



# Arbitration Award Rendered

Case Number: **KNPM1676-18**

Commissioner: **Garth Jenkin**

Date of Award: **19-Sep-2019**

In the **ARBITRATION** between

**PSA obo Chiliza, Thabsile P**

(Union/Applicant)

and

**Department of Education**

(Respondent)

Union/Employee's representative: **Mr Perfect Zulu**

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## DETAILS OF HEARING AND REPRESENTATION

- [1] In this case, the PSA obo Ms TP Chiliza (Applicant) alleged that the Department of Education KZN (Respondent) is discriminating against Ms Chiliza by not "promoting" her to level 4 as it has done with 6 of her colleagues who perform the same or similar work. The arbitration was set down on 6 September 2019 in Pietermaritzburg. The Applicant was represented by Mr Perfect Zulu, an official of the PSA. Respondent was represented by Mr Dexter Thwala of the Department.
- [2] The parties requested that the matter be decided on the written heads of argument and accompanying documents presented.

## ISSUES IN DISPUTE

- [3] Does the differentiation between applicant and the comparators amount to discrimination? If so, is the discrimination unfair and if so, what relief should be granted to her.

## BACKGROUND

- [4] Based on the written submissions of the parties it is difficult to discern facts that are common cause, save for the fact that Applicant and six of her security guard colleagues lodged a grievance with Respondent about why they had not been upgraded from level 3 to level 4. The grievance was not resolved internally and Applicant's 6 colleagues lodged an unfair labour practice dispute with the GPSSBC. Ms Chiliza was for some reason (not given) not an applicant in that dispute. The unfair labour practice dispute was arbitrated in the GPSSBC on 12 December 2016 in the absence of the Respondent, as Respondent failed to attend the arbitration. The arbitrator's award reads as follows:
- 4.1 The Respondent is directed to appoint the six applicants named in paragraph 2 above at salary level 4 and to backdate such appointment to the 8<sup>th</sup> September 2008. Respondent must do so within 30 days of the date hereof.
- 4.2 The Respondent is further ordered to calculate and pay each of the aforementioned applicants the difference between the salaries they actually received between the 8<sup>th</sup> September 2008 and the date of the arbitration, and the salaries which they ought to have been paid had they been appointed at salary level 4 on the said date. The Respondent must comply with this paragraph of the award within 90 days of the date hereof.
- [5] Applicant party's contentions were that:
- 5.1 The Applicant was a contract employee employed by the Respondent from 1 September 2008. Later that same year she was one of the seven employees chosen to be supervisors of the security guards by the respondent.
- 5.2 As a result of that, the seven of them were upgraded from salary level one to three.
- 5.3 On 1 April 2010, they were absorbed by the Respondent into permanent positions as Security Supervisors on salary level three.
- 5.4 During 2009, security guards on salary level one were upgraded from salary level one to salary level two but the seven supervisors were not upgraded to the next level which was level four.
- 5.5 In June 2014, security guards on salary level two were again upgraded to salary level 3 which was equivalent to the salary of their supervisors. The

