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# ARBITRATION AWARD

Panellist/s: Mr S M Moeketsi  
Case No.: GPBC 2364/2018  
Date of Award: 30 September 2020

## In the ARBITRATION between:

PSA obo R K Dibane

(Union / Applicant)

and

Department of Sport, Arts and Culture Northern Cape

(Respondent)

**Union/Applicant's representative:** Mr Francois Clark

Union/Applicant's address:

Telephone:

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**Respondent's representative:** Mr Fabian Bornman

Respondent's address:

Telephone:

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## ARBITRATION AWARD

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### DETAILS OF HEARING AND REPRESENTATION:

1. The matter came before the council for arbitration in terms of section 186 (2) (a) of the Labour Relations Act No 66 Of 1995 (the Act). It was set down for a virtual hearing on the 16<sup>th</sup> September 2020.
2. The applicant, Ms R K Dibane attended the hearing and was represented by Mr Francois Clark official of the applicant's trade union, PSA.
3. The respondent, The Department of Sport, Arts and Culture- Northern Cape, also attended the hearing and was represented by Mr Fabian Bornman an official for the respondent.
4. The matter proceeded on the 16<sup>th</sup> September 2020 and was finalized on the same day but the parties agreed to file closing arguments on or before the 22<sup>nd</sup> September 2020.

### ISSUE TO BE DECIDED:

5. Whether the respondent's conduct amounts to unfair labour practice when they decided that he does not qualify for both the pay progression and incentive bonus for the review year 2016/2017.

### BACKGROUND TO THE MATTER:

6. The applicant Ms Rachel Keitsing Dibane was employed as the Senior Personnel Practitioner with a salary level by the 8 by the department of Sport, Arts and Culture;
7. She was appointed at this position on the 1<sup>st</sup> June 2014;
8. In July 2017, the applicant's performance was reviewed by her Supervisor based on the departmental policy. They agreed on the review score/assessment rating and thereafter the supervisor presented the rating with the portfolio of evidence to Intermediate review committee (IRC);
9. The IRC accepted the rating and validated portfolio of evidence;
10. IRC then presented the rating and the portfolio of evidence to the the Moderation committee;
11. The moderation committee which is the final committee unanimously confirmed the rating as presented to them by the IRC;
12. The said confirmed assessment rating (CAR) was thereafter approved by the executing authority which is the office of the MEC Sport, Arts and Culture Northern Cape;
13. The confirmed assessment rating (CAR) of the applicant was 118%;
14. The respondent however indicated that though the applicant, qualify for pay progression and incentive bonus in terms of her CAR, she is not legible based on her date of appointment as employee;
15. The applicant then appealed this decision to the appeal committee;
16. The appeal committee though found that the moderation committee erred in making such decision, they however changed the confirmed performance rating of the applicant from 118% to 114%;
17. In terms of the policy, the said rating of 114% would make the applicant be legible only for pay progression. The qualifying rating for incentive bonus is 115% and above;



18. The applicant submitted a bundle of documents in this hearing which was marked as Bundle "A". The respondent's documents were marked as Bundle "B".
19. Both parties agreed that the documents in both bundles purports what they ought to be.

## **SURVEY OF EVIDENCE AND ARGUMENT:**

### **Evidence**

Although the applicant bear onus of proof and thus had to begin to lead the evidence, the parties agreed that the respondent will begin as their witness will not be available at a later stage during the proceedings. This was allowed and it was understood that in no way does it shift the onus of proof.

### **Respondent's evidence.**

The respondent led the evidence of only one witness Ms Carmen Pienar who testified that:

