GENERAL PUBLIC SERVICE SECTOR BARGAINING COUNCIL

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ARBITRATION AWARD

Panellist/s: Mohau C Ntaopane
Case No.: GPBC2377/2017
Date of Award: 29 May 2023

In the ARBITRATION between:

PSA OBO M PILLAY

(Union / Applicant)

and

DEPARTMENT OF TRADE, INDUSTRY AND COMPETITION

(Respondent)

Union/Applicant's representative: Mr. Johnson Matidza
Union/Applicant's address: _____

Telephone: _____
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Respondent's representative: Adv. Motlalepule Rantho
Respondent's address: _____

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ARBITRATION AWARD

DETAILS OF HEARING AND REPRESENTATION:

[1] This is the arbitration award in the arbitration between Dr Morgenie Pillay, as represented by PSA, hereinafter referred to as "the Applicant", and the Department of Trade, Industry and Competition, hereinafter to as "the Respondent".

[2] The arbitration was held under the auspices of the General Public Service Sector Bargaining Council ("GPSSBC") in terms of section 191(5)(a)(iv) of the Labour Relations Act, 1995 as amended ("the Act") and the award is issued in terms of section 138(7) of the Act.

[3] The arbitration was conducted via the Zoom virtual platform, and it was heard on 22 August 2022, 19 October 2022, and 02 and 05 December 2022. The matter had been set down for 11 July 2022 but did not proceed on the day. The Applicant was represented by PSA Official, Mr. Johnson Matidza, and the Respondent by Adv. Motlalepule Rantho, as instructed by the State Attorney.

[4] The process was conducted in English and digitally recorded. Both parties submitted bundles of documents into the record, referred to as Applicant's and Respondent's bundles respectively. Only the Applicant testified in support of her case, while the Respondent called two (2) witnesses. The parties undertook to submit written heads of arguments by no later than 12 December 2022.

ISSUE TO BE DECIDED:

[5] I am required to determine whether the Applicant has established that the Respondent committed an unfair labour practice related to benefits in terms of section 186(2)(a) of the Act. Should I find in the affirmative, I am also required to determine the appropriate relief in accordance with section 193(4) of the Act.

BACKGROUND TO THE MATTER:

[6] The Applicant is employed as Director: Trade and Services on Level 13, salary notch R1 138 800-00. In 2016/17 she was Deputy Director: Multi-Laterals on level 12. The dispute pertains to a special award or a non-pensionable cash award not exceeding 20% of the employee's pensionable salary in terms of section 50(b)(ii) of the Public Service Regulations, 2016.

[7] A grievance was lodged by the Applicant on 08 June 2017 and the outcome of the grievance was received on 06 Oct 2017. The dispute was referred to the Council on 20 October 2017, citing the date of dispute as 06

October 2017. The matter was initially set down before a different panelist, however, due to unresolved pre-arb minutes, Covid-19 delays, postponements, and the recusal of the panelist, the matter eventually came before me for determination.

PRELIMINARY POINTS:

[8] The parties sought to deal with the matter in writing and were alerted to the sentiments expressed in JR1075/18 - **PSA obo WC Gernandt v Department of Justice and Constitutional Development and Others**, in terms of which panelists are discouraged from allowing the matter to be disposed of without the hearing of oral evidence in the absence of a stated case.

SURVEY OF EVIDENCE AND ARGUMENT:

Evidence for the Applicant

[9] In her testimony Dr Morgenie Pillay explained that she filed a grievance (page 15-17 Applicant's bundle) because in her view she met the criteria for a special award as prescribed by section 50 of the Public Service Regulation, 2016 ("PSR"). She submitted the required nomination form (page 35) and it was recommended and signed by her manager, Ms. Kekeletso Mashigo. Despite Ms. Mashigo having submitted the nomination form to the Chief Operating Officer ("COO") as the next person to sign on 22 May 2017 (page 17), the nomination form was not signed or recommended by the COO, nor did the COO indicate that they she did not recommend or provide reasons. Instead, the COO forwarded the nomination form to Ms. Kruger, Ms. Mashigo's manager, to ensure that there was no "double dipping". When enquiring about the delay no response was given. Nomination forms of other employees were presented to the EXCO for final moderation, however, hers was not.

[10] Dr Pillay explained further that the letter from the DG dated 06 October 2017 in response to her grievance (page 18) indicated that her nomination was not supported by the business unit and that the Chief Director ("CD") should provide her with feedback by 10 October 2017. She did not receive feedback from the CD. The DG had further stated therein that employees of the DTI cannot qualify for both the special and cash awards. The response confused her because Ms. Mashigo had recommended the nomination as the head of the multilateral business unit. She also found the submission that DTI employee cannot qualify for both to imply that previously employees did qualify for and were paid for both. As a shopsteward and national chairperson of her union at the Respondent, she was also not aware of communication that Section 50 of the PSR would no longer apply to them, nor of any directive from national treasury in this regard. She pointed out para 4 of the PSR provides that only the Minister of the DPSA can deviate from the regulations (page 38), while Section 50 clearly stipulated that the special cash award and the performance award (incentive scheme) can run congruently so long as the recognition is for different achievements (page 40).

[11] Dr. Pillay submitted further that she followed the same procedure as was followed by other employees (pages 14-116) in that she completed the nomination form where she explained how she met the criteria, and that nomination form was then recommended by her manager. She explained that the special award different from normal performance management process in that the latter is regulated by the performance management. policy in the dept (page 41). In terms thereof, the performance agreement is made up of key performance areas and outputs that are agreed for the financial year on the different areas of work you are responsible for. 2.1.1 (page 46) stipulates that the performance cycle is a 12-month period starting 1 April to 31 March. 2.2.1 (page 46) explains the performance planning and agreement, and how one manages the outcomes of the performance assessment (page 49). The role of the moderation committee on the performance assessment is stipulated, while its role on the special award is not. She explained that her performance agreement of 2015/16 (page 28) indicated her key performance areas ("KPIs"), which are aligned to her job description (page 21). She reached a 5 in her performance assessment, hence she qualified, however, the achievements she outlined in her nomination form were not duplicates of her KPIs.

