



GENERAL PUBLIC SERVICE
SECTOR BARGAINING COUNCIL



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ARBITRATION AWARD

Panelist: Chance Khazamula
Case No.: GPBC755/2021
Date of Award: 13 February 2023

In the ARBITRATION between:

PSA obo IM Mthombeni
(Union / Applicant)

and

Department of Employment and Labour
(Respondent)

Applicant's representative: Joel Ntwampe – Applicant's Legal Representative

Respondent's representative: Betty Rampeng – Respondent Legal Representative

AWARD

DETAILS OF HEARING AND REPRESENTATION

1. The dispute was an Unfair Labour Practice – relating to benefits referred for arbitration in terms of section 186(2) (a) of the Labour Practice Act and resolution 3 of 2009 of the GPSSBC.
2. The arbitration proceedings commenced on 13 July 2021 and proceeded on various days until they were concluded on 01 December 2022. The Parties submitted oral opening statements. The proceedings were electronically recorded. Parties further submitted bundles of evidence which were marked Bundle A for the Applicant and Bundle R for the Respondent. The Parties submitted electronic written closing arguments.
3. At the end of the arbitration proceedings the Parties were directed to file the differences of the amount of salary level of 9 and 10 from the date of the Applicant's employment and it was served to me by the Council on 13 February 2014.

ISSUE TO BE DECIDED

4. Whether the post was graded on salary level 10 or not when the Respondent's organisational structure was approved.

RELIEF

5. The relief sought by the Applicant is to be remunerated from a salary level 9 to a salary level 10 with retrospective effect from 1 May 2018. The Respondent's relief sought is that the post should be evaluated or benchmarked to place the Applicant on the correct level.

BACKGROUND TO THE ISSUE

6. The Applicant was employed by the Respondent as an Assistant Director: Quality Assurance on 01 May 2018 on salary level 9 earning a salary of R344545, 00 per annum¹.
7. The Applicant referred an internal grievance alleging that he was wrongfully remunerated because his post was graded on salary level 10 based on the Respondent's approved structure. The Respondent dismissed his grievance and he referred a dispute to the Council. The dispute was therefore referred to me for arbitration.

SURVEY OF EVIDENCE AND ARGUMENT²

The Applicant's submission and argument

The Applicant

8. The Applicant testified in his evidence in chief, that he was appointed by the Respondent in 2007 as the Assistant Director: Quality Assurance to date.

¹ Pages 19 and 20 of the Bundle A

² I have considered all evidence submitted before me which I will not regurgitate. I however will refer to evidence relevant to the determination or to support any of the elements of fairness as required. This does not imply that in coming to a determination I failed to consider or ignored other evidence.

9. The Respondent graded his post on salary level 10 according to the approved organisation structure³ ("the approved structure") under box number 3, but he was remunerated on a salary level of 9. On the approved structure, his four subordinates (Call Centre: Quality Assurers) were upgraded from a salary level of 6 to 8. The Applicant submitted that was performing the duties of salary level 10 but remunerated on salary level 9.
10. The Applicant again testified that the Respondent's Minister could not have approved the structure without the job evaluation process. His subordinates were upgraded based on the job evaluation process.

The Respondent's submission and argument

The Respondent's 1st witness

11. Respondent's witness Shirley Rikhotso ("Rikhotso") testified that she was the Respondent's Assistant Director Organisation Development appointed in 2018 and briefly stated her duties *inter-alia* conducting job evaluations and compiling and reviewing job descriptions.
12. Rikhotso submitted that the approved structure was approved by the Respondent's Minister⁴ and concurrence must be sought from the Department of Public Service and Administration ("the DPSA"). The Applicant consulted her directorate regarding the structure. Her directorate tried to find supporting records but they were not available. The Public Service Regulation required the Respondent to conduct a job evaluation process however there was no system in place to be used for that purpose. The only option was to conduct a

³ Page 18 of Bundle A

⁴ The executive authority of the Respondent

benchmarking exercise and the recommendation will thereafter be taken to the Minister for approval and the DPSA for concurrence.

13. Rikhotso referred to page 16 5 (c)⁵ of the Respondent's bundle and submitted that where there are no records of any job evaluation being conducted in the past, such jobs/posts should be evaluated and consulted with the MPSA and full motivation should be provided why these posts/jobs should not be regarded from a running date. Rikhotso stated that the job evaluation should be conducted in the case of the Applicant because there are no records but because there was no job evaluation system benchmarking exercise was the only option.

ANALYSIS OF EVIDENCE AND ARGUMENT⁶

14. During the opening statement, the Applicant alleged that he requested the Respondent to conduct the job evaluation from 2018 and nothing was done by the Respondent. The Applicant submitted that the job evaluation will not assist because the process was completed before the structure was approved. In response, the Respondent submitted that it wanted to do the right thing and that it could rely on the approved structure. The Parties further agreed that it was a common cause that the Respondent was incorrect to rely on PSCBC Resolution 3 of 2009, clause 3.6.4.2 to dismiss the Applicant's grievance⁷.
15. It was a fact that the post was advertised on salary level 9 when the Applicant was appointed to the post in 2018. Rikhotso submitted that the records of the job evaluation process were not found by the Respondent and therefore on what basis did the Respondent advertise the post on salary level 9. I am stating this

⁵ Page 15 to 16 of Bundle A - Circular 4 of 2014

⁶ I have considered all evidence submitted before me. I however will refer to evidence relevant to the determination or to support any of the elements of fairness as required. This does not imply that in coming to a determination I failed to consider or ignored other evidence.