20. She is employed by the Department of Sport, Arts and Culture as Administrator of the Employees Performance Management and Development and that she also serves as the secretary of different departmental committees;
21. Most issues were common cause and thus were covered on the background, an attempt will be made to avoid repetition of those issues here in as far as her evidence is concerned;
22. Ms Pienar testified that unfortunately the applicant did not qualify for the performance bonus because her confirmed assessment rating was reduced by the appeal committee;
23. She then made reference to Bundle "B" page 10-39 with specific focus to page 29 clause 9 of the EPMDS, 2016 policy, which she said states that new participants must wait for 24 months for them to be able to qualify for performance bonus;
24. She further stated that it is the above mentioned clause 9, that the Intermediate Review Committee (IRC) as well as the Departmental Moderation Committee (DMC) applied in arriving at the conclusion that the applicant does not qualify hence she appealed. (its should be noted that it became common cause that this decision by the IRC and DMC was found to be wrong by the Assessment Appeal Panel (AAP));
25. The applicant on appeal presented the directives from the Provincial committee and the appeal committee as per pages 8 and 9 of Bundle "B". The AAP then found that the IRC and the moderation committee erred;
26. She further indicated that the directives were actually and implantation guide for the EPMDS, 2016 policy after it was realized that the policy was not properly implemented across the different departments;
27. The AAP however reviewed and then reduced the confirmed assessment rating(CAR) of the applicant from 118% to 114% and indicated that she does not qualify based on her performance rating of 114%.

That was in summary the evidence by the respondent.

### **The applicant evidence**

The applicant, Ms Rachel Keitsing Dibane was the only witness for her case and testified that:



28. She is employed as the Senior Personnel Practitioner and her date of appointment at this position is the 1<sup>st</sup> June 2014;
29. She also testified basically confirming the common cause issues that has been covered at the background until she appealed and stated that her confirmed assessment rating was changed by the AAP when they dealt with her appeal;
30. She stated that she was not satisfied with the change of her CAR as effected by the AAP, hence she lodged an internal grievance and ultimately referred the matter to the council for arbitration;
31. She indicated that she believes that she is entitled to both the pay progression and the performance bonus and referred to the Policy on Employee Performance Management and Development System (EPMDS), 2016. In the policy reference was made to same clauses that the respondent referred to as they were also in Bundle A and then referred to resolution 01 Of 2012 which states *"The first time participants who have completed 12 months within the reporting period, can qualify for performance bonus, however they will not qualify for pay progression. They will only be eligible after 24 months uninterrupted service"*;
32. The applicant also made reference to clause 8.4 (b) bullet 1 of the EPMDS in relation to the role of AAP which states *"To review a disagreement between employee and the department over his/her Confirmed Assessment Rating, and to make a recommendation in this regard to the Departmental Moderation Committee"*. She indicated that the AAP did not have powers to change her score as they can only recommend;
33. She further raised doubt about the composition of the AAP in particular pointing out page 53 of Bundle "A" (which reflects members of all the three committees being the IRC, the DMC and the AAP), that some of the AAP members appear as members of all the other committees though it was the decision of those committees that was being appealed;
34. She then referred me to the quantum that is in page 137 of Bundle "A" as the remedy she is asking for;
35. She testified that the unfair labour practice led to her loss of R46 637.85 which is a combination of performance and pay progression and that it should be paid to her in order to remedy the unfair labour practice.

The applicant's case was then closed.

## **Argument**

Both parties submitted written heads of arguments. The applicant also attached the documents referred to in their submissions.

## **Applicant Argument**

36. The applicant argued that I should find that the respondent's conduct amount to unfair labour practice and stated the following:
  - 36.1. That the matter referred to the appeal committee was based on the fact that the IRC and DMC erred in deciding that the applicant does not qualify for performance bonus;
  - 36.2. That when the AAP having decided to change the confirmed assessment rating of the applicant from 118% to 114%, it amounted to overreach as that was not the reason the matter was before them as it was not the dispute that they had to decide on;
  - 36.3. Further argued with reference to clause 8.4. (b) bullet 1, of the EPMDS that the appeal committee does not have the powers nor mandate to change the performance rating, but can only recommend to the to the DMC where there is disagreement between the



- employee and the department over the confirmed assessment rating and that that was not the case in the applicant's matter;
- 36.4. Further made reference to Resolution 1 of 2012 and argued that it allows first time participants who completed 12 months to qualify for performance bonus;
  - 36.5. The applicant then submitted that if I determine that the respondent's conduct amounts to unfair labour practice, I should award payment by the respondent of bonus as well as the outstanding pay progression to the applicant calculated and confirmed by the respondent to the amount of R46 637.85;
  - 36.6. Further submitted that I should then order the respondent to effect the correct notch as per implementation of outstanding progression which must be kept at R331, 629.00 per annum on persal in line with pay progression and cost of living salary adjustment affected and translated in the quantum.

