



ARBITRATION AWARD

Panelist/s: Kevin Perumal

Case No: GPBC 2346/2019

Date of Award: 1 December 2020

In the ARBITRATION between:

PSA obo M MOTHAE AND 2 OTHERS

(Union / Applicant)

and

DEPARTMENT OF TRANSPORT (KZN)

(Respondent)

Applicant's representative	MR. M Shibe
	Public Servants Association
Applicant's Address:	P O Box 2056
	Pietermaritzburg
	3200
Telephone:	033 392 7600
Email:	mbusi.shibe@psa.co.za

Respondent 's representative	Ms. S Lawrence c/o Deldrick's Attorneys
	Department of Transport- KZN
Respondent 's address:	90 (C) Roberts Road
	Clarendon
	Pietermaritzburg
	3201
Telephone:	033 342 9808
Email:	admin@diedricksattorneys.co.za

DETAILS OF HEARING AND REPRESENTATION

1. The arbitration at all materially times were held at the Department of Transport – KZN in Pietermaritzburg.
2. The arbitration commenced on the 3 March 2020, and was completed by the 29 October 2020.
3. The Applicant was represented by Mr. M Shibe of the Public Servants Association (PSA) and the Respondent was represented by attorney, Ms. S Deidrick's of Deidrick's Attorneys.

ISSUE TO BE DECIDED

4. I am called upon to determine whether the Applicant's review of performance scores by the IRC was unfair?
5. Whether the Respondent followed Policy guideline of Employee Performance Management and Development System (EPMDS)?
6. Whether the Respondent was consistent when applying the EPMDS Policy for the 2018/2019 period?
7. Whether the Applicants are entitled to the relief they sought?

POINT IN LIMINE

8. There was no *point in limine* raised during the course of the arbitration.

BACKGROUND TO THE ISSUE

9. The Applicants signed their respective performance agreements for the 2017/2018 and 2018 and 2019 financial years with their respective Supervisors.
10. They were assessed for both periods by their Supervisors and recorded scores that amounted to above average, thus qualifying them for performance bonuses for the periods under review.

11. In the 2017/ 2018 financial year they received a performance bonus, however in 2018/2019 they were not granted performance bonus.
12. Initially, the Applicants were Ms. Mothae and 4 other applicants, however during the course of the arbitration, the 3rd and 4th Applicants withdrew from the proceedings. i.e. Mr Mdluli and Ms. Ntombeni respectively.
13. Subsequently to the above-mentioned, the citation was changed to PSA obo M Mothae and 2 Others.

SURVEY OF EVIDENCE AND ARGUMENT

14. In the statement of the stated case, the parties agreed to the following facts:
 - 14.1 The applicants are all in the employ of the Department of Transport-KZN, who is the Respondent. The Applicants are situated in the Pietermaritzburg office of the Respondent.
 - 14.2 The applicants work in the Labour Relations Directorate of the Respondent; their performance assessments were supervised by their respective Supervisors for both assessment periods.
 - 14.3 Ms. Mothae, employed as a senior Labour Relations Practitioner was supervised by Ms. S Premchand during both assessments.
 - 14.4 Ms. V Magalyana is employed as a senior Administration Clerk and was supervised by Ms. S Premchand for both assessment periods.
 - 14.5 Ms. CF Ndlovu employed as a Registry Clerk was supervised by Ms. S Premchand for the period 1 April 2017 to 31 March 2018 and for the period 1 April 2018 to 21 March 2019 was supervised by Mr. S Andrews.
 - 14.6 All three performance assessment undertaken and agreed upon by the applicants and their respective Supervisors resulted in the performance assessments being rated above average and thus they were entitled to a performance bonus.
 - 14.7 The performance scores were referred to the Intermediate Review Committee (IRC) for both assessment periods. They provided detailed motivations for the 2017/2018 period and received their performance bonuses. The provided detailed

motivations for the 2018/2019 assessment year as well as proof of incidents but they did not receive performance bonuses.

- 14.8 Two colleagues from the same component as them (Labour Relations) received performance bonuses for the 2018/2019 performance year.

APPLICANTS CASE

Evidence of the 1st Witness: Ms. MN Mothae

15. The witness testified that she is employed by the Respondent as a Senior Labour Relations Officer and worked in the Labour Relations Directorate and worked for 2 Region/Clusters, Empangeni and Durban. She was on salary level 8. She commenced work with the respondent in 2007 and was later promoted in 2008 to Senior Labour Relations Practitioner.
16. She had not previously seen the amended Applicants Performance Management and Development System [EPMDS] contained on pages 98-119 of Bundle "B" prior to this arbitration.
17. Her understanding of a performance was that when you performed additional duties over and above your own duties, that's when you are compensated a performance bonus.
18. Within the Labour Relations Directorate there were many vacancies, and she was servicing two Region/Clusters, Empangeni and Durban being the only Labour Relations Practitioner.
19. The structure provided for 2 Labour Relations Officers for Region/Clusters 1 and 4, however she was the only one employed, therefore she was servicing both Region/Clusters. There were 2 Policy Compliance Officer posts, none were filled and only 1 Admin Officer servicing both Region/Clusters. The Assistant Manager position was also vacant, and the responsibilities of the post were undertaken by herself. She had performed various responsibilities like attending the GPSSBC and PSCBC meetings and Departmental Labour Relations Forums since the departure of Mr. Brown in 2017.
20. The Performance Agreement contained the Work Plan and the Personnel Development Plan and was entered into and signed each year by herself and her Supervisor. Based on the work Plan an employee is assessed on the Key Result Areas(KRA) and Generic Assessment Factors (GAF) twice a year. Previously, assessments were done 4 times a year.