[12] Dr Pillay read out the duties associated with an advert for the post of CD: Trade Policy and Research (page 27) and submitted that the portfolio of work outlined her special award nomination form was not part of her role as DD: Multilateral, but that of the CD: Trade Policy and Research. She explained she qualified for the special award because she was not merely providing day to day support to negotiations, but was in fact the lead negotiator, developing negotiation strategy and applying it effectively, thereby achieving certain outcomes of benefit to South Africa on climate change. This, in her view, fell within section 50 of the PSR and was not covered in her performance agreement or any KPI in terms thereof. She pointed out that in the nomination form she explained, in terms of the contribution made, how those negotiating output and the work she did made a significant contribution to South Africa. She also believed that when compared to the nomination forms of others (page 114), and while they nominated themselves for different areas of work, the way they motivated their nominations was similar to hers. She therefore believed that her nomination should have also been approved.

[13] With reference to page 60, an email in 2017 from Dr. Anusha Naidoo, D: Performance Management, in terms of which bullet No.2 provides that an employee can qualify for both the performance bonus and the special award provided that there is no "double-dipping", Dr. Pillay explained that prior to this email she had not come across the word double-dipping in any policy of the Respondent or any National Treasury document, which according to the email meant being paid twice for the same work. She pointed out that bullet No.4 of the email states that the special cash award must be different from day to day work of the employee and it must be clearly stipulated in the nomination form how it differs, and explained that unfortunately when one looks at the nomination form itself, it does not explain how this work differs from the day to day work since in the left hand column it only provides four (4) criteria that one must complete. Dr, Pillay held the view that she had been treated differently for arbitrary reasons when regard is had to the fact that in Mr. TP Mahos's nomination of 2018 he was recognized for negotiations and leading negotiations, which was similar to hers although it was for different

negotiations. She pointed out that on page 113 he was listed as one of the employees recognized for a special cash award in 2017/18 while the column for his performance agreement statement indicated that he had not submitted. In her view this meant that he had been recognized for meritorious performance despite having not had a performance agreement in that year, while in her instance it was said that she could not be recognized for both because she was exceptional performer and had also complied with her performance agreement.

[14] Dr. Pillay testified that she explained to management in an email (page 58) the difference between her performance agreement output and her special award output and did not receive feedback to the effect that management held a different view. On 17 July 2017 she received an email from Mr. Stephens Skosana in employment relations, the unit dealing with her grievance, in which he requested reasons as to the allegations of double-dipping being made (page 63). She was not aware of any allegations of double-dipping that have been made, which said to her that she was being investigated for irregular conduct without knowing why, a level of scrutiny she also did not think other employees were subjected to. She read out point No.1 of section 1.5 (Comments) of the minutes of the SMS Moderation Committee Meeting of 14 June 2017 (page 82), which read "*the purpose of moderation is to make sure that the operational and organizational practices of the department are consistent across the divisions*", while at point No.7 (page 83) it was said that the nomination for special award was done at acting DD level and did not go through the normal moderation process. This in her view highlighted the inconsistency because in the email of 2 June 2017 (page 70), Dr. Naidoo explained the process for the special cash award, which process in not published anywhere in the department for all employees to know, and which process page 83 clearly showed that the person did not follow, while she was subjected to those requirements.

[15] Dr. Pillay called our attention to the comments on page 85 in terms of which questions were asked as to why an individual had not been nominated for the special award despite having worked hard in the One Stop Shop launch, and the fact that it was agreed that this individual be included based on the presentation by the Chairperson. Dr. Pillay again highlighted the fact that this person was nominated during the EXCO moderation process, which was a deviation from the process, while the person never illustrated in the nomination form why they qualified. She also pointed out that on page 88, point 2.3 referred to a special award nomination for a group of individuals regarding work that had never been done in their area, and that this was similar to the negotiations she did on climate change as it was not in her role profile. She also called our attention to the comments on page 94, on which at "A" it said that a query was raised as to why Ms. Mpho Ramatla was recommended for both the performance cash award and special award, while at "D" it said that the CFO stated that awarding both awards was aligned to policy, while at "L" it said that the policy the DG signed allowed for both awards, but not double dipping.

[16] Dr. Pillay maintained that she qualified for both awards and that she was not double dipping. She referred to the decision section at the bottom of page 94, to the effect that SMS officials who qualified for both would receive the higher of the two, and held that the decision was contrary to the PSR as the DG did not have the

delegated authority to make the decision, while at the time she was not an SMS member, but a DD, as such she did not know how this decision became applicable to her. Dr. Pillay also referred to page 133, a nomination form of another employee in the department, and pointed out that in their performance agreement (page 200) the employee also had similar outputs. She questioned how double dipping was not applied to this employee if it was a principle that was applied consistently. Dr. Pillay referred to page 113 and located Mr. Mahosi at No. 13 (PT) and submitted that the document was an annexure to a submission that was signed by the CFO, the DG, and the Minister on page 109, and that these were all the parties authorized. She held that based on this authorization, Mr. Mahosi would have been paid.

Evidence for the Respondent

[17] Dr. Anusha Naidoo, Director: HR Planning, Strategy, Information and Performance Management, testified first for the Respondent. She explained that Section 50 of the PSR 2016 is different from PMDS in that the Minister of Public Service would issue directives departments in terms of which they could from time to time nominate officials for an award for meritorious work, distinguished or work of an illustrious service. As an example, she referred to the KZN floods of 2021 and suggested that an employee jumping onto a billboard and saving lives in that instance would be considered as meritorious or distinguished performance. The discretion to award in terms of section 50 lied with the Minister, who has a statutory right to delegate to the DG, to ensure that the decision taken is administratively fair. Since the powers were delegated to the DG for performance assessment cycle of 2016/17, the Applicant was therefore aggrieved with the decision of the DG not to award in terms of section 50 of the PSR 2016. Dr. Naidoo testified that nothing in the public service can ever be an entitlement, and that while there are processes, procedures and laws that govern public servants, an achievement beyond average or far beyond expectations does not lead to an entitlement since your responsibility first and foremost is to serve. A reward in those circumstances should therefore be seen as a privilege, not an entitlement.

