

# ARBITRATION AWARD

Panellist: Mr VF Mthethwa \_\_\_\_\_  
Case No.: GPBC 2201/2018 \_\_\_\_\_  
Date of Award: 10/10/2019 \_\_\_\_\_

**In the ARBITRATION between:**

**PSA obo ANT Ndlovu and 2 Others**

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(Union / Applicant)

**and**

**Department of Agriculture and Rural Development**

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(Respondent)

**Union/Applicant's representative:** Mr M Mbanjwa (PSA) \_\_\_\_\_  
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## **DETAILS OF HEARING AND REPRESENTATION**

1. This is the award in the matter between Abigail Neli Thandiwe Ndlovu, Phumezile Garane and SC Nzimande, the Applicants, and the Department of Agriculture and Rural Development, the Respondent. The hearing was conducted under the auspices of the GPSSBC at Umzimkhulu on 27/02/2019 and at Ixopo on 05/04/2019, 02/08/2019 and 04/09/2019. The Applicants were represented by a representative from PSA, Mr M Mbanjwa. The Respondent was represented by its official, Mr JJ Nxumalo. The Applicants submitted a bundle of documentary evidence which were admitted into evidence and used by both parties. The Respondent opted not to submit documentary evidence at this stage. The proceedings were digitally recorded.
2. Upon commencement of the proceedings the Respondent raised a point *in limine* that the dispute referred by the Applicants is not an unfair labour practice; but a dispute about interpretation and application of Circular 24 of 2009. The Respondent further submitted that the Applicants had to withdraw the present unfair labour practice dispute and then refer it as a dispute regarding interpretation and application of the said circular. The Applicants opposed the Respondent's point *in limine* and submitted that disputes about interpretation and application relate to collective agreements and not to circulars. The Applicants insisted that the present dispute relates to the Respondent's unfair conduct relating to up-grading, and it therefore relates to promotion as contemplated in section 186(2)(a) of the Labour Relations Act 66 of 1995 (hereinafter the "LRA").
3. In *Mathibeli v Minister of Labour* (JA25/2013) [2014] ZALAC 72, at para 17 and quoting from *National Commissioner of the SA Police Service v Potterill N O and Others* (2003) 24 ILJ 1984 (LC) at [11] – [20], the court expressed itself as follows regarding whether or not upgrading amounts to promotion: "The substance of the dispute pertained to the employees' complaint that their posts had been re-graded but, despite the fact that they had continued to be employed in the same posts and despite the requirements of regulation 24, their salaries had not been increased. In my view this is a complaint about alleged unfair conduct 'relating to the promotion' of the employees." I accordingly find that the present upgrading dispute relates to unfair conduct relating to promotion as contemplated in section 186(2)(a) of the LRA. Therefore the dispute is correctly referred as an unfair labour practice dispute and the council has jurisdiction to determine it. In addition, section 24 of the LRA relates to disputes about interpretation application of collective agreements. A dispute about interpretation and application of a circular is unheard of.
4. Subsequent to the Applicants closing their case the Respondent sought to submit a bundle of documentary evidence. The Applicants vehemently objected to the introduction of documentary

evidence after they had already closed their case. Save for the Public Service Regulations, I ruled against the introduction of new documentary evidence at that stage. I found that it would be unfair to allow the Respondent to introduce new documentary evidence after the Applicants had closed their case. The only way in which the Applicants could interact with that documentary evidence would be by way of cross-examination as they could no longer call a witness.

## **BACKGROUND TO THE DISPUTE**

5. The Respondent employed the Applicants as Extension Officers. In 2005 the National Department of Agriculture issued the Norms and Standards for Extension Advisory Services. The Norms and Standards were adopted on 01 April 2009 after minor adjustments had been effected to them. The Norms and Standards were designed to improve expertise and therefore enhance services delivered in the agricultural extension sector. The Norms and Standards provided for upgrading of Extension Officers to Agricultural Advisors provided they possessed a B Tech or four year tertiary qualification in Agriculture and three years' experience. The Respondent awarded the Applicants bursaries in order to study and towards a four year qualification in Agriculture. The Applicants submit that the Respondent was required to upgrade them to salary level 09 and to remunerate them accordingly upon completion of their qualifications. The Respondent, on the other hand, maintains that the upgrading was a once-off exercise which was aimed at employees who qualified as at 01 April 2009. The Respondent thus insists that the Applicants do not qualify for upgrading since they qualified after 01 April 2009. The Applicants accordingly referred an unfair labour practice dispute claiming that the Respondent is subjecting them to an unfair labour practice by refusing to upgrade them. They seek to be upgraded and to be remunerated at the level of the upgraded posts retrospectively to the dates when they obtained their qualifications.