21. On the 20 May 2018, her assessment rating for the 2017/2018 performance year came out at 156 %. She and her Supervisor had agreed on the rating. The IRC also confirmed the rating at 156%. She was paid a performance bonus in October 2018. With regard to the supporting information, all she was requested to do was to provide a motivation to each KRA. She was not required to provide a detailed motivation nor was she requested to provided supporting documentation as proof of achieving the KRA's.
22. On the 31 May 2019, her assessment rating for the 2018/2019 financial year came out at 125%, given that she had scored 4,4,4,3 for the 4 KRAs in her Work Plan, and was agreed between herself and her Supervisor and accordingly both parties signed off.
23. The assessment was referred by HR to the IRC. In and around August / September 2019, she recalled that she was in Vryheid when she her Supervisor indicated to her that she needed to provide additional information as the IRC had requested the same. She returned to PMB and put together a bundle of documents that supported her motivation for the rating of 125%. She emphasised the point that previously she was never requested to provided supporting documents and additional motivation. She had not received this request in writing from the IRC. However, she complied with the request by handing over a lever arch file with all the supporting documents required to her Supervisor. The file never came back to her. She had not received any written response to her final performance assessment by the IRC.
24. Sometime later in the year she heard via the grapevine that people were paid their bonuses, however she did not get a bonus. She heard that Ms. Goss and Mr. Andrews from Labour Relations got paid their bonuses. She raised a complaint with her Manager who was Acting at the time and was advised that the IRC had reduced her scores from 4.4.4.3 to 3.4.3.3 as they believed that the performance of additional duties was not undertaken consistently during the year, it was sporadic. He overall performance assessment for the 2018/2019 financial year amounted to 108%, thus she had not qualified for a performance bonus. The IRC ratings indicated that her performance was fully effective and not highly effective.
25. She subsequently lodged a grievance with the Respondent and was advised by Mr. Henman that it was not a grievance and that he required a detailed motivation to consider. She advised him that she had submitted all the required documents to the IRC in a lever arch file.

26. She testified that during the entire process of concluding the final assessments, she was never informed in writing by the IRC nor the DMC or for that matter the Director labour Relations of what had transpired at the IRC.
27. From the rating of 125% as agreed between herself and her Supervisor, she expected to be paid a 10% performance bonus for the 2018/2019 performance year.
28. Under cross-examination she reiterated that she was performing additional duties throughout the year, subsequent to Mr. Browns departure. The witness also indicated that included in her motivation was her normal duties however, she was performing such normal duties for an additional vacant post for another Region/Cluster. The Respondent had not filled critical vacancies within the Directorate and as a result thereof she was asked to perform additional functions in other Region/Clusters/ Cluster in order to ensure service delivery was not compromised.
29. When explained what the key challenges faced by the IRC was that the additional work performed were not done consistently over the year, as provided for in her motivation. She advised that, that was never an issue in the past. She then submitted that how can an employee who was off sick for over three months receive a performance bonus?
30. She reiterated that normal duties would be performed in her cluster as per her job description and over and above duties would be performed in another cluster or Region/Cluster. In her detailed motivation and the supporting documents, she had submitted, it contained notice of meetings, minutes and agendas of meetings and reports on activities undertaken by herself. She stated that she was never asked to redo her motivation and provide additional motivation but was asked to submit supporting documents to back up the motivation that she submitted.
31. At no stage was she advised that the procedure and protocols had changed from previous years, nor was she advised that she required completing additional motivation to support her claims of highly effective performance in 3 of the 4 KRAs. She further advised the arbitration that, after they had lodged a dispute with the respondent and referred the matter to arbitration. She only became aware of the new Policy (EPMDS) for Salary Levels 1-12 at the present arbitration. They were never trained nor did they attend any workshop on the new Policy.
32. Under re-examination the witness reinforced that view that she was performing additional duties of another cluster as well as duties left by Mr Brown the Assistant Manager. She had not performed investigations as she was not requested to do so, however, when Mr

Henman came he had requested her to conduct investigations. She was also called upon to act in her Supervisors post, and the Assistant managers post for periods of time.

Evidence of the 2nd Witness: Ms. VK Magatyana

33. The witness testified that she commenced work in 2003 with the Respondent and is currently working as the senior Admin Clerk for Durban and Empangeni Region/Clusters. Her duties entail working as a support system to the Region/Clusters, receiving calls, give advice, managing grievance and disciplinary cases, collection of information, receiving mandates and opinions and among other duties providing statistics to the Office of the Premier.
34. The Organisational structure has 2 approved posts of Compliance Officers, but none are filled, 2 posts of Senior Labour Relations Officers and only 1 is filled and 1 Interpreter, which is not filled. They are called upon to fulfill the duties of these vacant posts. In her position she undertakes the duties of the Compliance Officers in both Durban and Empangeni Region/Clusters. She also has to be on standby for the whole 5 Region/Clusters. At times she would fill in for her Supervisor and attend dispute meetings at conciliation and arbitration, and in the absence of the secretary to the Director assist there as well.
35. On the 31 May 2019, her assessment rating for the 2018/2019 financial year came out at 127% as agreed between herself and her Supervisor. The IRC had reduced her rating to 117% on the basis that her KRA scores were reduced from 4,4,3,4 to 4,3,3,4. She was therefore not entitled to a performance bonus as her performance was full effective and not highly effective.
36. She was informed by her Supervisor that the IRC requested supporting documentation to verify the motivation that she had submitted. She complied with the request by making copies of all the information and presented it to Ms. Premchand her Supervisor who in turn gave it to Mr. Henman. At no stage was she advised that the procedure and protocols had changed from previous years, nor was she advised that she required completing additional motivation to support her claims of highly effective performance in 3 of the 4 KRAs. She further advised the arbitration that, after they had lodged a dispute with the respondent and referred the matter to arbitration, they became aware of the new Policy on Employee Performance Management and Development System (EPMDS) For Salary Levels 1-12. They were never trained nor did they attend any workshop on the new Policy.

