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ARBITRATION AWARD

Panelist/s: SM. Beesnaar
Case No.: GPBC506/2023
Date of Award: 16 August 2023

In the ARBITRATION between:

PSA obo GL. Sehako
(Union / Applicant)

and

STATISTICS SOUTH AFRICA
(Respondent)

Union/Applicant's representative: Mr Regardo Abercrombie – PSA (Union) Representative

Union/Applicant's address:

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Respondent's representative: Mr Thomas Maila – Deputy Director: HRM

Respondent's address:

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ARBITRATION AWARD

PARTICULARS OF THE HEARING AND REPRESENTATION

1. This is the award in the arbitration matter between PSA on behalf of Ms Lorato Gladys Sehako, the applicant and Statistics South Africa (Stats SA), the respondent.
2. The arbitration hearing took place and concluded on 2 August 2023 at the respondent's premises in Kimberley.
3. The referral is in terms of section 186(2) (a) of the Labour Relations Act, 66 of 1995 as amended (herein after referred to as "the LRA") and the award is issued in terms of section 138(7) of the LRA.
4. The applicant appeared in person and she was represented by Mr Regardo Abercrombie from PSA (Union). The respondent was represented by Mr Thomas Maila in his capacity as Manager: Human Resource Management (HRM).
5. The parties submitted into evidence bundle of documents which were accepted as what they purported to be. The applicant's bundle is referred herein after as Annexures "A and B" and the respondent's bundle as Annexure "C".
6. The proceedings were conducted in English and were manually and digitally recorded.

ISSUE TO BE DECIDED

7. It must be determined whether the respondent committed unfair labour practice relating to a benefit, by failing to pay the applicant an allowance for acting in a higher position – Assistant Director: District Coordinator (ADC): Pixley ka Seme (salary level 9).
8. This was after the applicant was formally appointed. The appointment was later withdrawn and the allowance discontinued.

BACKGROUND TO THE DISPUTE

9. The applicant has 9 years of unbroken service as Personnel Assistant, salary level 7. She is earning R 19 300.00 per month.

10. The applicant was formally appointed to act on a higher position – ADC from February 2021. Her monthly allowance was R 7 919.00. In November 2022 the appointment to act was withdrawn and the allowance discontinued.
11. Aggrieved by the respondent's decision, she lodged a formal grievance on 29 November 2022. The response on her grievance was received on 15 December 2022 and still remained unsatisfied. The union referred the matter on her behalf to the Council on 28 March 2023.
12. Conciliation was scheduled on 14 May 2023 and failed to resolve the dispute.
13. The relief sought by the applicant is that the respondent be ordered to pay her acting allowance for the period of her appointment, plus compensation for unfair conduct. Further that she should be allowed to act until the position is filled.

SUMMARY OF EVIDENCE AND ARGUMENT

Applicant's evidence –

14. Ms Sehako is employed as Personnel Assistant since 2014. She was appointed by the respondent to act in a higher position, ADC: Pixley ka Seme. While she is on salary level 7, she was formally appointed to act on salary level 9 post and was paid an acting allowance equivalent to R 7 919.00 per month. That was in February 2021.
15. On 1 April 2022 she was given an extension to continue to act until the post was advertised (see B1). The post was then advertised and she applied. She was shortlisted and interviewed for the post. During the vetting process it was discovered that she had a criminal record and was disqualified as a candidate. It was after she got a traffic fine for driving under the influence of alcohol in 2015.
16. That was followed by the respondent's decision to withdraw her acting role on 22 November 2022 (see A18). The reason was due to a negative vetting outcome in terms of the recruitment and selection process. She felt that was unfair in her view to disqualify her based on the vetting outcome. It is not a requirement and cannot be considered in the appointment to act in a higher position.
17. She did not apply to get appointed into an acting position like when one applies for an advertised post. These are two different processes operating independently and regulated by different policies.

Respondent's evidence –

18. Mr Maila stated that the applicant was appointed formally to act in the higher position from February 2021 until 22 November 2022. She was accordingly paid an allowance and that no acting allowance is

outstanding. One of the conditions in her appointment to act was that she would be allowed to act until the post is advertised and filled.

19. The applicant was the only one identified by the respondent to act in the position because she had the necessary knowledge and capacity to do the work satisfactorily. In July 2022 the post was advertised and the applicant applied. She was shortlisted, interviewed and subjected to a competence assessment.
20. She was also subjected to a vetting process. It was then discovered that she had a criminal record committed in 2015. She was made aware of her negative vetting outcome and a decision was made to withdraw her from acting. On 22 November 2022 her acting stint was terminated as management prerogative. The applicant was also made aware that not legitimate expectation for a permanent appointment was raised.
21. Under cross exam he conceded that it was not a requirement in acting capacity for vetting to be conducted like in their recruitment and selection processes but the respondent exercised its discretion.