## **ISSUE TO BE DECIDED**

6. I am required to determine whether or not the Respondent subjected the Applicants to an unfair labour practice; and if so;  
Decide on an appropriate remedy.

## **SURVEY OF EVIDENCE AND ARGUMENTS**

### **SURVEY OF EVIDENCE AND ARGUMENT OF THE APPLICANTS**

7. The first witness for the Applicants was Ms Abigail Neli Thandiwe Ndlovu. Her evidence is briefly that she was appointed on 10 May 1999 as an Extension Officer. In 2009 Circular 24 of 2009 was issued providing that employees who have a B Tech qualification together with three years' experience would be upgraded. The circular did not state any time-frame within which the upgrading was to be effected.

8. The Respondent then awarded them (the Applicants) bursaries so as to study towards a B Tech in Agriculture; to put them in line for upgrading in accordance with Circular 24 of 2009. They completed their B Tech qualifications and graduated in June 2010.
9. They subsequently received letters advising them that they had become Agricultural Advisers on salary level 8. Only the title changed but they were not upgraded. Their job descriptions and duties remained unchanged.
10. Up to now other qualifying colleagues are being upgraded and they are placed on the next salary level. Up to the present moment the Respondent is still effecting the upgrading of qualifying employees in batches. She began making enquiries when a lady they studied with, Miss D Xulu, was upgraded. She was informed that she did not qualify for upgrading since she qualified in 2010. She was further informed that the Respondent was only considering employees who qualified in 2009 for upgrading. However, the circular does not specify the period within which employees must qualify for upgrading. Had there been a cut-off date Miss Xulu would not have been upgraded. They graduated together with Miss Xulu. She disagrees that the upgrading was a once-off process for employees who qualified by 01 April 2009.
11. They are currently held against salary level 9 posts on the organizational structure but they are remunerated at salary level 8. To her understanding translation and upgrading mean the same thing. The Respondent is abusing them. The Respondent is subjecting them to an unfair labour practice.
12. The second witness for the Applicants was Mr Phumezile Garane. His evidence is briefly that he was employed by the Respondent as an Agricultural Development Technician at salary level 06 on 22 August 2003. They are currently serving as Agricultural Advisors at salary level 08. They are held against salary level 09 posts on the organisational structure.
13. Circular 24 of 2009 required that Agricultural Advisors had to have a four year qualification and three years' experience in order to qualify for upgrading. He accordingly studied and completed a B Tech in 2013 in order to comply with Circular 24 of 2009. He qualifies to be upgraded since he has satisfied the requirements for upgrading. The circular does not specify cut-off dates for upgrading. Upon making enquiries he was informed that the upgrading was meant for 2009 only. He was however given a document which contradicts this. The due date was extended since they were required to obtain a four year qualification.

14. The Respondent had to take them to school so that they could qualify for upgrading. Employees who qualified after 01 April 2009 were upgraded. Miss Xulu obtained her B Tech in 2010 and was upgraded from salary level 08 to salary level 09. The Respondent is inconsistent since Miss Nxumalo and others were upgraded after 01 April 2009. Miss Memela, who was together with him at the tertiary institution and qualified together with him in 2013, was also upgraded from salary level 07 to salary level 08. They are due for upgrading since they have obtained their B Tech qualifications. The Respondent has subjected them to an unfair labour practice by not upgrading them. The Respondent's refusal to upgrade them has had a financial and emotional impact on him.

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

15. Mr Langaletu Duncan Madondo testified for the Respondent. His evidence is briefly that he has 39 years' experience in the public service. He is the current Director: Human Resources Administration. He has been specialising in human resources since 1989. The core function of the Respondent is Agriculture. Changes in occupational levels began in around 2005.
16. The National Department of Agriculture issued a document, namely Extension Norms and Standards, which would guide the process of translating Extension Officers to Agricultural Advisors. Provincial departments adopted the document with approval of the provincial administrations. The said adoption necessitated the initiation of job evaluations. Job evaluations were conducted at national level since they had to be done in a co-ordinated manner.
17. The Respondent received the outcome of job evaluation in 2013. The Respondent thus implemented the job evaluation model by translating Extension Officers to Agricultural Advisors provided they met the requirements, namely a four year degree in Agriculture, to be translated to Agricultural Advisors; or a four year degree in Agriculture with 3 years' experience to be translated to Senior Agricultural Advisor. Those who qualified were translated accordingly. Those who did not qualify were assisted with bursaries to upgrade themselves to the required qualifications. They remained Extension Officers but they were held against posts of Agricultural Advisors. When they completed their qualifications, they were then translated to Agricultural Advisors.
18. Upgrading was a once-off exercise in terms of the Public Service Regulations. It resulted in a bottleneck in progression of staff. Hence those who qualified after 01 April 2009 would not be upgraded due to the Public Service Regulations. As the department they are trying to find a way to resolve this bottleneck but at the same time they should not flout the provisions of the relevant prescripts.