[18] Dr. Naidoo testified further with reference to para 6.2 of the referral form (page 5 of the Applicant's bundle), that in terms of section 50 of PSR 2016, there is no performance standard that can be set by the employer, this being the key difference with PMDS. This also meant that if one designed a model or a system or a framework that is not part of their performance agreement, usually outside of their normal work hours as this would form part of the performance agreement, there can be no performance standard for it. When you present this tool, your supervisor would take it to the committee, and the committee would then take it to the DG. She submitted, however, that a special award in the public sector is not a benefit as it was not even negotiated in any chamber or any council but is something that the public sector has come up with, which can be awarded under certain circumstances, while a benefit is something any of them as employees can qualify or are eligible for. She explained further that the role of the supervisor is to recommend and nominate the applicant, since the moderating committee must make sure that the supervisor endorsed the nomination objectively. She could not comment on whether the nominations of other employees were presented to the moderating committee while the Applicant's was not, as she was not the committee. She explained, however, that when the was presented to them after the grievance investigation, there was no substantive reason to review the decision.

[19] With reference to paragraph 3 of page 18 of the Applicant's bundle, the letter signed by Mr. Lionel October, DG, Dr. Naidoo testified that the DG was squarely within his right to take the decision that employees in the DTI cannot qualify for both the special and the cash award, which is a decision in terms of section 50 of the PSR, as such powers were delegated to the DG by the Minister. She also referred to page 38 of the Respondents bundle, which was the submission made by her subordinate, Mr. Dumisane Sithole, to the DG, in terms of which at paragraph 1, approval was sought for the consideration of a 7.08% Category A cash award, 4.55 Category B cash award, and 4.5% Special Cash award, among other things, in line with the 1.5% cap of the compensation budget. The submission also recommended that employees be paid the higher of the Cash Award or the Special Award in the even they qualify for both. Page 42 were the recommendations similar to these submissions, the difference being that the purpose is approves. She explained that the DG increased the Category A cash award to 10.05% and the Category B cash award to 6.5%, and the Special Cash award to 7.5%, provided it is still within the 1.5% of the compensation budget, and subject to the Minister's approval. She explained further that the Applicant received the Category A cash award of 10.05% for the period in question, meaning that if she had also qualified for the Special Cash award it would not have been paid to her by virtue of the fact that she would have been paid the higher of the two. The decision on para 3 of page 18 as communicated by the DG in the letter therefore correlated directly with page 42.

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[20] Dr Naidoo explained that when an employee enquires, they would provide an interpretation of Section 50 of PSR 2016. It was therefore correct that the process she explained to the Applicant in her email regarding the Special Award was not policy, nonetheless there was still good governance around the process ensured through nomination, the first and second level of moderation, and eventual presentation to the DG. She explained with regard to bullet point 2 of her email on page 60 (Applicant bundle) that double dipping implied that an employee cannot be paid twice for the same work as this would result in an audit finding of irregular expenditure. She submitted that an employee has to clearly stipulate how the work for which the Special Cash award is claimed differs from the performance agreement. Dr Naidoo testified that Mr. TP Mahosi's nomination form as it appears on page 72 (Applicant bundle) was signed on 18 May 2018 by Ms. Kruger, which date did not coincide with the period under review as far as the Applicant is concerned. This meant that the Applicant's nomination form and that of Mr. Mahosi were not dealt with in the same financial period. She explained, however, that that for a Special cash or Regulation 50 award, there is no period in the same way PMDS awards are dealt with as at any given time when such work is done an employee can be awarded.

[21] Ms. Niklasina (Nikki) Maria Kruger, Chief Director: Trade Policy and Negotiations responsible for South Africa trade negotiations, bilaterally and multilaterally, was the second and last witness to testify in support of the Respondent's case. She explained that at the time of the dispute the Applicant was a Deputy Director in the Multilateral Organisation Directorate, a unit that falls under her chief directorate, her direct supervisor having been one of the Directors, Kekeletso Mashigo. She explained that at stage the direct supervisor of the employee being nominated for a Special Cash award would, if at a Director level, sign the nomination if they

agree, following which the nomination would go to the COO of the division for recommendation and then the moderation committee for consideration, before it is recommended to go to the DG. In her understanding the recommendation by the direct supervisor was exactly that, a recommendation that is then considered by the moderation committee made up of Chief Directors of all the directorates within the branch, approval ultimately lying with the DG. She confirmed that page 7-9 of the Respondent's bundle was the Applicant's nomination form for the Special Cash award signed by both the Applicant and Ms. Mashigo.

[22] Ms. Kruger confirmed that page 27 of the Applicant's bundle was an advert for the CD: Trade Policy and Research in ITED, the division she works for, however, she could not confirm when it was advertised as she could not see a date. She read the duties into the record and as to the Applicant having performed duties outlined in bullet No. 2 as per her evidence, she explained that it was correct that the Applicant did develop position papers and papers on indications for trade in terms of the climate change negotiations that she was taking part in. She confirmed that the Applicant was nominated for a special cash award for the assessment period 2016/17 by her direct supervisor, however, as far as she was aware it was not recommended by the moderating committee, nor was it approved by the DG. She explained that, while she was not part of the moderating committee, what she recalled is that the moderating committee considered the nomination and requested her view and whether she had seen the nomination. At that stage she had not seen the nomination so it was sent to her and her response was that the work that was set out in the nomination form for the Special Cash award was already covered in her performance assessment for which she was already approved for a Category A performance award, which is the highest performance assessment an employee can receive.

[23] Ms. Kruger testified further that when she received the grievance outcome letter from the DG (page 10 and 18 of the Respondent and Applicant bundles respectively) she had been out of the country, as such when she had wanted to provide feedback to the Applicant as per bullet point 2, the Applicant had already referred the matter to the Council, so she did not speak to the Applicant about it. Ms. Kruger explained Mr. Siphiwe Mahosi worked in the Directorate for Market Access that also falls under her Chief Directorate. She confirmed that Mr. Mahosi received a Special Cash award for the performance period 2017/18, but disputed that he also received a normal performance bonus.. She explained that in her understanding it does and can happen that an employee can be awarded both awards if the work done and for which there is recognition differs. She explained further that the DG as the Accounting Officer can make the decision in terms of his letter in response to the Applicant's grievance.