37. She did not receive any feedback from the IRC in writing and when she queried with her colleagues, she was advised that Ms. Goss and Mr. S Andrews received a bonus in their section. She alleged that Ms. Goss and Mr. Andrews was only performing duties for 1 Region/Cluster as opposed to herself performing for 2 Region/Clusters.
38. She disagreed with the IRC findings that compilation of statistics was her responsibility, in fact she stated that it was Mr. S Andrews responsibility to provide statistics to the Office of the Premier, however when he had taken ill for a period of about 3 months she undertook such responsibilities.
39. The witness stated that the Respondent had failed to comply with the new Policy on EPMDS for Salary levels 1-12 in that no proper feedback in writing was given to her, nor was their matter taken to the Departmental Moderating Committee (DMC) for further consideration.
40. Under cross-examination, the witness stated that she was employed for the Durban Region/Cluster and not for the Empangeni Region/Cluster, but that she was performing the job functions and carrying out responsibilities for both Region/Clusters.
41. On KRA 2 she understood the word consistently to mean providing stakeholders with information on an ongoing basis. She had submitted adequate proof of her performance over and above what she is employed to do. She was adamant that her Supervisor only requested for proof of performance and not additional motivation.
42. She was of the view that the IRC should have called her in to explain how she had rated herself. Her Supervisor was aware of her performance and ratings as they had agreed upon it.
43. She was not entitled to a notch increase as she had attained the top of the salary scale. She awaited, in anticipation for her bonus to be paid but was not informed formally about not receiving a bonus. She had not submitted any additional motivation as per their grievance as she believed that the motivation and supporting documents was sufficient to justify her being paid a performance bonus.
44. Under re-examination she reaffirmed that she was employed to work for Durban Region/Cluster, but was requested by management to work in the Empangeni Region/Cluster, Head office, Ladysmith and PMB Region/Clusters as well.
45. The witness stated that her Supervisor had not asked her to improve on her motivation. She only requested that she submit supporting documentation in support of her motivation.

46. She requested the arbitrator to confirm that the Respondent had committed an unfair labour practice and that she be paid an 18% performance bonus as her rating had come out at 127% for the 2018/2019 financial year.

Evidence of the 3rd Witness: Fikile Ndlovu

47. The witness testified that she commenced work in April 2011 as a Registry Clerk in the Labour Relations Section of the Respondent on a salary level 5.
48. She was working for the Head Office Region/Cluster during the performance assessment period in question. However, in November 2015 she was asked to work for the Durban and Empangeni Region/Clusters. She was supervised by Ms Manqinana. Later on she was supervised by Ms. Premchand.
49. During the assessment period 2017/2018, she received an overall assessment score of 120 % and was paid a performance bonus.
50. During the assessment period under dispute, her Supervisor had confirmed and signed off an overall assessment score of 127% given that they both agreed that the scores for each KRA was 4,4,4,3.
51. When the assessment was considered by the IRC it had changed to 110 % and they had scored each KRA as follows, 3,4,3,3. Therefore she had not qualified for a performance bonus for the 2018/2019 financial year.
52. The witness testified that she was never made aware of the new EPMDS Policy. Her Supervisor was also not aware of the new Policy as they both signed the old performance assessment form not attached and later filled in a new one which is attached to page 63 to 65 bundle "B". She was never aware of the Policy on page 97 as well page 98 to 119. She only became aware when she was preparing for this arbitration.
53. She testified that Durban and Empangeni cluster was short staffed during the financial year 2018/19, she was then asked to assist in this cluster under the supervision of Ms Premchand. She assisted with the duties of Administrative clerk for Empangeni and Durban Cluster.
54. The witness confirmed in her testimony that Mr. Stanton Andrews another official in the Labour Relations Directorate of the Respondent was not present at work for more than 3 months but was awarded a performance bonus. During this time, she had performed the

duties of the Senior Admin Clerk, that of Mr. S Andrews. In February 2019, she was formally advised to go back to Head Office and work.

55. Her performance scores were reduced but was never informed in writing. she only became aware that the scores were reduced after she requested disclosure of information from the respondent.
56. She stated that the relief sought is an award of 18% of her salary notch as a performance bonus. She had received her notch increase for 2018/2019 performance year.
57. Under cross-examination, the witness confirmed that she was doing the work of Registry clerk at Head Office but in 2015 she was asked to work for the Durban and Empangeni Region/Clusters as well. She was therefore performing over and above her normal duties. She also performed the responsibilities of the Senior Admin Clerk. She had previously received a performance bonus whilst performing the same functions for different Region/Clusters and could not understand how come she was not entitled to a performance bonus for the 2018/2019 financial year.
58. Between November 2015 to February 2019, she had performed both jobs excellently.
59. She reaffirmed that her Supervisor had only asked her to submit supporting documentation to justify her motivation. She was not asked to substantiate her motivation.
60. Under re-examination she stated that she was employed at salary level 5 but had performed at salary level 6 and was not paid any acting allowance as per the Acting Policy. She was advised verbally to submit the supporting documentation.
61. The relief sought by the witness was that the arbitrator should confirm that the Respondent had committed an unfair labour practice. She therefore requested that she be paid her performance bonus of 18% of salary.

