



ARBITRATION AWARD

Case No: GPBC1983/2017

Date: 07 June 2018

Panellist: Vuyiso Ngcengeni

In the matter between

PSA obo Bailey SJ and 1 other

1st Applicant

POPCRU obo Magagula WZ

2nd Applicant

And

Department of Correctional Services, KZN

Respondent

PSA representative: Siduduzo Ndlovu

Telephone: 033 292 7600 / 071 371 1941

Facsimile 087 234 7716

POPCRU representative: D Makhathini

Telephone: 083 247 7958

Facsimile:

Employer representative: S Kgoahla

Telephone: 012 307 2244 / 076 615 1477

Facsimile: 012 323 3476

DETAILS OF HEARING AND REPRESENTATION

1. This is the award in the arbitration between PSA obo Bailey SJ and Jansen JP ("1st applicant") and POPCRU obo Magagula WZ ("2nd applicant") and the Department of Correctional Services – KZN, the employer ("respondent"). The arbitration was held on 02 May 2018 in Qalakabusha Correctional Centre under

- the auspices of the General Public Service Sector Bargaining Council ("the Council") in terms of section 24 (2), 24 (5) of the Labour Relations Act, No 66 of 1995 as amended ("the Act").
2. The dispute is about interpretation or application of clause 11 (recognition of experience phase 2) of resolution 2 of 2009 read in conjunction with the Departmental Bargaining Chamber ("DBC") settlement agreement 1 of 2016.
 3. There is only one bundle and it was submitted by the applicants and I will refer to it as a bundle. I received the final arguments on 20 May 2018.
 4. PSA submitted arguments for both the 1st and the 2nd applicants in one and I will thus refer to all three applicants as the applicants.

ISSUE TO BE DECIDED

5. I have to determine whether:
 - 5.1 Based on a proper interpretation of a collective agreement, the respondent's action not to adjust the applicants salaries by 1 notch is in line with the provisions of resolution 2 of 2009 or not.
 - 5.2 In view of paragraph 13, 14, 15 and 16 above, whether the respondent acted in breach of the terms of the said agreement or not when the respondent failed to adjust the applicants' salaries by 1 notch.

BACKGROUND TO THE ISSUE

Issues of common cause

6. The applicants were appointed by the employer as indicated below:
 - SJ Bailey - 2000/10/05
 - JP Jansen - 2000/10/05
 - WZ Magagula - 2000/10/05
7. The applicants were promoted from salary level 5 to salary level 6 on 2006/02/01.
8. When the resolution was signed on 24 June 2009, the parties had agreed to have Occupational Specific Dispensation for Correctional Officials implemented in two phases: first phase to be implemented in terms of clause 7 and clause 18.1 of resolution 2 of 2009 ("the resolution") and the second phase to be implemented in terms of clause 11 and 18.2 of the resolution.
9. The respondent implemented phase 1 on 01 July 2009 and did not implement phase two as it was expected to be implemented on 01 April 2010.
10. On 21 November 2016, the parties (the respondent and the unions) concluded a Departmental Bargaining Chamber settlement agreement 1 of 2016 ("settlement agreement") on the implementation of clause 11 of the resolution, recognition of experience (phase 2) of the Occupational Specific Dispensation ("OSD") for Correctional Services Officials.
11. Clause 11.1 of the resolution stipulated that "with effect from 1 April 2010, the recalculation of salary notch position shall be based on Department of correctional services officials experience as at 30 June 2009 based on years of experience obtained in addition to the experience required for appointment on that level.
12. The respondent and the unions in the settlement agreement clause 3.1 agreed on the criteria to be used in order to determine the experience required for appointment on that level. Clause 3.1.2 of same states that for salary level 6, three (3) years of experience is required for appointment on that level.