Argument

Submissions for the Applicant

[24] With reliance on **Apollo Tyres SA (Pty) Ltd v Commission for Conciliation, Mediation & Arbitration & others** ("**Apollo Tyres**") argument advanced for the Applicant was that a benefit means existing advantages or

privileges to which an employee is entitled as a right or granted in terms of policy or practice subject to the employer's discretion. It was further advanced that the S50 of the PSR 2016 Special Award is classified under Part 2: Remuneration and other Benefits, as opposed to Part 5: Performance Management, clarifying the issue of it being a benefit and separate from performance management. It was submitted that the climate change work was not part of the Applicant's job description (Level 12) as it was part of the CD: Trade Policy and Research post (Level 14), while leading negotiations for South Africa and Africa was also not part of her job description. It was submitted that the Respondent committed an unfair labour practice by not consulting the Applicant on the alleged double-dipping, by deviating from S50 of the PSR thereby exercising powers only vested with the Minister, and by exercising a discretion arbitrarily and capriciously in applying criteria outside of S50 of the PSR. It was further pointed out that the Respondent failed to provide proof of delegation by the Minister to the effect that the DG could decide that an employee qualifying for both awards would only receive one.

[25] It was further highlighted that Dr. Naidoo in her evidence emphasized the key difference between a performance award and a special award in that S50 prescribes no standards for a special award in the same way an employee is appraised on the standards set out in their KPIs to qualify for a performance award. It was pointed out that Ms. Kruger gave hearsay evidence on Ms. Mashigo informing her that she did not know that an employee could not receive both a performance and a special award. It was submitted that by not being part of the process of drafting the Applicant's performance agreement, Ms. Kruger's claim that the performance agreement could not cover everything one is meant to do is not only contrary to the provisions of the PMDS policy, but she also could not say with authority that the Applicant was expected to lead negotiations and achieve outcomes of benefit for South Africa. It was pointed out that Dr Naidoo could not explain the disparity in the 20% Special Cash Award she advised the Minister to award for employees involved in digitalization, which included herself, and the 5% Special Cash Award she advised in enquiries pertaining to the Applicant, nor did she explain the inconsistency between her advising that employees can qualify for both awards while the DG indicated that employees cannot qualify for both awards. It was submitted that Dr Naidoo's submission that the Applicant received the higher of the two awards should be rejected as it is not provided for in regulation 50, while she is not a financial management expert, nor should such explanation justify denying the Applicant a benefit.

[26] It was argued further that because there is no official departmental policy on "double dipping", it could not be known how it was to be assessed and applied in a fair and consistent manner across all employees. It was submitted further that Ms. Kruger assumed that the since the Applicant received a cash award, the work for which she was nominated for a Special Cash award was the same, which showed unfairness and misled the committee's deliberations. It was pointed out that Ms. Kruger confirmed that Ms. Mashigo was best placed to know the Applicant's day-to-day work the same way she (Ms. Krguer) knew that of Mr. Mahosi. It was submitted further that no evidence had been submitted by the Respondent as to the delegation of authority to the DG. It was therefore submitted that under the circumstances Respondent's discretion was open to scrutiny

when regard is had to the views expressed by the Court in **National Coalition for Gay and Lesbian Equality and Others v Minister of Home Affairs and Others**[1]. It was argued further that evidence showed that employees were nominated during moderations without following the procedure outlined by Dr Naidoo. An order was sought that the Respondent's substantive and procedural unfair conduct unreasonably denied the Applicant a benefit (7.5% of Applicant's pensionable salary) which resulted in material injury due to payment in arrears since 2017.

Submissions for the Respondent

[27] It was argued that it was incorrect for the Applicant to conclude that Ms. Mashigo's recommendation that she be awarded the Special Cash Award was binding on the approving authority. It was also argued that the Applicant was not entitled to be paid twice for the work which she had already been rewarded through a Category A Cash award. It was further argued that the Applicant sought to impose her own understanding of what should have earned her a Special Cash award, thereby seeking to usurp the Respondent's discretionary powers to make a determination on what to reward employees in terms of regulation 50. It was argued that the Applicant failed to demonstrate that the Respondent acted irrationally, capriciously, grossly unreasonably or mala fide as expected of an unfair labour practice claimant in terms of the decision in **Aucamp v SA Revenue Service**[2]. It was submitted further that the DG, as the accounting officer, is empowered in terms of section 38 of the Public Finance Management Act 1 of 1999 as amended ("the PFMA") to ensure that the department has and maintains effective, efficient and transparent systems of financial and risk management and internal control, and that any decision taken by the DG in this regard constituted administrative action which may only be subjected to judicial review.

ANALYSIS OF EVIDENCE AND ARGUMENT:

[28] Section 185(b) of the Act affords every employee the right not to be subjected to unfair labour practice. Section 186(2)(a) considers an unfair labour practice, the unfair conduct by the employer relating to the provision of benefits to an employee. It is for the applicant to prove that the conduct or practice complained of can be characterized as an unfair labour practice in terms of section 185(b) – **Nawa & another v Department of Trade & Industry**[3]. In **Apollo Tyres SA (Pty) Ltd v CCMA and others**[4] the Court held the definition of benefit, as contemplated in section 186(2)(a) of the LRA was not confined to rights arising *ex contractu* or *ex lege*, but included rights judicially created as well as advantage or privileges Employees have been offered or granted in terms of a policy or practice subject to the Employer's discretion. In **Thiso and others v Moodley NO and**

[1] 2000 (2) SA 1 (CC) at para 11
[2] (2014) 35 ILJ 1217 (LC)
[3] [1998] 7 BLLR 701 (LC)
[4] [2013] 5 BLLR 434 (LAC); [2013] 34 ILJ 1120 (LAC)

others[5] the Court referred to the decision in Apollo, where the term "benefits" had been extended to include situations where Employees do not have a legally enforceable right to the benefit claimed, but where the Employer has a discretion to grant in terms of a policy or agreement. In **Aucamp v SARS**[6] the Court held that Employee must show that they were unfairly deprived of the benefit in that an Employer when exercising discretion whether such benefit accrues to an Employee, the Employer exercises such discretion unfairly.