THE RESPONDENTS CASE

Evidence of the 1st Witness: Ms. Pelzer

61. The witness testified that she is the Assistant Director HR Admin employed at the Human Resources Section of the Respondent. She has worked for the Respondent since 1992.
62. She testified that there were changes made to the EPMDS Policy of the Respondent. On the 18 April 2018, the Head of Transport issued a circular to all concerned and requested

management to ensure that the circular and reviewed Policy attached thereto is distributed to all concerned (See pages 108-119 Bundle "B". The Policy that was operational since 2003 was superseded by the new one which came into effect on 01 April 2018. The newly approved Policy contained minor, rather cosmetic changes as compared to the old one and she testified that the circular together with the amended Policy was communicated to all the Applicants.

63. The witness referred to page 108 of Bundle "B" and explained how the calculation of performance bonuses were to be determined. She explained that according to the new Policy, an employee who scored a performance rating of between (120% - 126%) was rated as Highly Effective and those that scored between (127%- 133%) was regarded as exceptional performance. This is where an employee will provide a detailed motivation of incidents during the mid-year review and during the final annual assessments once they are being undertaken by their respective supervisors. The IRC will then consider the performance of the individual employee and determine the final results of the performance rating in order to determine whether or not the employee would receive a performance bonus or for that matter whether the employee will be counselled or sent for further training due to non-performance.
64. The witness went on to explain that the reviewed Policy capped the payment of departmental bonuses to 1.5% of Budget, and should this be exceeded, the Departmental Moderation Committee must inform the HOD of the situation and call on the HOD to reduce the overall payment of performance bonuses to 1.5% of budget.
65. The IRC was made up of senior management who were on Salary Levels 13 and above. She was present throughout the 6 IRC meetings for the Labour Relations Directorate where she was a scribe. Ms Premchand and Ms Manqinana were not part of some of the meetings of the IRC. Her role was not one of decision-making. There were about 54 Applicants that were assessed. In this directorate 5 employees received performance bonuses, 2 of the 5 were from Labour Relations. The 2 employees from Labour Relations was also given a chance to beef up their motivations, which they did and were then subsequently assessed by the IRC and were then paid recommended to receive their performance bonuses.
66. She recalled that when it came to the Applicants assessments, the main concern raised by the IRC was that the motivations submitted by the Applicants was not sufficient enough to justify the scores agreed to between the Applicants and their Supervisors. The IRC was of the opinion that the 3 Applicants motivations contained information that was related to their normal duties and not over and above duties. The IRC then requested the Supervisors to address this matter. The IRC had requested the Applicants to beef up their motivations.

67. During cross examination, she highlighted that Premchand attended the IRC meetings twice. Applicants were given the opportunity to beef up their motivations once. She was not aware of an employee who was not at work for more than 3 months and who received a performance bonus. She could not comment on how the IRC came to the conclusion to award him a bonus given that his performance was not continuous performance throughout the performance cycle.
68. She testified that the scores of Applicants were reduced according to the resolutions of the IRC. She is not aware whether the Applicants were made aware that their scores were reduced. She further stated that she did not write any letters to the Applicants about their reduced scores. It is not clear on the Policy about who is responsible for writing to the Applicants regarding the work of the IRC. The issue of writing to the Applicants after the IRC had reduced the scores of the Applicants was never discussed during the IRC meetings. The witness had assumed that DMC had written to the Applicants about the outcome of their performance assessments.
69. With regards to the issue of training or information sessions on the newly approved Policy on EMPDS, she had attended an information session, however she was not aware of whether the Applicants had attended such training.
70. She did not issue written letters from the IRC to the Applicants regarding either the request by the IRC for them to beef up their motivations or for that matter the final outcome assessments and the scores given to the Applicants. She was adamant that she was never advised by the IRC to perform such functions. HR should have advised the Applicants of their final outcomes. She agreed that the IRC had failed to comply with the provisions of Clause 8.6 (f) of the Policy as the DMC was not advised of the IRC's work.
71. She re-affirmed that it would not be fair to pay an employee a performance bonus who was absent from work for a period of three months.
72. Under re-examination she advised the arbitration that the DMC looked at the entire department and not individual assessments.
73. Under a question raised by the arbitrator regarding the level of vacancies within the Labour Relations Directorate, the witness confirmed that there were a number of vacant posts. She further stated that the Policy was emailed to all staff.

Evidence of the 2nd Witness: Mr. Shaun Henman

74. Mr Shaun Henman is the Director for Labour Relations at the Respondents employ. In May 2019 he was seconded to the Respondent from the Department of Agriculture. His secondment comes to an end in December 2020. He served on the IRC meetings that reviewed the performance assessments of the Applicants for the 2018/19 financial year.
75. He testified that he joined the Respondent after 2018/19 financial year had commenced and did not know how the Applicants performed during the financial year in question because he was not there.
76. The witness submitted that performance management was introduced so that the strategic objectives of the department is met, individuals were performing and that exceptional performance was rewarded and under-performing Applicants were counselled and sent for training to improve their performance. Depending on the final performance outcomes employees would receive a notch increase and a performance bonus for performance significantly above expectations and outstanding performance. Those that achieve fully effective status would only receive a notch increase, provided that they are not on the ceiling of the salary range.
77. He had joined the Directorate during the final assessment period and served on the IRC which was now chaired by the Chief Director. He had no knowledge as to how performance assessments were done in the past.
78. At the second meeting of the IRC, Supervisors (Ms Premchand and Ms Manqinana) were instructed to inform their supervisees that they needed to improve on their motivations in order to qualify for a performance bonus. He was not there when the message was conveyed to Applicants, therefore he did not know how the message was conveyed. The feedback that he received from the Supervisors was that the Applicants were not happy but they had submitted proof of incidents contained in lever arch files. He is also aware that some Applicants were on leave but came to the workplace to compile their documental proof of incidents for consideration of the IRC.
79. When asked about the method of assessing documents of the lever arch files, he testified that the IRC did not go through the documents on the lever arch files.
80. The witness then went on to explain the challenges faced by the IRC in respect of each Applicant. With regard to Ms. Mothae, under KRA 1 she had performed only on 2 days over and above what was expected, she had failed to paint a picture that was concise and clear that showed exceptional performance that was performed throughout the year. The 2nd

Applicants assessment showed that under KRA 2 the Applicant had failed to adequately improve on her motivation as the motivation provided appear to be part of her normal duties. With regard to the 3rd Applicant under KRA 3 the Applicant failed to adequately improve on her motivation in terms of what incidents were over and above. He stated that the same approach was adopted by the IRC when they had assessed all the Applicants of the Labour Relations Directorate.

