



GENERAL PUBLIC SERVICE
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ARBITRATION AWARD

Panellist/s: Michael Marawu
Case No.: GPBC 1940/2022
Date of Award: 23-May-2023

In the MATTER between:

PSA obo Dr D Parker
(Union / Applicant)

and

Department of Environment, Forestry & Fisheries and DPSA
(Respondent)

Union/Applicant's representative: Ms N Adams (PSA Representative) _____
Union/Applicant's address: 6th Floor, 80 Strand Street _____
Cnr Strand and Bree Street _____
Cape Town, 8000 _____
Telephone: (021) 409 - 7360 _____
Fax/Email: natalie.adams@psaftss.co.za _____

Respondent's representative: Mr R Sentleeng (DAFF Official) _____
Respondent's address: Environment House _____
473 Steve Biko Road _____
Arcadia _____
Tel: (012) 399 8890 _____
Fax/Email: rsentleeng@dffe.gov.za _____

ARBITRATION AWARD

DETAILS OF HEARING AND REPRESENTATION:

1. The arbitration hearing was held at the premises of the department of Environment, Forestry and Fisheries in Cape Town from November 2022 and concluded in February 2023. The parties further agreed to meet on 08 March 2023 in anticipation of the quantified calculated figures relating to the Grade Progression claim to be presented by the Respondent's Human Resources department for necessary approval by the parties.
2. The Applicant was represented by a trade union (PSA) Official, Ms Natalie Adams, and the Department of Environment, Forestry and Fisheries by Mr Roderick Sentleeng. The arbitration proceedings were digitally recorded.

ISSUE TO BE DECIDED:

3. I am required to determine fairness in respect of the employer's conduct relating to the facilitation of grade progression as well as the counter-offer benefits claimed to be due to the employee, as contemplated in section 186(2)(a) of the Labour Relations Act, as amended (the LRA).

BACKGROUND

4. The Applicant in this matter is a **Production Scientist** (Dr. D Parker) employed with the Department of Environment, Forestry and Fisheries since 2016; he is claiming to have been entitled to receive grade progression benefit with effect from 01 July 2020 to 31 December 2022. He is also claiming to be entitled to be paid a counter-offer benefit due to him effective 01 September 2021.
5. The Respondent confirmed the Applicant's entitlement to the grade progression benefit due with effect from 01 July 2022, however it is not yet at liberty to provide retrospective back-pay calculations and is challenging the Applicant's entitlement to the claimed counter-offer payment.

SURVEY OF SUBMISSIONS AND ARGUMENTS

THE APPLICANTS' CASE

6. **Mr Natalie Adams (PSA Representative)** submitted on behalf of the applicant that he was a Production Scientist operating at Grade A level earning a monthly remuneration of R55533.50 (R666402.00pa) until his grade progression became due and effective as at 01 July 2020, wherein he had to progress to a Grade B first notch level. The grade progression necessary adjustments on the Applicant's remuneration by the Respondent's Human Resources department until the Applicant resigned in December 2022.
7. On or around 01 September 2021 the Applicant received an offer of appointment from an external institution and his line management submitted a counter-offer motivation for the Director-General's approval. The Applicant is of the view that his remuneration had to be further adjusted in respect of the counter-offer payment he was entitled to receive with effect from 01 September 2021.
8. The papers submitted on behalf of the Applicant also presented quantified calculations and estimations as prepared by the Applicant for his outstanding payment claimed to be due to him until his resignation in December 2022. The amount of grade progression adjustment to Grade B first notch should have been a total amount of R178225.00 effective from 01 July 2020.
9. Further remuneration adjustment should have been implemented effective 01 September 2021, due to the counter-offer remuneration adjustment payable until the Applicant's resignation in December 2022. Thus, the Applicant is, in the alternative, seeking twelve (12) months compensation as a suitable remedy for his unfair labour practice claim.