Is the Special Cash Award a benefit?

[29] In cross-examination Dr Naidoo confirmed that section 50 of PSR 2016 fell under Part 2: Remuneration and Other benefits, and clarified that when she, in her evidence, stated that the Special Cash award was not a benefit she meant that it was not a benefit in so far as a right in the same way a salary is. In other words, the fact that one did something did not mean that the Respondent was compelled to award a Special Cash award. Regulation 50 of the **Public Service Regulations, 2016**, reads as follows:

"**50. Suggestions, improvements and innovations**. – If an employee makes a suggestion, improvement or innovation of exceptional value to the department or the public service as a whole or has exceptional ability, a special qualification or has rendered meritorious service, other than the service recognized in terms of department's performance incentive scheme, to the department or the public service as a whole-

(a) the State shall have the right of use of any such suggestion, improvement or innovation; and

(b) the executive authority may, only as provided for in the directive issued by the Minister, reward the employee through-

(i) a non-monetary reward;

(ii) a non-pensionable cash award not exceeding 20 per cent of the employee's pensionable annual salary; or

(iii) such a non-monetary reward and a cash award.

[30] The argument that the fact that an employee has done something does not necessarily imply that they should receive a Special Cash award would be applicable to rewards derived from the performance incentive scheme in that the discretion to reward in that regard would still be that of the employer. In other words, it is not enough to conclude that a reward in terms of regulation 50 is not a benefit. The Court in **Apollo** also considered the distinction between remuneration and benefits unsustainable and stated as follows:

> "The distinction that the Courts sought to draw between salaries or wages as remuneration and benefits is not laudable but artificial and unsustainable. The definition of remuneration in the BCEA is wide enough to include wages, salaries and most, if not all extras or benefits… Many benefits that are payment in kind form part of the essentialia of practically all contemporary employment contracts. Many extras are given to Employees as a quid pro quo for services rendered just as much as a wage is given as a quid pro quo for services rendered".

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[5] (JR 2209/13) [2014] ZALCCT 64; [2015] 5 BLLR 543 (LC) ; (2015) 36 ILJ 1628 (LC) (handed down on 2 December 2014)
[6] (JS 884/2011) [2013] ZALCJHB 266; [2014] 2 BLLR 152 (LC); (2014) 35 ILJ 1217 (CC) (handed down on 17 October 2013)

The regulation 50 reward for meritorious would fall within the concept of an advantage or privilege offered or granted in terms of a policy or practice or agreement. As such it constitutes a benefit for the purposes of the Act.

Did the Applicant qualify for the Special Cash Award?

[31] In cross-examination the Applicant could not agree that, when regard is had to the nomination form on pages 34-36, the recommendations were for the purposes of approval by some authority elsewhere because the only approval she saw therein referred to financial approval in Section C, while she held the view that her manager having recommended in Section D, everyone else that follows (COO, CD: HR&LC, Divisional DDG) would have also recommended because her manager was the only person who could verify whether the work differed from her day to day work. The Applicant could also not accept that the same process of quality assurance as performed by the moderating committee in the normal performance assessment process was applicable to the special award which she knew to be regulated by item No.9 of the PSR 2016. The Applicant, in cross-examination still, agreed that neither the email from Dr. Naidoo (page 60), nor the letter from the DG (page 18) stated that she did not qualify for the special cash award because of double dipping. When it was put to her that a witness would testify that she was not recommended for a special cash award for 2016/17 because she had already been compensated for the work she performed in terms of a Category A performance bonus, the Applicant responded that the letter from DG (page 18) did not state as such. The Applicant also disputed that the performance management development policy is not separate to section 50 of the PSR 2016, holding that the policy is only applicable to performance management and not the special cash award.

[32] In cross-examination Dr. Naidoo submitted that the process she outlined in her email pertaining to the Special Cash award was an administrative process that they would communicate to the department on an annual basis, however there was no SOP for it. Dr. Naidoo maintained that no employee received a Cash Award and a Special Cash Award for the same work, and explained that the Applicant did receive a Cash Award and pay-progression. In cross-examination Ms. Kruger maintained that her assessment of the work covered in the Applicant's nomination form was the same as that in her performance agreement. She held that what the Applicant had set out in her nomination form was what she was supposed to do and that she was paid for it. She also held the view that a performance agreement sets out only high-level things and will not necessarily stipulate every single aspect of your performance. Ms. Kruger conceded that she was not present when the Applicant's performance agreement (page 28) was drafted. Mr. Kruger submitted further that when she engaged Ms. Mashigo regarding the Applicant's nomination Ms. Mashigo informed her that she was not aware that an employee could not qualify for both awards.

[33] It was the Applicant's submissions that she had never been made aware of the concept of double dipping prior to lodging a grievance. The Applicant has relied, however, on regulation 50, and indeed other regulations of the PSR 2016, and her understanding thereof extensively in the advancement of her case. When regard is had to

regulation 50 it clearly stipulates that it provides for recognition of service other than that recognized in the department's performance incentive scheme. It is my submission that this implies that an employee cannot claim a reward in terms of regulation 50 for service that would have been rendered in terms of their performance agreement, as this would constitute what we now know to be "double dipping". This understanding should be clear to the Applicant seeking reliance on regulation 50 of the PSR 2016 as the basis for her claim of unfair labour practice regardless of whether she knew what "double dipping" was. My understanding of the evidence as to the difference between the work outlined in the Applicant's nomination form and her performance agreement is that how far it differs is a subjective assessment in the absence of the account of the Applicant's immediate superior as the person best placed confirm that indeed the work done by the Applicant and for which she nominated herself or was nominated for differed from her day-to-day work. The Applicant did not call Ms. Mashigo as a witness and relied on the fact that she had signed the nomination form as proof of her assent to submissions made by the Applicant. It was argued in the arbitration that this was hearsay evidence, as was the evidence submitted by Ms. Kruger in relation to Ms. Mashigo having informed her that she did not know that employees could not qualify for both.