81. The witness stated that he had a meeting with the Supervisors and the Applicants and advised them that they needed to improve on their motivations but he only received the lever arc files containing supporting documents. Subsequent to that the Applicants lodged a grievance with the Respondent. He addressed a letter to the Applicants contained in Annexure "C" stating that this grievance could not be assessed as it was a collective grievance and that only individual grievances will be looked at. The Applicants then declared a dispute with the Respondent.
82. He argued that it would be in his interest that staff get bonuses as this would prove that the Directorate was performing.
83. Under cross-examination, the witness testified that he did not know whether the circular and Reviewed Policy on EPMDS was shared with the Applicants. He was not within the Respondent's employment at the beginning of the 2018/19 financial year. He only joined on 1 May 2019. He was in agreement with clause 8.2 on page 111 of Bundle "B" which reads "performance of all Applicants is evaluated fairly and consistently across the board".
84. The witness went further to agree with the contents at 8.5(b) on page 111 of Bundle "B" but when asked who was responsible for informing the Applicants about the reduction of scores, he said that this issue of notifying Applicants about reduction of scores was never discussed or reduced to writing during the IRC meetings.
85. The witness testified that he agreed with the Chairperson of the IRC when she was saying that the EPMDS Policy must be adhered to at all times. When he was asked whether the EPMDS Policy was adhered by the IRC if they were not informed in writing about their reduction of scores, he said that the IRC failed to adhere with the EPMDS Policy if the Applicants were not informed in writing about their reduction of performance scores.
86. When the witness was asked whether his supervisees received performance bonuses, he confirmed that Mr. Stanton Andrews and Ms. Belinda Goss were supervised by him. When asked how did it come about that a performance bonus is paid to an employee who was absent for from work for a considerably long time, thereby not being able to perform

consistently throughout the performance cycle, he stated that he was not aware that Mr. Andrews was away from work for more than 3 months.

87. The witness further stated that within the Labour Relations Directorate, the Applicants Ms. Mothae and Ms. Magatyana were not entitled to represent the Respondent at arbitration proceedings, but may provide support and assistance to the process. He confirmed that in 2019/2020, Ms. Mothae, conducted disciplinary hearings and he had subsequently amended her job description to include such responsibilities. He did not consider motivating for that as an over and above at the IRC.
88. He confirmed that both Supervisors were present when the IRC was dealing with their staff/ Applicants. He stated that he was aware of what the IRC had recommended that the Supervisors call on the Applicants to beef up their motivations, however, he was not present when the Supervisors had communicated with the staff the decision of the IRC.
89. He believed that the Applicant should have come to him for advise on how to deal with the request of the IRC, but they chose not to. However, he did not make a follow up on the matter.
90. The witness was adamant that it was not his responsibility to send out the letters concerning the final outcomes of the Applicants assessments.
91. When put to him that it was rather strange that at some point he had supervised Ms. Goss and Mr. Andrews and they both received performance bonuses, he said that he was the Director responsible for all staff not only Ms. Goss and Mr. Andrews. He further pointed out the Ms. Goss had approached him for assistance, which he rendered to her. The Applicants did not.
92. He agreed that there were a lot of vacant posts within the Directorate and that the Applicants were performing in more than 1 Region/Cluster/ Cluster.
93. Under re-examination, the witness stated that the role of the IRC was to be objective in their assessments of all staff. The Supervisors were informed as to what was expected of the Applicant, not the submission of lever arch files but to improve on their motivations. Those Applicants who improved on their motivations received performance bonuses.

On-site Inspection of Documents

94. On the 19 October 2020, an on-site inspection of various documents was conducted by the arbitrator as well as parties to the proceedings.

95. The performance contracts for the applicants for the 2018/2019 financial years, together with the undated letters to 2 Applicants indicating the final conclusion of the performance assessments for the 2018/2019 performance cycle were included into the bundle of documents marked as Annexures (Mothae- "F "). (Magatyana- "G") and (Ndlovu- "H") respectively. The email dated 25 April 2019, confirming that HR had sent out the Circular of the HOD dated 18 April 2018, (See pages 108-119 Bundle "B") to all concerned including the Applicants (Annexure "E"). The sick leave records for the Mr. Stanton Andrews which confirmed that Mr. Andrews was absent from work for 54 days during the performance cycle (Annexure "D").
96. On the 29 October 2020, Ms Thelma Nomasa Manqinana was interviewed by the arbitrator and the following information was revealed by the witness.
97. She is an Acting Deputy Director in Labour Relations section, she was managing the section but not directly supervising the Applicants during the financial year in question. She was part of IRC during June to July 2019. At the beginning of the IRC meeting, she was made aware of the new EPMDS Policy but was not aware of changes in the EPMDS Policy. She is also not aware of any training conducted at Labour Relations section on this new Policy. She confirmed challenges of staff shortages especially in Durban and Empangeni Region/Clusters/cluster.
98. Even though the Applicants were under Ms Premchund, Ms Mothae performed duties of Mr Brown who left the department a few years ago. This resulted in Ms Mothae reporting some of the KRA's directly to her such as Collective Bargaining, attending to PSCBC, GPSSBC Forums and task team meetings which was performed over and above her normal duties.
99. She was unsure as to how the information recommended by the IRC had been communicated to the Applicants. She further affirmed that the staff shortages were as a result of funding shortages which had an impact on service delivery. Although the Applicants were expected to act in some of these positions as well as carry out the functions of the vacant posts in other Regions/Clusters they were not paid any acting allowances.
100. Ms. Sharathie Premchund testified that that she is Deputy Director for Durban and Empangeni cluster/ Region/Cluster. Her post and those of the Applicants are based at PMB Head office. She confirmed that she had direct supervision over Ms. Magatyana and Ms. Mothae (2 Applicants) while Ms. CF Ndlovu was supervised by Mr. Stanton Andrews as they both worked for the Head Office Region/Cluster.