ANALYSIS OF EVIDENCE AND ARGUMENT

22. This is a referral in terms of section 186 (2) (a) of the LRA. The relief sought by the applicant is that the respondent be ordered to pay her acting allowance for the period of her appointment and to continue acting until the post is advertised and filled. Further that she should be compensated for unfair conduct.
23. In determining the dispute between the parties, I considered the provisions of the LRA, and the Respondent's ACTING ALLOWANCE POLICY of June 2017.
24. The LRA entitles employees to institute action against an employer for what is termed 'unfair labour practice' in terms of section 186 thereof. One of the matters where an employee is entitled to take action because of the unfair conduct of the employer is in relation to benefits.
25. If the benefit is not a guaranteed contractual right per se, the employee could still claim the same on the basis of an unfair labour practice if the employee can show that the employee was unfairly deprived of the same. An example would be where an employer must exercise the discretion to decide if such benefit accrues to an employee and exercises such discretion unfairly.
26. In ***Appolo Tyres SA (Pty) Ltd v CCMA & others (unreported case DA1/11 [2013] ZALAC)*** a benefit was said to be any advantage or privilege to which an employee was entitled or offered, in terms of an

existing policy or practice, and which was granted at the employer's discretion. The concept would seem to include discretionary and performance bonuses.

27. It is common cause that the applicant was appointed in an acting capacity from 1 February 2021 in terms of the Respondent's Acting Allowance Policy (C16-25). Further that on 1 April 2021 she was given an extension to continue acting until the post was advertised and filled. She was paid an acting allowance accordingly. On 1 April 2023 the decision to abolish the post on the establishment of the respondent was taken.
28. In July 2022 the post was advertised and the applicant applied. After the respondent's recruitment and selection process was followed and the vetting process, it was discovered that she had a criminal record dating back to 2015 and her acting stint was terminated. The reason furnished for the termination of her acting was a negative vetting outcome and the applicant felt that was unfair.
29. I considered that when one is appointed to acting position that is regulated by the respondent's Policy on Acting Allowance of June 2017. The policy does not encompass the vetting process neither is that a requirement as in the Recruitment and Selection process. That is demonstrable in the applicant's first appointment in her acting capacity followed by an extension in that regard. That was formally done in writing and vetting was not required.
30. The standard used in the appointment on acting capacity is different to those in the Recruitment and Selection process. These processes are regulated by mutually exclusive policies. The applicant was appointed in an acting capacity and one of the conditions states that – *'you should have no expectation that Stats SA will be obliged to offer you this position in a permanent capacity'*.
31. The applicant was acting. It was not a permanent appoint and for the respondent to invoke a condition outside this policy to justify termination of her acting role is absurd and I find that to be unfair. According to the respondent's testimony she was the only one acting in the position. She was competent and performed satisfactorily. There were no issues raised regarding her performance and I am of the view that the respondent benefitted from the services she rendered in her acting capacity.
32. I also considered that the applicant asked for an order to compel the respondent to allow her to act beyond her formal appointment notwithstanding the fact that the post has been abolished. That in my view is problematic.
33. Having regard to the full conspectus of all relevant facts and circumstances of the matter, I find that the applicant has established on a balance of probabilities that the conduct of the respondent by

terminating the acting stint of the applicant in the circumstances of this matter is tantamount to unfair labour practice in terms of section 186(2)(a) of the LRA

34. In light of the foregoing, I make the award hereafter –

REMEDY

35. For the reasons stated above I find that the respondent acted unfairly towards the applicant, by terminating her acting when she was formally appointed and denying her the benefit of an allowance for the period of her appointment. It follows therefore that the applicant is entitled for payment in terms of the relief sought.

36. The applicant is accordingly entitled to be paid an acting allowance for the period of her appointment for 5 months, for 1 November to 31 March 2023, calculated at R 7 919.00 x 5 = R 39 595.00 (thirty-nine thousand, five hundred and ninety-five rand).

37. The applicant also prayed for compensation should I find in her favour. In lieu of the respondent's unfair conduct towards the applicant, I will not hesitate to use my discretion and order that the applicant be paid compensation equal to two weeks salary, calculated at R 19 300.00 / 2 = R 9 650.00.

AWARD

38. The respondent, Stats SA's termination and failure to pay Ms. Sehako acting allowance for the period 1 November 2022 to April 2023 is unfair labour practice in terms of section 186(2) (a) of the LRA.

39. The respondent is herewith ordered to pay the applicant acting allowance equal to R 39 595.00 as stated in paragraph 36 above. Further that the applicant is entitled to compensation amount equal to R 9 650.00 as per paragraph 37 above.

40. The acting allowance plus compensation amounts (calculated at R 49 245.00) stated in paragraphs 36 and 37 *supra* must be paid by the respondent directly into the applicant's bank account (known to the respondent) by no later than 31 August 2023.

41. If an arbitration award orders a party to pay a sum of money, the amount earns interest from the date of the award at the same rate as the rate prescribed from time to time in respect of a judgment debt in terms of section 2 of the Prescribed Rate of Interest Act, 1975 (Act No. 55 of 1975), unless the award provides otherwise.



SM. BEESNAAR

GPSSBC ARBITRATOR