Arguments on the issues in dispute

The applicants argued as follows:-

13. From 06 October 2000 to 30 June 2009, the applicants had 8 years and 8 months Correctional services experience. Clause 3.2 of the settlement agreement states that *"the years of experience listed in clause 3.1.1 to 3.1.4 shall be deducted from a qualifying correctional official's total years of experience in DCS, and the remaining years will be the years used for the purpose of calculation of the correct OSD second phase notch calculated from the new notch of the OSD that the qualifying correctional official was translated to during the implementation of the first phase of the OSD"*
14. The applicants had on 30 June 2009, 8 years and 8 months correctional services experience. If one had to deduct three (3) in terms of clause 3.1.2 (page 14 of the bundle), the applicants will be left with five years and eight months experience.
15. Clause 11.2 of the resolution (page 6 of the bundle), states that *"translation of experience shall be recognized as 1 notch for every 5 years worked, calculated from the date of employment in DCS based on the new notch of the OSD"*. The applicants had 5 years and 8 months to be considered for second phase OSD and therefore qualified for 1 notch in terms of clause 11.2 read with clause 4.1 of the settlement agreement (page 15 of the bundle).
16. One notch is equivalent to 3% of the annual notch and this is based on the fact that when pay progression (adjustment of salary every second year) is implemented, all qualifying correctional officials receive 3% adjustment in terms of clause 8.2 of the resolution (page 5 of the bundle).
17. When the respondent implemented the second phase OSD in terms of the settlement agreement clauses 4.1 to 4.4 (pages 15 to 16 of bundle), the applicants received 17% on the 27th of March 2017 (pages B3, B5 and B6). On 12 February 2018, the applicants received 6% however there was no adjustment on their salary notches.
18. The applicants were on notch R 235 509 and upon implementation of the settlement agreement in October, their notch should have been adjusted to R 242 577.
19. The notches were never adjusted at all and the respondent's stated notches is incorrect as the applicants' are referring to the notches as they were in 2016 and the notches could have appeared in the applicants' service records as follows:
 - Bailey SJ, notch R 242 577 should appear on page 9 of the bundle.
 - Jansen JP, notch R 242 577 should appear on page 11 of the bundle.
 - Magagula WZ, notch R 242 577 should appear on annexure B1.
20. The applicants salaries were adjusted from notch R 235 509 to notch R 252 702 on the 1st of April 2017 because of the cost of living adjustment and they were further adjusted to R 260 286 on 01 July 2017 as a result of the biennial pay progression of 3% in terms of paragraph 8.1 of the resolution (page 5 of the bundle) and they are correctly reflected on pages 9 and 11 of the bundle and on annexure B1.
21. If the applicants' salaries were adjusted because of the second phase OSD, and entry indicating TRANS OSD would have appeared between 01 April 2016 and 01 July 2017 on pages 9 and 11 of the bundle and on annexure B1.

The respondent argued as follows:

22. Agrees with the applicants on clause 11.1 of the resolution and clause 3.1 of the DBC Settlement agreement. However, it adds that the applicants ignore the provision that says "recognition of experience required for appointment of that level".
23. The applicants' recognition of experience was calculated and implemented as follows:
 - 23.1 Their total years of experience in DCS gained from the date of appointment are calculated to 30 June 2009 as per the resolution and that makes it 8 years of experience.
 - 23.2 The applicants' years of experience recognition is 8 years and less requirement for the post which is 3 years, and the experience considered is therefore 5 years.

24. As a result the applicants qualified for 1 notch based on DCS Settlement Agreement and the respondent has accordingly implemented the second phase correctly.
25. It disputes that the applicants' notch is currently R 235 509 instead of R 242 577 had the adjustment been made. It submits that the applicants' notch is R 260 286 as reflected in annexure B1 with respect to WZ Magagula and that is the same for all the applicants, therefore the applicants are not honest.
26. The applicants are therefore correctly placed on their salary band and their notches were correctly adjusted. The applicants received a once off payment of 17% applicable to the OSD second phase.