[34] In summary, **section 3 of the Law of Evidence Amendment Act 45 of 1988** provides the following in relation to the admissibility of hearsay evidence:

Subject to the provisions of any other law, hearsay evidence shall not be admitted as evidence at criminal or civil proceedings, unless:-

a. Each party against whom the evidence is to be adduced agrees to the admission of the evidence at such proceedings; or

b. The person upon whose credibility the probative value of such evidence depends, himself testifies at the proceedings; or

c. The Court, having regard to:-
   - The nature of the proceedings;
   - The nature of the evidence;
   - The purpose for which the evidence is tendered;
   - The probative value of the evidence;
   - The reason why the evidence is not given by the person upon whose credibility the probative the value of such evidence depends;
   - Any prejudice to a party which the admission of such evidence might entail;
   - Any other factor which should in the opinion of the Court be taken into account;
   - Is of the opinion that such evidence should be admitted in the interest of justice.

[35] In **Swiss South Africa (Pty) Ltd v Louw NO and others**[7] the Court held that depending on the circumstances of each particular case hearsay evidence may accordingly be admitted to the proceedings before the CCMA.

[7] [2006] 27 ILJ 395 (LC)

Commissioners are nonetheless required to deal with the disputes with the minimum of legal formalities and with some flexibility as provided for in section 138 of the LRA. Even if my conclusion were to be that Ms. Kruger's evidence is hearsay to the extent that it cannot be relied on, her evidence only spoke to the fact that Ms. Mashigo did not know that an employee cannot qualify for both, and not whether the Applicant qualified in the first place. This implies that she would not have recommended the nomination only in that respect. Ms. Kruger's evidence as to the reason she did not support the Applicant's nomination is, in my view, defeated by evidence she did not support in respect of why the work in question is what the Applicant was expected to do. She conceded that the Applicant did perform CD: Trade Policy and Research functions in her contribution to the climate change negotiations that she was taking part in. It should be noted that it was not disputed that the Applicant led those negotiations and that it was not part of her duties to do so, which evidence must be accepted as uncontested[8]. Ms. Kruger's submission that a performance agreement outlined only high level duties did not assist in clarifying the difference between what it contained and what was submitted in the nomination form. Ms. Kruger also accepted that both Mr. Mahosi and the Applicant both had contributed to different departments in their own ways, while also accepting that both forms spoke to defending the interests of South Africa. She confirmed the same regarding their respective contributions to South Africa's national economic objectives. It is therefore my view that Applicant's evidence that her work would be recognized in terms of Regulation 50 was poorly challenged, as such I am also of the view that her manager would not have supported the nomination had it not outlined work beyond what is in the Applicant's performance agreement.

[36] Regulation 9 of the **Public Service Regulation of 2016** reads as follows:

"9. **Reporting, monitoring, evaluation and compliance**,-(1) For purposes of reporting on and assessing compliance with the Act or reviewing the appropriateness and effectiveness of any regulation, determination or directive made under the Act, the executive authority or head of department shall submit to the Minister or the Director-General: Public Service and Administration, as the case may be, information and data on such matter with respect to the Act, in such format and on such date as directed by the Minister.

(2) A head of department shall introduce mechanisms to monitor and evaluate any provision of the Act for reporting to the Minister as contemplated in subregulation (1).

(3) An executive authority may not require or permit a head of department or any other employee to

(a) redesign the job to equate with the grade of the post before it was regraded; or

(b) reduce the grade of the post in line with the job weight and transfer the incumbent to another suitable post of an equivalent grade to the post that he or she occupied before it was regraded.

(2) Any transfer of an employee in terms of subregulation (1) (b) shall-

(a) not alter the place of work of the employee without his or her consent; and

(b) take place by the first day of the month following the month of approval by the executive authority of the grading of the post."

[8] In **Klaas and another v Eskom Holdings Ltd and others** (JR 251/2011) [2016] ZALCJHB 152 (handed down on 19 April 2016), the Court stated that appropriate / or considerable weight should always be placed on uncontested evidence.

[37] The fact that Special Cash Awards are regulated by Regulation 9 of the PSR 2016 as a response negating the submission that normal performance assessment processes are applicable was not taken further than that by the Applicant to illustrate what is provided by Regulation 9 in respect of evaluating a nomination. Subregulation (2), however, provides that the head of department shall introduce mechanisms to monitor and evaluate as contemplated by subregulation (1). While Dr Naidoo accepted that no SOP was in place, it would not be unreasonable to accept that the process outlined by her in respect of good governance in evaluating the submissions for Special Cash Awards would be similar to that applied in respect of normal performance incentives requiring moderation and submission to the DG for approval. It is in my view unreasonable for the Applicant to expect that it be accepted that the mere nomination and recommendation by her immediate supervisor is enough motivation for a Regulation 50 award to be granted without a process to evaluate submissions objectively, at least in the absence of an explanation by the Applicant as to her understanding of Regulation 9. The reason advanced by Ms. Kruger as to the fact that the Applicant's nomination was not supported by her on the basis that the work was contained in the performance agreement for which the Applicant received a Category A Cash Award, and indeed the fairness thereof, should further be assessed on whether or not the Respondent had the discretion in respect of whether the Applicant should have been recognized for both awards.

Did the Respondent have a discretion in respect of Regulation 50?

[38] With reference to section 50 of the PSR 2016, the Applicant also held that the Executive Authority had a discretion only in terms of which type of award – be it b(i), (ii), or (iii) – through which to reward an employee who meets the criteria. The Applicant also did not agree that the EA in this regard was the DG and referred to the definitions section of the PSR 2016 where it is stated that the EA is the Minister of the DPSA. If there was delegation, the Applicant held that it would have to be proven through the submission of a delegation for that year. In cross-examination Dr. Naidoo conceded that there was no documented evidence in either bundle of the delegation of authority by the Minister to the DG, stating further that in practice the purpose of the delegation of powers is not to inundate the Minister with administrative, transactional, and operational processes. Still in cross-examination, Dr Naidoo explained that the decision taken as articulated by the DG on page 18 (Applicant bundle) on employees not qualifying for both awards was not a deviation in terms of section 4 of the PSR 2016, nor was it delegated to the DG by the Minister of Public Service and Administration, to whom the Minister in that clause refers, since any delegation would come from the Minster of the DTIC.