101. She confirmed EPMDS processes for 2018/19 was done according to the new EPMDS Policy. In terms of the old Policy under the previous Director Ms Nzuzi, Applicants were scoring themselves, include motivations to the Supervisor who would score and submit to the IRC which was headed by Ms Nzuzi. On previous cycles, some functions were reported directly by Ms Mothae to Ms Nzuzi.
102. In terms of the new Policy rolled out in April 2018, the Applicants filled scores in front of her as a Supervisor. They had agreed on the scores and signed off the assessments for 2018/2019 performance year. Both Applicants had qualified for a performance bonus.
103. The witness stated that she was instructed by IRC to ask her 2 supervisees Ms. Magatyana and Ms. Mothae to beef up their motivations with proof of incidents for submission to the IRC. This was done verbally. The IRC did not go through the lever arch files. She wasn't present at all the IRC meetings, but she had not received any written communication to inform her about the reduced scores of the Applicants. She was further not sure if the Applicants received written confirmation from the IRC on their reduced scores.
104. She further confirmed that there were vacancies within the Directorate of Labour Relations but could not voice an opinion on the matter.

SURVEY OF EVIDENCE AND ARGUMENT

105. The parties had agreed that closing arguments would be submitted to the GPSSBC on or before the 12 November 2020 and that the award will be issued on or before the 30 November 2020.
106. On the 12 November 2020, the Union Representative acting for and on behalf of the Applicants had submitted their closing arguments. The Respondent had failed to submit their closing arguments by the deadline agreed upon by all parties concerned.
107. On the 17 November 2020, the writer hereof enquired from the GPSSBC as to whether the GPSSBC had received any closing arguments on file and was advised that only the Applicants closing arguments were on file.
108. I am called upon to determine the following issues and have set out the survey of the evidence and argument in respect of each matter that I am to consider.
 - I am called upon to determine whether the Applicant's review of performance scores by the IRC was unfair?

- Whether the Respondent followed Policy guideline of Employee Performance Management and Development System (EPMDS)?
- Whether the Respondent was consistent when applying the PMDS Policy for the 2018/2019 periods?
- Whether the Applicants are entitled to the relief they sought?

Whether the Applicant's review of performance scores by the IRC was unfair?

109. The first issue to be determined is whether the review of the performance scores by the IRC was unfair?

109 In the public service, there are mechanisms in place that are intended to reward deserving public service employees for good performance, by way of a performance bonus, paid annually. The mechanism at stake in this instance, as touched on above, is the Respondent's Employee Performance Management and Development System ('EPMDS'). The EPMDS was executed under the Public Service Regulations.

110 The Respondent implemented a EPMDS Policy as far back as 2003. There were various amendments to the EPMDS Policy over the years, with the latest applicable amendment being effected on 1 April 2018.

111 A consideration of the EPMDS Policy shows that it is not just aimed at individual performance of individual Applicants. It also has a group objective, with the first listed purpose of the Policy being to enhance organizational/departmental performance against the strategic plan.

112 The next listed purpose is to enhance individual performance against agreed upon objectives. It is recognized that good performance must be rewarded. The Policy applies to all Applicants that are not senior management.

113 In short, the EPMDS Policy prescribes that an annual performance bonus be paid to deserving Applicants in the department, based on the Applicants excelling where it comes to work performance. These bonuses are paid as a percentage of annual salary. It is however specifically prescribed that these performance bonuses paid to Applicants cannot be in excess of a total of 1.5% of the salary bill for the Department.

114 In order to determine if Applicants qualify for such performance bonuses, there is an evaluation process in terms of the EPMDS Policy. It starts with an assessment of the employee's performance by his or her supervisor, which is followed by an annual

performance review, pursuant to which the Applicants is then given an 'assessment outcome' (the Applicants are entitled to challenge such an outcome, if dissatisfied with it).