SURVEY OF EVIDENCE AND ARGUMENTS

27. A dispute over the interpretation of a collective agreement exists when the parties disagree over the meaning of a particular provision and a dispute over the application of a collective agreement arises when the parties disagree over whether the agreement applies to a particular set of facts or circumstances.
28. Clause 8 of the resolution is titled "PAY PROGRESSION" and it partly reads as follows: -*"8.1 Biennial pay progression of 3% shall apply on condition that the relevant employee has maintained a satisfactory level of performance as set out in the performance management system of the department that shall be applicable at the time when such employee becomes eligible for pay progression.
8.2 Biennial pay progression shall be awarded to Centre Based Correctional Officials and to Non- Centre Based Correctional Officials with effect from 1 July of the year in which the employee has complied with the prescribed requirements for such pay progression"*.
29. The first paragraph of the principles of the settlement agreement reads as follows: - *"WHEREAS the Employer and the Employee Representatives (the 'Parties'), recognise the importance of giving effect to clause 11 of GPSSBC Resolution 2 of 2009 in its entirety in providing for the implementation of the Second Phase of the OSD for Correctional Services Officials..."*
30. Clause 4 of the settlement agreement of 1 2016 is titled "PAYMENT" and it partly reads as follows: *"4.1 All qualifying correctional officials currently in the employ of the department who were on salary levels 3 to 8 in DCS as at 30 June 2009 shall be placed on their correct notches they would have been on as at 1 October 2016, had they been translated to their correct Second Phase OSD notches on 1 April 2010."*
31. It is common cause that the applicants had five years and 8 months after the deduction of three years in terms of clause 3.1 of the settlement agreement as at 30 June 2009.
32. The applicants submitted that when the respondent implemented the second phase OSD in terms of the settlement agreement 1 of 2016 clauses 4.1 to 4.4, they received 17% on the 27th of March 2017. On 12 February 2018, the applicants received 6% however there was no adjustment on their salary notches. The applicants further submitted that as they were on notch R 235 509 on 01 April 2016, upon implementation of the settlement agreement in October 2016, their notch should have been adjusted to R 242 577.
33. The respondent stated that the applicants qualified for one notch based on the Settlement Agreement and that it has accordingly implemented the second phase correctly. The respondent disputed that the applicants' notch is currently R 235 509 instead of R 242 577 had the adjustment been made and further submitted that the applicants' notch is R 260 286 as reflected in annexure B1 with respect to WZ Magagula which is the same for all the applicants.
34. The key issue to determine first is whether the applicants were on the correct notch as at 01 October 2016 in terms of the Second Phase OSD notches on 1 April 2010.
35. The applicants submitted that they were not in their correct notch, and therefore they should have been placed on the correct notch first, which is R 242 577 before the staggering of payment as per clause 4.2 to 4.5 of the settlement agreement.
36. Clearly, the respondent has misconstrued the notch that the applicants were referring to as R 260 686, which is the current notch after two adjustments named ADJUSTMENT and NOTCH ITO PSR.

- That does not address the lacking adjustment from R 235 509 to R 242 577 first, which is a cornerstone of this dispute and it would have been made before making the other mentioned upward movements.
37. The respondent's response to this argument is insufficient and shallow in my view, as the respondent simply stated that the applicants qualified for one notch, which is not in argument, and it further stated that it has implemented the second phase correctly. However, the respondent has not substantiated its argument, to give effect to the notch that it agrees that the applicants qualify for and how was it given to them, if that was the case.
 38. As stated in paragraph 32 above, my simple interpretation of the clause is that the employees had to be placed first on the correct notch in terms of the second phase OSD notches on 01 April 2010 and that would be before the implementation of clauses 4.2 and the subsequent clauses.
 39. The applicants are clear that such a translation would have resulted in them being placed on R 242 577 and the entry would have read as "TRANS OSD" between 01 April 2016 and 01 July 2017 and there is no such an entry.
 40. As I have stated, the employer could not substantively illustrate how has it implemented clause 4.1, having regard to the dispute brought by the applicants.
 41. In *NUCW v Oranje Mynbou en Vervoer Maatskappy Bpk* [2000]2 BLLR (LC) it was held that a dispute about the application of a collective agreement applies to a situation where there is a non-compliance with a collective agreement and one of the parties wishes to enforce its terms.
 42. It is my view that the respondent has incorrectly interpreted and applied clauses 11.1 and 11.2 of the resolution read together with clause 3.2 and 4.1 of the settlement agreement.
 43. To that end, I consider the above case of *NUCW* as an appropriate authority and as such, the respondent must comply with the collective agreement and adjust the salaries of all three applicants by one notch and that is from R 235 509.00 to R 242 577.00.

AWARD

44. The respondent must adjust the salaries of Messrs SJ Bailey, JP Jansen and WZ Magagula by one notch up from R 235 509.00 to R 242 577.00 as at 01 April 2016.
45. The respondent to make the aforesaid adjustments by no later than 07 July 2018.



Commissioner: Vuyiso Ngcengeni