### **Respondent argument**

- 37. It is basically argued on behalf of the respondent that there is no act of unfair labour practice considering the following:
  - 35.1. The conduct by the Assessment Appeal Panel does not amount to unfair labour practice;
  - 35.2. That even though it has become clear that the applicant does qualify in terms of her appointment date as corrected by the AAP, she however did not meet the score/rating target to be awarded performance bonus as well as pay progression;
  - 35.3. It is argued further that I should accept that the AAP was empowered to change the score of the applicant based on the portfolio of evidence submitted with the score and thus the applicant's rating should be 114% as opposed to the initial confirmed assessment rating of 118%.
  - 35.4. Further that the AAP was empowered by the EPMDS in reviewing the performance rating of the applicant in terms of clause 8.4;
  - 35.5. That the respondent disputes that the applicant is entitled to the payment as stated on the applicant's calculated quantum which is R46 637.85.

### **ANALYSIS OF EVIDENCE AND ARGUMENT:**

- 36. Given that it is common cause that the Confirmed Assessment Rating (CAR) of the applicant is 118% and that there was no disagreement between the applicant and the department on the rating when the matter was referred to Assessment Appeal Panel (AAP);
- 37. I then conclude that the performance rating of the applicant was not the matter before the AAP and that it was not in dispute;
- 38. Having said that, it is important to look into the role of the AAP. Clause 8.4 (a) of EPMDS states: *"this role is two-fold: (a) as a departmental recourse for an employee in a disagreement over a proposal by the IRC to amend an assessment rating, and after being informed of a final rating (Confirmed Assessment Rating) before a formal grievance is lodged, and as an arbiter in ad hoc disputes and disagreements"*.
- 39. It is clear from the evidence presented as well as the documentation by both the respondent and the applicant that there was no disagreement in as far as Confirmed Assessment Rating (CAR) of Ms Dibane is concerned, and understandably the reason why CAR was not the matter before AAP;
- 40. Even if I accept that AAP had as they did actually review the applicant's CAR I will then have to look at the effect of the change and for this I am referred to clause 8.4 (b) bullet 2 which states: *"The AAP that is then constituted has the following responsibilities: to review the disagreement between an employee and the department over his/ her confirmed Assessment Rating. And to make a recommendation in this regard to the Departmental Moderating Committee"*.



41. The reason why the matter was before the AAP is captured by the applicant's referral letter which is in page 27 and 28 of Bundle "A" which in short it was because of the wrong interpretation of the policy by the Intermediate Review Committee (IRC) and Departmental Moderation Committee (DMC) when coming to the conclusion that the applicant does not qualify for performance bonus due to her date of appointment;
42. Pages 29, 30 and 31 of Bundle "A" deals with the outcome of the applicant's appeal. However, it is clear that notwithstanding the issue that was brought before them they went ahead to decide on an issue that was not before them and changed what was a confirmed assessment rating/final score when that was not in dispute;
43. Other than the evidence by Ms Pienar about the fact that the applicant did not qualify because her rating was changed by the AAP, none of the members of the AAP were able to come and give evidence indicating at least what policy or practice did they rely on in acting in the manner that they did interfering with the applicant's CAR;
44. I find therefore that the respondent in deed acted capriciously in changing the performance rating of the applicant and concluding that she does not qualify for performance bonus;
45. The evidence presented does not make it clear as to why the applicant's pay progression was not implemented as this is not affected by the lowering of her CAR either;
46. I therefore find that the respondent failed to implement applicant's pay progression without a just cause at all.

#### **AWARD:**

I find that the respondent had committed an unfair labour practice relating to benefits.

I therefore order as follows:

- (a) The respondent to pay the applicant an amount of R46 637.85, which is the amount calculated to include both the outstanding/area pay progression as well as the performance bonus for the review year 2016/2017 per the quantum in page 137 of Bundle "A" on or before the 31<sup>st</sup> October 2020.
- (b) The respondent to effect a correct notch as per implementation of the outstanding pay progression which must be kept at R331 629.00 per annum on persal system, effective from 1<sup>st</sup> October 2020 onwards in line with pay progression and cost of living salary adjustments affected and translated in the quantum referred to at par. (a) above.

(c) I make no order as to the costs.



**Sekonyela Moeketsi Moeketsi**