- 115 The Applicants are given a score in this annual performance assessment, which places the Applicants into one of five categories of performance, starting with 'not effective performance' and ending with "highly effective performance'. The particular category firstly determines if the employee qualifies for a bonus. Performance bonuses only accrue to employees in the categories of 'performance significantly above expectations' and 'outstanding performance'. For Salary Levels 1 – 12, and in the category of 'performance significantly above expectations (Highly effective)', bonuses range from 5% to 17% of annual salary, and in the category of 'outstanding performance (Exceptional Performance)', the bonus is 18%.
- 116 This annual performance assessment is however subject to moderation by 2 committees Intermediate Review Committee (IRC) and the Departmental Moderation Committee (DMC). The EPMDS Policy of the Respondent specifically records that the primary role of the Intermediate Review Committee (IRC) established at Programme or Chief Directorate Level, was to review the performance assessments rating agreed upon by the Supervisor and the Employee whilst the Departmental Moderation Committee whose role was to ensure that annual performance assessments must be conducted in a realistic, consistent and fair manner. The Moderation Committee is to 'ensure equity and consistency in the application of the EPMDS'. If the moderating committee identifies deviations or discrepancies in the performance assessments, it must remedy the situation through a moderation process to be submitted to the head of department for approval.
- 117 All three applicants signed their performance contracts for the period 2018/2019. On the 31 May 2019, the Applicants concluded their final assessments with their Supervisors and scores were agreed upon and signed off by the Supervisor and the Applicants.
- 118 As per the EPMDS Policy the scores of the Applicants were submitted to the Intermediate Review Committee (IRC) for consideration. The IRC met on no less than 6 times during the assessment period and reviewed the assessments of all 53 staff within the department.
- 119 The Applicants performance ratings agreed between the Supervisor and the Applicants were not approved by the IRC. The IRC indicated that there was insufficient detail to the motivations submitted by the Applicants and in the presence of the Supervisors resolved that the Supervisors must request the Applicants to beef up their motivations. The IRC further noted that the Applicants had not performed the key result areas consistently throughout the year. The witnesses that testified in the arbitration including that of the

Respondent stated that they were unsure as to whether this communication was to be done in writing by the IRC to the Applicants.

- 120 The Supervisors argued that they had requested the Applicants to beef up their motivations which was further elaborated upon by Mr. Henman when he had replied to the grievance of the Applicants.
- 121 The Applicants argued that they were never requested to beef up their motivations but was requested to supply proof of performance which was done through the submission of documents verifying performance contained in lever arch files. In the absence of any knowledge of the new EPMDS Policy, the applicants submitted proof of performance as done in previous years.
- 122 In conclusion, the IRC had not considered the documentation contained in the lever arch files and had reduced the scores of the Applicants from highly effective to fully effective thus, the Applicants had not qualified for a performance bonus.
- 123 Clause 8.5 (b) of Bundle "B" state the following: "Any recommendation on changing the ratings must be referred back to the employee's supervisor in writing with reasons for the decision for the supervisor and the employee to try and reach consensus on the change". The evidence of the Ms. Polzer and Mr. Henman together with the evidence of the Supervisors of Manqinana and Premchund confirmed that the employees were never advised in writing of the decision of the IRC who had changed the scores.
- 124 Furthermore, in the absence of the Applicants having been trained on the new EPMDS Policy of the Department, and in the absence of the IRC clearly communicating its decision to the Applicants in writing as required by the policy, it is clear that the Applicants had not interpreted the request correctly. The Applicants had attempted to meet with the request of the IRC in the manner that they deemed fit. In my view, the failure by the IRC to consider the submission of documents contained in the lever arch files constitutes and act or omission that renders the decision of the IRC as being unfair.
- 125 In addition to the above the IRC when assessing the key results areas of each Applicant stated that performance was not consistently undertaken throughout the year, however they had failed to consider the fact that the Applicants were called upon to perform functions of similar positions that they held in other Region/Clusters or Clusters. This was confirmed by the witnesses of the Respondent that vacancies existed in other Region/Clusters however the Applicants were performing such functions as per the request of the Respondent. In my view, this fact constitutes performance over and above what they were employed to do. The Respondent cannot benefit at the expense of the Applicants commitment to the

Respondent by making themselves available to perform such functions in other Region/Clusters, without even being paid any allowances in this regard. The Applicant were not even appointed to act in these positions nor were they paid any acting allowances when they were called upon to act and perform such functions.

- 126 Accordingly, I find based on the arguments advanced above, the review of the Applicants performance ratings to be unfair.

Whether the Respondent followed Policy guideline of Applicants Employee Performance Management and Development System (EPMDS)

- 127 In the letter dated 18 April 2018 contained in Bundle "B", the HOD the following instructions to management.

- a. *"The HR Policy Formulation Component will conduct information sharing sessions per directorate/ Region/Cluster upon request regarding the amended provisions"*. These sessions are specifically meant for supervisor levels and upwards. From the facts obtained before me, these information sharing sessions was only attended to by Ms. Pelzer the Assistant Director HR Admin. One of the Supervisors, Ms. Manqinana stated that at one of the IRC meetings held in 2019 she was made aware of the new EPMDS Policy but was not aware of changes in the EPMDS Policy. She was also not aware of any training conducted by HR for the Labour Relations section on this new Policy. The second supervisor, Ms Premchund, could neither confirm nor deny whether she had attended any information sharing on the new EPMDS Policy.
- b. *"These representatives are expected to further cascade the information on the implementation of the employee performance management and development system, thus ensuring that employees under their control know how to correctly implement the policy and are able to fully participate in the processes"*. The evidence obtained from the Applicants is that they were never trained nor were they advised about the new Policy and its provisions. This evidence was never disputed by the Respondent during the proceedings. Furthermore, according to the Applicants, they only became aware of the new policy during this arbitration. The Applicants further advanced the argument that they had submitted their 2018/2019 performance documents based on the old policy and not the new one, this was never disputed by the Respondent.