THE RESPONDENTS' CASE

10. **Mr Roderick Sentleeng (DFFE Representative)** submitted on behalf of the Department of Forestry, Fisheries and Environment that the matter relating to the claimed counter-offer payment was not deemed to be an unfair labour practice relating to a benefit dispute by the Respondent, but that which fell outside the Council's jurisdiction. The facts of the matter are simply that the Director-General had the authority to approve or not approve the counter-offer motivation submitted by the Applicant's line manager in this regard; the DG elected not to approve the application and the matter was dealt with in accordance with the relevant guiding legal prescripts.
11. Furthermore, the legitimacy of the Applicant's grade progression claim was not challenged, as it was common cause that the Applicant was entitled to the Grade B pay progression with effect from 01 July 2020. The Respondent relied on the relevant department to provide necessary calculations in this regard. Ms Sarah Mathonyane (Human Resources Specialist) was in consultation with the Finance department, in order to quantify the actual amount due to the Applicant with effect from 01 July 2020 until his resignation in December 2022.

12. He did not necessarily dispute the grade progression (Grade A – B) case presented on behalf of the Applicant, however the authority rests with the Finance department to give direction and necessary resolution, in the circumstances.
13. **Ms Sarah Mathonyane (Human Resources Specialist)** indicated that there is an ongoing process dealing among other things with the calculation of the actual figures of the Applicant's grade progression from Grade A to Grade B first notch with effect from 01 July 2020. She fully accepts that Dr. D Parker was dully entitled to receive the grade progression remuneration adjustment effective from 01 July 2020, as he was a top performer for a number of years since his appointment from 2016.
14. Her department needed to satisfy itself with proper calculations and fair determination of the relevant figures to be presented in this matter, in order to give due direction to all affected employees, in the circumstances.
15. During her first appearance in the arbitration proceedings in February 2023, she sought to be given a further opportunity to engage with the Finance department and be able to present proper calculations by no later than the 7th March 2023.

ANALYSIS OF SUBMISSIONS AND ARGUMENTS

16. Most of the pertinent issues in this dispute were largely common cause, except for specific figures and amounts to be considered, wherein the parties were delayed by the Finance department that could not provide the grade progression retrospective back-pay calculations timeously. In this particular matter, there was no dispute that the Applicant ought to have be granted a grade progression from Grade A to Grade B first notch level effective 01 July 2020.
17. Where the parties dispute rested in this regard, was mainly on the counter-offer remuneration adjustment claim. The Respondent's representative stated that as much it could not dispute the grade progression adjustment claimed by the Applicant, he did not believe that the Council has the necessary jurisdiction to deal with the Applicant's second (counter-offer) claim. The Director-General had exclusive discretion and exclusive authority to approve or not to approve the application. Therefore, the Council could not just assume jurisdiction or confer on itself authority not granted in law; that would be '*ultra vires*' (outside its legal authority).
18. Regarding the grade progression adjustment amounts due effective 01 July 2020 the Respondent's Human Resources Specialist (Ms Sarah Mathonyane) indicated that she had to provide the Finance department's verified calculations in respect of the actual amount of back-pay due to the Applicant from 01 July 2020 until December 2022, which were not made available to date. She requested and was granted ample opportunity to consult the relevant department, in order to provide such verified calculations until the 8th March 2023; however she could not provide the required calculations or a reasonable explanation when we reconvened on 08 March 2023.

19. The respondent's failure to quantify the actual outstanding back-pay amount due to the Applicant with effect from 01 July 2020 to 31 December 2022 without just cause, makes it more probable for just and equitable compensation to be considered, in the circumstances. The Respondent had all the resources at its disposal as well as necessary obligation to determine employee's outstanding grade progression payments and keep proper records thereof.
20. However, the respondents' arguments presented in this arbitration were more about waiting on the on-going internal determination process and verified calculations to be provided, which were ultimately not presented. In **Arries v Commission for Conciliation, Mediation and Arbitration & Others**, Nel AJ held:

"I accordingly first considered how our courts generally have approached the question of interfering with a discretion which has been exercised by another party. Then I looked at how this has been approached in the employment jurisprudence. A consideration of this question discloses that there are limited grounds on which an arbitrator, or a court, may interfere with a discretion which had been exercised by a party competent to exercise that discretion ... It ought to be interfered with only to the extent that it can be demonstrated that the discretion was not properly exercised.