- seven security supervisors lodged grievances since all of them were not upgraded to the next level and they were now on the same level as their subordinates.
- 5.6 In July 2014 Facilities Management and Auxiliary Services Directorate requested the Organisational Development Directorate to assist in the upgrading of the aggrieved security supervisor's posts from level 3 to 4.
- 5.7 On 29 August 2014, the Organisational Development Directorate submitted the post the posts Senior Security Officers to the Departmental Job Evaluation Panel and recommended that the 8 posts of Senior Security Officers' posts are upgraded to salary level 4 from salary level 3.
- 5.8 The Organisational Development Directorate then made the following submission to the Head of Department:
- 5.8.1 The upgrading of the 8 Senior Security Officers from salary level 3 to 4 and;
- 5.8.2 The upgrading of the 7 incumbents from salary level 3 to salary level 4 as per revised grading.
- 5.9 This was not approved by the HOD and was not implemented due to budgetary constraints.
- 5.10 The seven affected security supervisors/senior security supervisors, including the applicant, then lodged a formal grievance. Six of the seven aggrieved employees referred the matter for dispute resolution with GPSSBC.
- 5.11 On 27 December 2016 an Award was issued in favour of the Applicants. The Respondent was directed to appoint the six senior security officers from salary level 3 to salary level 4 and to backdate such appointment to 08 September 2008 within 30 days.
- 5.12 The Respondent was further ordered to calculate and pay each of the applicants the difference between the salaries they actually received between the 8<sup>th</sup> of September 2008 and the date of the arbitration; and the salaries which they ought to have paid had they been appointed at salary level 4 on the said date.
- 5.13 Since the applicant did not form part of the six Senior Security Officers who referred the matter for dispute Resolution to the Sectoral Council, the Respondent has not promoted her from salary level 3 to salary level 4 even though she formed part of the seven senior security officers who were aggrieved about the salary upgrade in the first place.
- 5.14 The Applicant is performing the same duties performed by the six Senior Security Officers who are in salary level 4 that were promoted according to the Award mentioned above.
- 5.15 The Applicant feels being discriminated against since she was not promoted together with the six other Senior Security Officers who were promoted with effect from 8 September 2008.
- 5.16 The Respondent has failed to promote the Applicant to salary level 4 just like her colleagues who perform similar duties as she is. As a result of that, the Applicant has referred this matter in terms of Section 6 (4) of the Employment Equity Act, as she is not compensated the same as the other six Senior Security Officers who were employed on the same date as her and who perform similar duties. She seeks promotion to salary level, 4 backdated to 8 September 2008, as her remedy.

[6] Respondent's main contentions were that:

- 6.1 Applicant, like her colleagues who are doing the same or similar work, is employed by the Respondent as a Security Officer. In terms of the Benchmark Job Description and grading level for the job of Security Officer (part of Respondent's bundle) the revised position of the rank of Security Officer is at salary level 3. This has been confirmed with the Organisational Development component of the Respondent which deals with job evaluation and regularly liaise with the Department of Public Administration.
- 6.2 Applicant has failed to prove that the two jobs, that of hers and her colleagues, on an objective evaluation, are of equal value. It also has to be noted that the applicant has not detailed the precise functions performed by her colleagues. The Applicant has failed to establish that the work performed by her and her colleagues is the same/similar.
- 6.3 Factors such as skill, physical and mental effort, responsibility and like factors are necessary and would have assisted in assessing the value of the work the Applicant performs in relation to that performed by her colleagues.
- 6.4 The award the Applicant is relying on (N.T. Mokoena and 5 Others) was not challenged on review. It is the Respondent's submission that the failure to challenge the award was an administrative error on the part of the Respondent, it is not because the Respondent is in agreement with the same. The award has since been referred to the Legal Services component of the Respondent so that the latter would facilitate the review of the same.
- 6.5 The Applicant has failed to prove unfair discrimination on arbitrary grounds.

ANALYSIS OF ARGUMENT

- [7] Chapter 2 of the Employment Equity Act (*the Act*) prohibits unfair discrimination in the workplace.
- [8] Clearly there is a differentiation between Applicant who is currently on salary level 3 and her 6 colleagues whom Respondent has been ordered to appoint at salary level 4 and backpay to 8 September 2008. The issues to be determined are whether the differentiation amounts to discrimination and if so, whether the discrimination is unfair. Applicant party bears the onus to do this.
- [9] Differentiation between groups of employees is not unfair *per se*, it is only unfair if the differentiation amounts to discrimination because it is based on a ground listed in Section 6(1) of *the Act* or on any other arbitrary (but analogous) ground and that the discrimination is proven to be unfair.
- [10] In **Harksen v Lane NO & Others 1998 (1) SA 300 (CC)** the Constitutional Court established a two pronged test for determining whether differentiation between people or categories of people amounts to unfair discrimination, as follows:  
*"(i) Firstly, does the differentiation amount to "discrimination"? If it is on a specified ground, then discrimination will have been established. If it is not on a specified ground, then whether or not there has been discrimination will depend upon whether, objectively, the grounds are based on attributes and characteristics which have the ability to impair the fundamental human dignity of persons as human beings or to affect them adversely in a comparably serious manner.*