19. Translation and upgrading are two different things. Translation means to move from one occupational class to another. Therefore translation is the change of job title. It involves movement from one occupational class to the next. Upgrading, on the other hand, means to move to a higher salary level. Upgrading is a result of job evaluation which elevates the post to a higher level. The incumbent must have been performing in the same post to be upgraded. Upgrading is effected on the first day of the month after approval has been given.
20. Employees who qualified or met the requirements as at 01 April 2009 were upgraded. They were considered for upgrading if they met the requirements on 01 April 2009, and not thereafter. Those who did not qualify were awarded bursaries in order to study and meet the requirements. When the employees submitted the qualifications they were translated from Extension Officers to Agricultural Advisors. They were thus translated to an occupational class and not a salary level. The awarding of bursaries was in line with the Norms and Standards. The purpose was to improve and develop the level and quality of Extension Services in accordance with the Extension Revitalisation Plan. He is not aware of any employees who were upgraded after this exercise.
21. The upgrading was a once-off benefit as required by the Public Service Regulations. It would be wrong if any employees who did not meet the requirements on 01 April 2009 were subsequently upgraded upon qualifying. Such employees would have been upgraded illegally and the Respondent would have to recover the amounts they received in terms of the Public Service Act. The Respondent is currently working on a process to address the bottleneck which resulted from the upgrading.

#### **ANALYSIS OF EVIDENCE AND ARGUMENTS:**

22. Section 186(2)(a) of the LRA defines an unfair labour practice as “*any unfair act or omission that arises between an employer and an employee involving unfair conduct by the employer relating to the promotion of an employee,*” among other things. I am accordingly required to decide whether the Respondent subjected the Applicants to an unfair labour practice by its refusal to upgrade them to salary level 09.
23. In *Apollo Tyres South Africa (Pty) Ltd v Commission for Conciliation Mediation and Arbitration and Others* (DA1/11) [2013] ZALAC 3, at para 53, the court explained unfairness as follows: “*It has been said that unfairness implies a failure to meet an objective standard and may be taken to include arbitrary, capricious or inconsistent conduct, whether negligent or intended.*”

24. On 05/04/2019 the Applicants submitted that other employees who qualified after 01 April 2009, such as Miss Xulu, Miss Nxumalo and Miss Memela, had their posts re-graded from Extension Officers to Agricultural Advisors and they were remunerated according to the re-graded posts. On 02/09/2019 when this version was put to Mr Madondo the Respondent still could not provide a concrete rebuttal save to say that it was not aware of such employees. Mr Madondo is the appropriate official within the Respondent to respond to this version. For him not to be able to respond concretely after the version had been raised since April is unacceptable. I accordingly accept the version of the Applicants that there are employees who have been translated and upgraded after 01 April 2009. Therefore the Respondent is acting arbitrarily, capriciously and inconsistently in refusing to upgrade the Applicants as well. The Applicants have accordingly proved that the Respondent has acted unfairly towards them regarding promotion as contemplated in section 186(2)(a) of the LRA.
25. I accordingly find that the Applicants are entitled to be upgraded to salary level 09 retrospectively to the dates in which they qualified; and to be remunerated accordingly.

#### **AWARD**

26. The Respondent, DEPARTMENT OF AGRICULTURE AND RURAL DEVELOPMENT, is found to have subjected the Applicants, ABIGAIL NELI THANDIWE NDLOVU, PHUMEZILE GARANE AND SC NZIMANDE, to an unfair labour practice.
27. The Respondent is ordered to upgrade the Applicants to salary level 09 retrospectively to the dates on which they qualified; and to remunerate them accordingly.
28. The Respondent is to effect the upgrading and the remuneration ordered in paragraph 27 above within 14 days of the council delivering this arbitration award to the parties.
29. No cost order is made.

A handwritten signature in black ink, appearing to read 'VF Mthethwa', with a long horizontal stroke extending to the right.

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

Panellist: Mr VF Mthethwa  
Sector: General Public Service