"Taking this proposition further, and applying what our courts have said in this regard to the employment field, I am of the view that an employee can only succeed in having the exercise of a discretion of an employer interfered with if it is demonstrated that the discretion was exercised capriciously, or for insubstantial reasons, or based upon any wrong principle or in a biased manner (see Rex v Zackey 1945 AD 505 at 513; Madnitsky v Rosenberg 1949 (2) SA 392 (A) at 398; Ex parte Neethling & others 1951 (4) SA 331 (A) at 335D; Benson v SA Mutual Life Assurance Society 1986 (1) SA 776 (A) at 781J and 783C; Shepstone H & Wylie & other v Geyser NO 1998 (3) SA 1036 (SCA) at 1045A).

"This approach, I believe, is consistent with the test applied by judges sitting in the Labour Court and commissioners of the CCMA when considering the principles applicable to interference with an employer's decision ..."

21. With respect it is my conclusion that, failure by the Respondent to process payment of the Applicant's outstanding back-pay in respect of his grade B progression over the period from 01 July 2020 to 31 December 2022, amounts to an unfair application of the employer's discretion and falls in the realm of capricious discretion exercised with insubstantial reasoning.
22. Based on the evidence presented before me, I am of the view that taking into account the compelling argument presented on behalf of the Applicant as well as the Respondent's admission, there are no valid grounds proffered to justify the respondents' failure to process outstanding grade B progression retrospective payments, as claimed.
23. The delayed determination of the actual amount due to be paid to the Applicant in respect of grade B progression due effective 01 July 2020 was filled with invalid reasoning that could not be justified during the arbitration proceedings by the Respondent; such is deemed to be unlawful and without legal grounds.

24. Turning to the question of compensation that is just and equitable sought by the Applicant in light of the outstanding grade progression retrospective back-pay found to be unfair. In *Johnson & Johnson (Pty) Ltd v Chemical Workers Industrial Union*, the LAC held:

*"The compensation for the wrong in failing to give effect to an employee's right to a fair procedure is not based on patrimonial or actual loss. It is in the nature of a **solatium** for the loss of the right, and is punitive to the extent that employer (who breached the right) must pay a fixed penalty for causing that loss. In the normal course a legal wrong done by one person to another deserves some form of redress. The party who committed the wrong is usually not allowed to benefit from external factors, which might have ameliorated the wrong in some way or another. So too, in this instance"*

25. It follows therefore that suitable remedy to be considered in such a case, would be appropriate compensation amounting to four (04) months' remuneration to be awarded incorporating within it a reasonable solatium to also redress the injuria of being treated unfairly in respect of an unfair labour practice relating to the Applicant's benefit entitlement. This amount should not be lower than that which the Applicant would have received, in the event that his grade B progression was adjusted effectively on 01 July 2020 and amount due added on his monthly remuneration until 31 December 2022 (30 months).
26. Having said that, with respect to the matter relating to the counter-offer claim by the Applicant I could not establish sufficient evidence or relevant statutory grounds to determine if the Director-General's discretion was applied unlawfully and/or it is within the Council's jurisdiction to review such a decision. It is my view that the Applicant did not discharge its onus of proving, on the balance of probabilities, its counter-offer claim in this regard.

AWARD

27. The Applicant's unfair labour practice claim has been proven in respect of the outstanding grade B progression retrospective back-pay effective 01 July 2020 to 31 December 2022.
28. The Applicant, **Dr. D Parker** must be compensated with **R222134.00** in respect of the unfair labour practice endured due to the unfairness of the employer's conduct, in the circumstances.
29. The above amount due in respect of ten months' remuneration must be paid to the Applicant by no later than 15 June 2023.



Michael Marawu

Name:

GPSSBC Arbitrator