(ii) *If the differentiation amounts to "discrimination" does it amount to "unfair discrimination"? If it has been found to be on a specified ground, then unfairness will be presumed. If on an unspecified ground, unfairness will have to be established by the complainant. The test of unfairness focuses primarily on the impact of the discrimination on the complainant and others in his situation".*

[11] Despite the provisions of Section 6 (4) of *the Act*, there is however still an onus on the employee to present a *prima facie* case (sufficient to lay some basis for the claim, but not to the extent of a balance of probabilities) that she is being discriminated against, that is, treated differently based on a listed or an analogous ground. A mere allegation of discrimination by the employee is not enough to establish a *prima facie* case. See **Ntai & Others v SA Breweries Ltd [2001] 2 BLLR 186 (LC)**.

[12] In my view, the Applicant has not established a *prima facie* case and has therefore not proven that Respondent's conduct amounts to discrimination, let alone unfair discrimination. My reasons are as follows:

- 12.1 Applicant's case is based on the following proposition, set out in its Heads of Argument under the heading "Case Analysis", being that: *"The applicant feels she has been discriminated against since the other six were promoted from level 3 to level 4. She feels that the respondent should have considered her for promotion on the basis of her doing similar duties as the other six senior security officers who are employed by the respondent who are remunerated on salary level 4."*
- 12.2 Applicant has failed to set out the grounds upon which she alleges unfair discrimination. It appears that her allegation is based on arbitrary grounds but nowhere in argument is this even stated, let alone how the unspecified ground is based on attributes and characteristics which have the ability to impair Applicant's fundamental dignity as a human being or to affect her in a comparably serious manner.
- 12.3 Applicant relies heavily on a default arbitration award issued in 2016 ordering Respondent to upgrade her 6 colleagues from level 3 to level 4. That matter was an alleged unfair labour practice resorting under Section 186 (2) of the Labour Relations Act, a different cause of action with different considerations. Applicant was not part of that process for a reason not disclosed, but relies on its outcome as the basis for the current claim. It strikes me that Applicant's current claim falls within the ambit of an alleged unfair labour practice.

#### AWARD

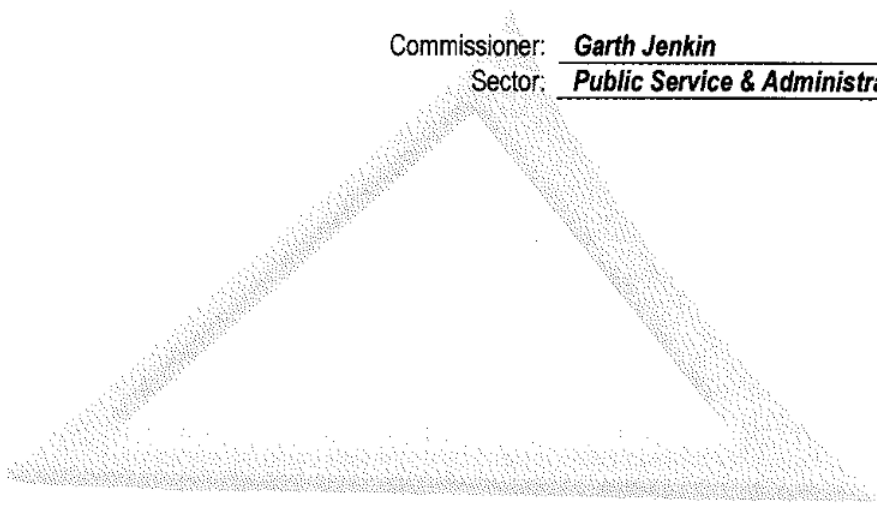
[13] Applicant has failed to discharge the onus of making out a *prima facie* case of unfair discrimination. The application is dismissed.



Signature: \_\_\_\_\_

Commissioner: **Garth Jenkin**

Sector: **Public Service & Administration**



**APPROVED**