- c. *Kindly ensure that the content of this circular minute and its attachments are brought to the attention of all concerned.* According to Ms. Pelzer, the circular and its attachments (Reviewed Departmental Policy on Employee Performance Management and Development System (EPMDS) for Salary levels 1-12 was emailed to all staff on the 25 April 2018 (See bundle "E "). It must be noted that the Applicants argued that they had not been informed about the circular, however the evidence confirms that the circular was issued to all staff. However, this does not exonerate the Respondent from providing the necessary information and possible training of the Applicants on the newly adopted EPMDS Policy.
112. Clause 8.5 (b) of Bundle "B" state the following: *"Any recommendation on changing the ratings must be referred back to the employee's supervisor in writing with reasons for the decision for the supervisor and the employee to try and reach consensus on the change"*. The evidence of the Ms. Pelzer and Mr. Henman together with the evidence of the Supervisors of Manqinana and Premchund confirmed that the employees were never advised in writing of the decision of the IRC who had changed the scores.
112. Clause 7.2 (d) *"Dispute Resolution under sub clause (v) which provides for the process of mediation of any dispute regarding performance reviews or performance assessments which must be resolved internally within the Branch/ Component/Unit"*. It is common cause that the Respondent had failed to comply with this provision of the Policy and had failed to appoint a mediator in this regard prior to the formal grievance having been submitted by the Applicants. It is further common cause that the Applicants were dissatisfied with the change in scores by the IRC.
113. Clause 8.6 (f) of the Policy provides for the *"Departmental Moderation Committee (DMC) shall confirm the final rating score for the employee"*. The Respondent did not present any evidence in this regard. It is clear from the evidence before me that the respondent had failed to comply with this provision, it was the IRC that had reduced the scores. The change in scores of the Applicants were never confirmed nor approved by the DMC.
114. Furthermore, on a closer examination of the Performance Agreements entered into by and between the Respondent and the Applicants, it is clear from the evidence before me that the dispute resolution mechanisms provided for in Clause 13, had not been complied with by the Respondent

115. Accordingly, I find that the Respondent had not complied with critical and important provisions outlined in the circular of the HOD read together with the reviewed Policy on EPMDS for Salary Levels 1-12, read together with the provisions contained in the Performance Agreements entered into by and between the Applicants and the Respondent.

Whether the Respondent was consistent when applying the PMDS Policy for 2018/2019 periods?

116. Ms. B Goss was paid a performance bonus after she had requested Mr. Henman to assist her. In my view a manager has a duty and a responsibility to ensure that all staff are treated fairly and equally. The argument advanced by Mr. Henman that he was not requested by the Applicants to assist them does not make sense. In the IRC meeting which he was a part of, it was reported that employees in the Labour Relations Directorate were having challenges with the new protocols regarding performance assessments since the implementation of the new policy. Mr. Henman assisted Ms. Goss, in my view Mr. Henman would not have lost anything had he assisted the Applicants in this regard irrespective of whether or not they had requested for assistance from him. Accordingly, I find Mr. Henman's actions to be unfair and one sided.
117. The evidence confirms that Mr. Stanton Andrews was absent from the workplace in excess of 54 days during the performance cycle, this excluded annual leave days taken by Mr. Andrews. This period amounts to almost three months as alleged by the Applicants. The IRC argued that one of the reasons advanced by them in reducing the Applicants scores is that the Applicants did not perform the over and above functions consistently throughout the year. However, in the case of Mr. Stanton, how is it that the IRC had not considered the fact the he was absent from the workplace in excess of 54 days. Based on the number of days being absent from the workplace excluding days taken as annual leave, how it is that Mr. S Andrews had performed consistently throughout the year. Accordingly, in my view the inconsistent application of the principle of consistency to the applicants is unfair.
118. A further point to note is that Ms. B Goss and Mr. S Andrews only performed functions for 1 Region/Cluster i.e. Head Office.
119. Accordingly, I find that the Respondent had acted in an inconsistent manner towards the Applicants.

Whether the Applicants are entitled to the relief they sought?

120. In my view and based on the evidence provided at this arbitration together with the failure of the Respondent to address me with their closing arguments, the Respondent committed an unfair labour practice when it had failed to pay the Applicants their performance bonuses for the 2018/2019 performance year.
121. As far as the issue was concerned, the process prescribed to work was that employees were assessed by their individual supervisors. These assessments by the supervisors would then be presented to the IRC for assessment and thereafter the Departmental Moderating Committee would pronounce on the final assessments. The Departmental Moderation Committee would then make the final determination when it came to performance bonuses, and that was that. This process was not complied with specifically in respect to the final decision being made by the Departmental Moderation Committee.
122. Furthermore the dispute provisions contained in the Reviewed Departmental Policy on EPMDS read together with the provisions of the Performance Agreements were never complied with.
123. Accordingly, in my view the Applicants are entitled to their performance bonuses for the 2018/2019 performance year.

CONCLUSION

124. The review of the Applicants performance ratings was conducted in an unfair manner.
125. The Respondent had not complied with critical and important provisions outlined in the circular of the HOD read together with the reviewed Policy on EPMDS for Salary Levels 1-12, read together with the provisions contained in the Performance Agreements entered to by and between the Applicants and the Respondent.
126. The Respondent had acted in an inconsistent manner towards the Applicants.
127. The Applicants are entitled to their performance bonuses for the 2018/2019 performance year.
128. The Respondent is therefore ordered to pay the performance bonuses to the Applicants.

AWARD

129. The Respondent committed an unfair labour practice relating **Section 186 (2)(a)** of LRA relating to benefits when it failed to pay the Applicants their performance bonuses for the 2018/2019 performance year.

130. The Respondent is ordered to pay the Applicants as follows:

- Ms. Mothae must be paid a 10% performance bonus for the 2018/2019 financial year;
- Ms. Magatyana must be paid an 18 % performance bonus for the 2018/2019 performance year; and
- Ms. CF Ndlovu must be paid an 18% performance bonus for the 2018/2019 performance year.

131. The Respondent is ordered to pay the Applicants their respective performance bonuses within 14 days of receipt of this award.



KEVIN PERUMAL

ARBITRATOR