[39] Regulation 4 of the **Public Service Regulation of 2016** reads as follows:

"4. **Deviations.**- The Minister may-

(a) under justifiable circumstances, authorize a deviation from any regulation; and

(b) if necessary, authorize a deviation contemplated in paragraph (a) with retrospective effect for purposes of ensuring equality."

If it is accepted that the definition of a benefit as articulated by the Court in the **Apollo** matter includes existing advantages or privileges to which an employee is entitled as a right or granted in terms of policy or practice subject to the employer's discretion as argued for the Applicant, then it must be accepted that a discretion exists as regards regulation 50. To stop short of recognizing that prerogative is to imply that a reward in terms of regulation 50 is an absolute right. The word "may" as written in respect of what is possible when an employee has demonstrated that they met the requirements of regulation 50 implies that discretion. Holding that the exercise of a discretion is a deviation is therefore misplaced. The Applicant's view that the only discretion inherent in regulation 50 is as to the type of reward between (i), (ii), and (iii), is also misplaced. The proper reading of regulations 50 should show that any one of those rewards may be afforded an employee found to have satisfied regulation 50 as a choice, not that there is no choice as to reward that employee or not. To read regulation 50 differently would be to take away the discretion recognized in **Apollo**.

[40] The question of whether the Director-General was competent in exercising a discretion in terms of regulation 50 surely requires a review of that decision. In **NEHAWU obo James V General Public Service Sectoral Bargaining Council and Other**[9] the Court held that the Council has no jurisdiction to resolve the dispute around the exercise by the Director General of his powers in terms of 32 of the Public Service Act as this would amount to a review of the exercise of statutory power. It is therefore not for me to pronounce on whether the Director General could decide that employees cannot qualify for both the Cash and the Special Cash Award, notwithstanding the concession by Dr Naidoo that she was testifying about a delegation of authority in practice and that none was presented at the arbitration. As to the issue of the apparent inconsistency between her communication in the her email of 23 May 2017 on page 60 (Applicant bundle) to the effect that an employee can qualify for both awards provided certain conditions are met, while on the outcome letter of the grievance dated 6 October 2017 by the DG (page 18 of the Applicant's bundle) he has taken a decision that an employee cannot qualify for both, Dr Naidoo correctly responded that she is an administrator while the DG was a decision maker, whose decision I still submit can only be subjected to review.

Did the Respondent exercise its discretion fairly?

[41] The Applicant submitted that when referring to employees who had received two awards in previous years, she was not referring to Mr. Mahosi, whom she referred to only in reference to the similarities between their nominations, while contending that in her case there was insistence on verifying the work. She conceded that she and Mahosi did not report to the same manager and were not assessed by the same person, nor did they perform the same functions at the time. She submitted that the deliberations that took place as to whether he should have been awarded the special cash award were of relevance to her dispute because her nomination was compared to her performance agreement while she was informed that he did not have a performance agreement in place. She conceded that Mr. Mahosi's job description was not submitted in the arbitration and referred to Mahosi having been a Director leading a unit and having more responsibilities than she did as a DD,

[9] (JR1285/17) [2021] ZALCJHB 465 (16 March 2021)

hence the fact that she was not lending negotiation support but actually leading the negotiations meant that her contribution should have been recognized the same way his was. Ms. Kruger submitted that the nomination criteria for the Applicant and Mr. Mahosi would differ despite being in the same unit because they did different work. And when regard is had to page 72 (Applicant's bundle), Mr. Mahosi's Special Cash award nomination form, paras 1 – 4, being the reasons he was paid the Special Cash award, she submitted that this was more than his day to day work as he is only responsible for market access and he had worked on all the issues to assist in the finalization of the African Continental Free Trade Agreement (AFCFTA) in time, and this was the reason he was nominated.

[42] In **Southern Sun Hotel Interests (Pty) Ltd vs CCMA and others**[10] the Honourable Judge Van Niekerk when dealing with parity held: "*Similarity of circumstance is the inevitably most controversial component of this test. An inconsistency challenge will fail where the Respondent is able to differentiate between employees who have committed similar transgressions on the basis of inter alia differences in personal circumstances, the severity of the misconduct or on the basis of other material factors*". In **Southern Sun** the Court dealt with a dismissal dispute, however, the principle of treating similarly placed employees the same is still applicable here. The fact that Mr. Mahosi did not have a performance agreement in place for the performance year in question was not disputed by the Respondent. The only evidence as to the difference between Mr. Mahosi's nomination submissions for the Special Cash Award and his day-to-day work was the testimony by Ms. Kruger. Ms. Kruger was, however, the best person to speak to this issue as the immediate supervisor of Mr. Mahosi. In other words, the fact that the Applicant felt that her submissions were compared to her performance agreement does not take away from that fact. It should be noted that the performance cycle in respect of the Applicant is 2016/17 while that in respect of Mr. Mahosi was 2017/18. The distinction in this regard is hardly artificial as a discretion may be exercised differently in different period for different reasons. It is not my view that in awarding Mr. Mahosi the Special Cash Award the Respondent was inconsistent when it did not do the same for the Applicant solely on the submission that their nomination forms were similar.

