels 11 to 12.
29. Masilele confirmed that Mr Mhlanga approved the Moderation Committee and acted as the chairperson of the moderation committee. His role was to facilitate and direct the moderation process by assessing the documents and getting the comments of the committee members. Although Mr Mthimunya, the Applicant's Supervisor, was listed as a committee member, he did not form part of the moderation committee that assessed the Applicant's performance because a supervisor did not form part of the moderation of their own team members.
30. The documents relied on by the moderation committee were, the performance agreement of the Applicant stipulating the KRA's, compared to the achievement of the Applicant. The decision was made by the whole Moderation Committee, including the chairperson,
31. Any differences in the performance assessment by the Moderation Committee would be referred back to the supervisor, see A26, paragraph 7.7.7. In this case the performance agreement belonged to the Applicant and, if the supervisor was unavailable, the moderated score was sent to the Applicant for additional motivation.
32. Under cross-examination, Masilele would neither confirm nor deny that the chairperson acted as both a referee and a player on the Moderation Committee. She confirmed that the submission of a moderated score, with a request for additional motivation, to the Applicant, was in contrast to the Respondent's policy

Respondent's argument

33. The Respondent submitted written, heads of argument as well as closing arguments, which form part of the documentary record of this arbitration. I have perused their written argument, which is briefly summarised hereunder.
34. The Applicant failed to prove that the Respondent had committed an unfair labour practice in relation to her performance score for the performance period. The Applicant was not automatically entitled to a performance bonus and failed to prove that she entitled to a performance bonus and/or that the Moderation Committee acted unfairly.
35. In the circumstances the Applicant failed to discharge her onus and the Respondent requested the dismissal of the Applicant's dispute.

## Analysis of the evidence and argument

36. In terms of section 186 (2) of the Labour Relations Act 66 of 1995, the LRA, an unfair labour practice is any unfair act or omission that arises between an employer and an employee involving a closed list of four categories listed on section 186 (2) (a) to (d).
37. The first category listed in section 186 (2) (a) includes any unfair conduct by an employer relating to promotion, demotion, probation, training or provisions of benefits. The employee must prove, on a balance of probabilities, that the Respondent's conduct amounted to an unfair labour practice.
38. In this matter the dispute related to the non-payment of a benefit, namely a performance bonus. The LRA does not define the term 'benefit' and, from a reading of case law, a benefit is an advantage which an employee is entitled to by reason of contract or law. In *Protekon (Pty) Ltd v CCMA & others (2005) 12 ILJ 1105 (LC)* the court held that a benefit did not only arise from a contract or a statute as an employer's obligations were often extended in policies, procedures, rules and standards.
39. In *Apollo Tyres South Africa (Pty) Ltd v CCMA & Others [2013] 5 BLLR 434 (LAC)* the court followed *Protekon supra* and held "...to interpret the term benefit to include a right or entitlement to which the employee is entitled to, whether 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 i.t.o a policy or practice subject to the employer's discretion..."
40. It is important to note that a 'benefit' in section 186 (2) (a) of the LRA does not include the creation of new rights.
41. An arbitrator may determine an unfair labour practice dispute on terms that the arbitrator deems reasonable which may include, in terms of section 193 (4) of the LRA, ordering reinstatement, re-employment or compensation. In terms of section 194 (4) of the LRA any compensation ordered must be just and equitable and is limited to 12 month's salary.
42. In this case the parties concluded a performance agreement for the period beginning 1 April 2016 and ending on 31 March 2017. The performance agreement set out key result areas (KRA) with a weighting of each KRA. The payment of performance bonuses was regulated by the Respondent's Performance Management Policy, see R133, paragraph 6.3.

43. In terms of the Performance Management Policy an employee, who achieved an approved performance score between 115% - 129%, was entitled to a 4% performance bonus. An employee who achieved a score of 114% or lower was not entitled to a performance bonus.
44. The Respondent conducted a half yearly assessment of the Applicant's performance, see B33 to B43. This assessment was signed by the Applicant and her supervisor. In this assessment the Applicant and her Supervisor scored her performance: -
- a. four out of five for the first KRA;
  - b. four out of five for the second KRA;
  - c. four out of five for the third KRA;
  - d. four out of five for the fourth KRA; and
  - e. three out of five for the fifth KRA
45. Subsequently, in the assessment of the Applicant's annual performance, see B44 to B81, the Applicant and her Supervisor scored her performance: -
- a. four out of five for the first KRA;
  - b. four out of five for the second KRA;
  - c. four out of five for the third KRA;
  - d. four out of five for the fourth KRA; and
  - e. three out of five for the fifth KRA
46. The Applicant's annual performance assessment, signed by herself and her Supervisor on each page, set out:
- a. the key performance areas (against work plans),
  - b. what was achieved (the expected performance) in respect of each KRA; and
  - c. the achievements that were significantly above or outstanding performance (what was achieved above the expected performance).
  - d. In terms of their combined assessment of the Applicant's performance, the Applicant achieved a performance rating of 127% and, if approved, would have been entitled to a performance bonus.
47. The Respondent's Performance Management Policy ("PMP") was set out in B132 to B147. Paragraph 7.3 the PMP stipulated that the Regional Head shall, inter alia, -
- a. approve moderation committees; and
  - b. approve or disapprove assessment results of a Moderation Committee.