⁷ Page 2, Para 3 of Bundle R

because there was no evidence submitted by the Respondent to provide the basis on which the Applicant's post was advertised on a salary level of 9.

16. What needs to be considered is whether the Minister could approve the structure without job evaluation or not. I doubt that would be the case. Rikhotso explained the job evaluation process steps leading to the approval by the Minister and thereafter concurrence by the DPSA. It would not be plausible for the accounting authority to refer the submission for approval to the Minister without this process lacking.
17. I must emphasise that the Respondent's case was a complete deviation from the reasons to dismiss the Applicant's grievance. The grievance referred to the unavailability of the documents but the essence of the reasons to dismiss the Applicant's case was based on the resolution which the Respondent admitted that it was an error to rely on the resolution. The unavailability of the documents was a second defence and later and only at the arbitration level.
18. The Applicant submitted in cross-examination that there was no way that the Minister could approve the structure without a job evaluation process. This was not disputed by the Respondent's witness instead Rikhotso outlined the process of job evaluation which led to the approval of the structure and concurrence by the DPSA which seems to support the Applicant's version.
19. There was no explanation from the Respondent as to how the Minister ended up approving the structure without the supporting document but Rikhotso's evidence in cross-examination submitted that according to the Public Service Regulation, the Minister must approve the structure with the following attached document, (a) the old organisational structure, (b) submission recommended by the job evaluation panel, the job description and the attendance register of the job evaluation panel. I do not doubt that this would have been complied with when the Minister approved the organisational structure.

20. The Respondent was responsible for the safe custody of the Respondent's assets and records. There was no evidence from the Respondent whether the supporting documents existed or not except the oral testimony of Rikhotso that they were not found. I find it strange that only the approved structure was the only document found. It cannot be just for the Applicant to be remunerated below the approved salary level on the basis that the supporting documents are lost. It was not the Applicant's responsibility but those in charge of safe record keeping to keep records safe. Rikhotso in cross-examination submitted that the 2013 approved structure has been utilised by the Respondent since then and it was the same organisation structure she was provided with when she commenced working for the Respondent.
21. It must be noted that Rikhotso commenced employment in 2018 and the structure was approved in 2013 which was 5 years before she joined the Respondent. Rikhotso in my view would not be appraised on the facts that occurred in 2013 when the structure was approved especially without any supporting documents. In this regard, I find her to be an irrelevant witness to the events before she joined the department unless she had documents to support her version.
22. The Respondent further relied on Circular 4 of 2014 (5) (c) which deals with jobs in corporate services. In re-examination, Rikhotso submitted that the Applicant's post did not form part of corporate service and it was a core function. This renders Rikhotso's evidence regarding the Circular irrelevant.
23. The Applicant submitted that his subordinates were upgraded to salary levels of 6 to 8 and their jobs went through a job evaluation. The Respondent in their closing arguments dismissed this version as irrelevant to the dispute because the upgrade was a result of job evaluation however there was no contrary evidence to the Applicant's testimony. I find it strange that the Respondent would argue

against the Applicant's version considering that the salary level of his subordinates was reflected on the approved structure as level 8. If their jobs were subjected to a job evaluation, then it meant that the Applicant's job went through the same process.

24. I find that the Applicant was able to prove that the Respondent committed an act of unfair labour practice. I find that there was no rational basis to advertise the post on salary level 9 and to appoint the Applicant at that level. The Respondent kept on changing the goalpost for its defence against the Applicant's allegations of unfair labour practice relating to benefits. It was the fact that the approved structure was the only official structure of the Respondent.
25. The differences between the Applicant's salary level 9 and 10 calculation were calculated and submitted by the Respondent as follows;

DATE	NOTCH SR 10	NOTCH SR 9	DIFFERENCE
2018-05-01	R 444 693,00	R 356 289,00	R 88 404,00
2019-04-01	R 470 040,00	R 376 596,00	R 93 444,00
2021-07-01	R 484 236,00	R 382 245,00	R 101 991,00
2022-04-01	R 498 762,00	R 393 711,00	R 105 051,00
2022-07-01	R 506 250,00	R 399 609,00	R 106 641,00
			R 495 531,00

I further find that the applicant's salary grade should be upgraded from salary level 9 to salary level 10 in line with the approved structure and he be remunerated the difference between salary level 9 and 10, retrospectively from the date of his appointment being 01 May 2018, calculated as per the above table⁸.

AWARD

26. I, therefore, issue the following award;

25.1. The Respondent is ordered to upgrade the Applicant's salary level from salary level 9 to 10, retrospectively from the date of his appointment, being 01 May 2018 on or before 28 February 2023

25.2. The Respondent is ordered to pay the Applicant a total sum **of R495, 531,00** on or before 28 February 2023.

(The total sum is calculated based on the annual differences of amounts between Applicant's salary level 9 and 10 from the Applicant's date of appointment (01 May 2018) up to 2022 as follows;

2018 - R88 404,00

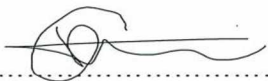
2019 - R93 444,00

2021 - R101 991,00

2022 - R105 051,00

2022 - R106 641,00

Total: - R495531,00)



CHANCE KHAZAMULA
(GPSSBC) Arbitrator

Chance Khazamula
GPSSBC Arbitrator