[43] When it was put to Dr Naidoo that the process she outlined was not followed to justify the inclusion of the person referred to on the minutes of the moderation committee meeting of 14 June 2017 in the nominations of the Special Cash award for those who worked on the 1-stop shop, and that this amounted to an arbitrary awarding of the Special Cash award and inconsistency, Dr. Naidoo submitted that the moderation committee was well within their right to question the exclusion of the individual in line with a fair, consistent, and equitable moderation process, while the fact that the DDG supported the individual's inclusion based on a presentation made by the chairperson negated the suggestion that their inclusion was arbitrary. In **Noonan v Safety & Security Sectoral Bargaining Council & Others**[11] the Court considered the fairness criterion in disputes related to unfair labour practices to be the fairness of the process in its entirety. In **Protekon (Pty) Ltd v CCMA**

[10] [2009] 11 BLLR 1128 (LC)
[11] (2012) 33 ILJ 2597 (LAC)

& Others[12] the Court confirmed that the approach in terms of which separate analyses of questions of substance and procedure are made was well established under the general unfair labour practice jurisdiction of the 1965 LRA, and that the requirements of consultation and negotiation on decisions that affect employees in their working relationship would be basis for determining a fair procedure in this regard. In her email outlining the process of Special Cash Award nomination Dr Naidoo did not indicate that nomination may be done at moderation level. Her evidence regarding the right of the moderation committee to question why a particular individual was not nominated was unsupported by anything other than her say so. While this particular process took place in 2017/18, employees should surely be subjected to the same process.

[44] In cross-examination Dr Naidoo was referred to page 101 (Applicant's bundle) and confirmed that it was submission for the Minister's approval of cash award, notch increases, package progression, and special cash award for 2017/18. She also confirmed that at 5.4(a) on page 105, the Group Systems and Support Services team recommended for a 20% Special Cash award for digitalization included herself, while at 5.4(b) on page 106 reference was to all other employees who may not have digitalized but qualified for a special cash award for whom the recommendation was a 5% Special Cash award. She submitted that her submissions were only in an advisory role as she was not the decision maker and reminded us that section 50 of PSR says the maximum for a Special Cash award was 20%. This part of the cross-examination explored evidence that the Applicant did not lead, as such its relevance to the arbitration was questionable. The Applicant's case straddled between issues, while new issues were raised as the arbitration progressed. In **NUM obo Botsane v Anglo Platinum Mine (Rustenburg Section)**[13] it was stated that a party must raise a claim of inconsistency at the outset of proceedings in concrete terms, identifying the persons who were treated differently and the basis upon which they ought not to have been treated differently. Only the claim of inconsistency was raised on concrete terms in respect of Mr. Mahosi, and while the Applicant herself led evidence in respect of an individual who was nominated at the moderation committee, any other issues of inconsistency came up during the cross-examination of Dr Naidoo.

[45] As to how she arrived at the conclusion that the Applicant had been paid the higher of the Cash and the Special Cash award when the former is calculated/comes from the compensation budget while the latter is calculated on her pensionable salary, Dr Naidoo explained that both are calculated form the Applicant's notch salary. She submitted further that her understanding was from a PMDS, HR perspective, and that only the finance department could give disaggregated figures. She held, however, that logically speaking, 10.5% was higher than 7.5%. Dr Naidoo also could not comment on whether the Applicant qualified for a Special Cash award as only the Applicant's manager could provide a comparison between the Applicant's day-to-day work and meritorious work not related thereto, nor could she say to whether it is to the degree commensurate with the maximum of 20%. She also could not confirm whether other employees have never received both in the past as she could only speak to the 2017/18 financial year during which no employee could receive both. The

[12] (2005) 26 ILJ 1105 (LC)
[13] (JA2013/42) [2014] ZALAC 24 (15 May 2014) at para 39

Applicant's case as to whether she received the higher of the two cash awards was not properly made out in this regard. I am inclined to accept Dr Naidoo's explanation in the absence of any other. Submissions being made that the Special Cash Award be 7.5% is also not a deviation from regulation 50% as it provides that it should not exceed 20% of the employee's pensionable salary, which should not be read to imply that it cannot be less than 20%.

Did the Respondent commit an unfair labour practice related to benefits?

[46] On the substantive aspect of the decision of the Respondent it is my finding that the Applicant has not proven an unfair labour practice. While the Applicant was able to demonstrate that she qualified for a Special Cash Award in terms of regulation 50, the Respondent demonstrated that the discretion not to pay her the Special Cash Award was not arbitrary. The Applicant was paid the higher of the Category A Cash Award and the Special Cash Award as per the decision of the DG. In **Arries v CCMA and others**[14] the Court held that there are limited grounds on which a Commissioner may interfere with a discretion which had been exercised by a party competent to exercise that discretion, because the ambit of the decision-making powers inherent in the exercising of a discretion by a party, including the exercise of the discretion, or managerial prerogative, of an Employer, ought not to be curtailed.

[47] On the procedural aspect of the decision of the Respondent it is my finding that the Applicant has proven an unfair labour practice. The Respondent's evidence that the moderation committee could nominate an employee for a Special Cash Award was inadequate. It raises a lot of questions that this arbitration has sought to answer in respect of how work of such nature is determined to meet the criteria of regulation 50. Ms. Kruger also conceded that the Applicant was not provided with feedback as per the outcome grievance letter from the DG, citing the fact that at the time she received the letter the Applicant had already referred the matter to the Council. Ms Kruger had been able to consult Ms. Maseko on the Applicant's nomination and had declined to support it, as such the feedback to the Applicant I would submit may have been necessary even prior to the grievance. It is also my impression that the reason Ms. Kruger did not support the Applicant's nomination is because employees could not qualify for both, not that her work was not meritorious as contemplated by Regulation 50, which is part of what has led to the confusion as it appears that the Applicant did not know whether her Special Cash Award nomination was not supported because she did not qualify or whether it was because employees could not qualify for both awards. Section 193(4) of the Act provides that an arbitrator may determine any unfair labour practice dispute referred to the arbitrator, on terms that the arbitrator deems reasonable, which may include ordering reinstatement, re-employment or compensation. It is my view that compensation of one (1) month is commensurate *solatium* to remedy the procedural defects in this matter.

[14] (2006) 27 ILJ 2324 (LC)

AWARD:

[48] The Applicant, Dr Morgenie Pillay, as represented by PSA, has established an unfair labour practice related to benefits on procedural unfairness.

[49] The Respondent is ordered to pay to the Applicant one (1) month salary amounting to R94 900-00 (R1 138 800-00 / 12), subject to statutory deductions, by no later than 30 June 2023.

[50] I make no order as to costs.

Name: Mohau Clement Ntaopane

GPSSBC Arbitrator