48. In this instance the Regional Head, Mr Mhlanga, approved the Moderation Committee and acted as the Chairperson of the Moderation Committee.
49. The PMP specifically required the Moderation Committee to return the performance assessment, with reasons, back to the supervisor in cases where they found the appraisal rating unacceptable. The Moderation Committee failed to follow the PMP in that it handed a letter, indicating the appraisal rating unacceptable and requesting additional motivation, to the Applicant.
50. The Moderation Committee was tasked with, see B145, 7.7 (ix), the duty of making recommendations to the Regional Head.
51. The Applicant argued that it was an anomaly, incorrect for the Regional Head to act as the Chairperson of the Moderation Committee in addition to the duty to approve or disapprove the results of the Moderation Committee. I support the Applicant's argument as it is at best a misstep, and at worst a procedural failure, to appoint oneself as the head of a decision making body, and thereafter to assume the responsibility to approve or disapprove any decision(s) made by the decision making group.
52. The Moderation Committee reviewed the Applicant's performance assessment on 9 November 2017. The Committee input of the Applicant's performance assessment in respect of: -
- a. KRA 1 was that there was no indication of improvement in the motivation, insufficient evidence;
  - b. KRA 2 was that the motivation set out what was expected of the Applicant; and
  - c. KRA 3 was that the motivation was not extra-ordinary, did not cover all the indicators and did not specify the role of the Applicant.
53. The inputs of the Moderation Committee, with a request for additional motivation by 22 November 2017, was handed to the Applicant. It was common cause that the Applicant submitted additional motivation to the Moderation Committee.
54. On B121 the Applicant's Supervisor wrote that
- 'The Officer has during the reported period **exceeded expectation** by any stretch of the imagination, in that she **carried out responsibilities of three officers at DD level alone** and was equal to the task as she had to do supervision of other activities and outreach events and SABC radio talks. Her **performance can be rated as exceptionally excellent**.'* [my emphasis]
55. Also on B121 the Chairperson of the Moderating Committee, also the Regional Head, commented that
- 'The official is a **top notch**'* [my emphasis]

56. Nevertheless, in spite of the glowing recommendations of the Applicant's Supervisor and the Regional Head, the Moderation Committee lowered the Applicant's performance score to 113%, a score that rated below the threshold of attaining a performance bonus.
57. The moderated score was procedurally unfair in that it was approved by a Moderation Committee that: -
- a. failed to observe the procedure as set out in the Respondent's PMP;
  - b. appointed the Regional Head as the chairperson of the Moderation Committee tasked with determining whether or not the Applicant's performance score was acceptable or unacceptable; and
  - c. assigned the Regional Head, the power to approve or disapprove the decision of the Moderation Committee, which he had chaired.
58. I am of the view that the moderated score, which precluded the Applicant from achieving a performance bonus, was arbitrary and substantively unfair as it failed to take into account numerous aspects and achievements raised by the Applicant in motivation of her supervised performance score.
59. The Applicant's performance for the performance period was consistent, as evidenced by the half yearly supervised score.
60. Further, on the last page of the moderated performance score, the comments and motivation of the Applicant's Supervisor as well as the Regional Head tended to show that the Applicant's work not only exceeded her own performance expectations, she also performed the duties of two, absent colleagues and that the Applicant performed at the highest level.
61. In the circumstances I find that the Moderation Committee acted unfairly when it lowered the Applicant's annual performance score. The Applicant's performance was superior and, as such fell within the scoring assigned to her by her Supervisor, namely one hundred and twenty-seven percent, which meant that the Applicant was entitled to a performance bonus of four percent.

## **Award**

1. The Respondent is ordered to pay the Applicant the equivalent of a four percent performance bonus, for the performance period beginning 1 April 2016 and ending on 31 March 2017, on or before 10 April 2021.

2. In the event that the quantum is disputed the parties are directed to approach the GPSSBC with a request to allocate a date, for the determination of the sum of the performance bonus due to the Applicant.



Signed and dated at **Nelspruit** on this the **20<sup>th</sup>** of **March 2021**.



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**Name: Ann Marlies Dreyer**

**(General Public Sectoral Bargaining Council) Arbitrator**