



ARBITRATION AWARD

Panellist/s: THOMAS MAHASHA
Case No.: GPBC 2507/2018
Date of Award: 03 JUNE 2018

In the ARBITRATION between:

PSA OBO SM NETSHISHIVHE

(Union / Applicant)

and

DEPARTMENT OF JUSTICE AND CONSTITUTIONAL DEVELOPMENT

(Respondent)

Union/Applicant's representative:

ASNATH

SEDIBANE

Union/Applicant's address:

Telephone:

Telefax:

Respondent's representative:

MICHAEL NDITWANE

Respondent's address:

Telephone:

Telefax:

ARBITRATION AWARD

DETAILS OF HEARING AND REPRESENTATION:

1. .
2. The Applicant, Mbulaheni Samson Netshishivhe, attended the hearing and was represented by Asnath Sedibane of PSA
3. The respondent also attended the hearing and was represented by its employee, Michael Nditwane.
4. The hearing was digitally recorded.

ISSUE TO BE DECIDED:

5. Whether or not the Moderating Committee had powers to reduce the scores and whether in doing so, it followed the correct procedure.

BACKGROUND TO THE MATTER.

1. The Applicant referred an unfair Labour Practice, relating to benefits dispute with the GPSSBC in terms of section 186(2) (a) of the Labour Relations Act 66 of 1995 (" the LRA") as amended.
2. The matter was not resolved at the conciliation stage, and was therefore referred for arbitration.
3. The matter was set down as an arbitration process on 30 May 2019 at the Department of Justice and Constitutional Development, in Nelspruit.
4. The Respondent exchanged one bundle of documents, which had pages 1 to 74.
5. The Applicant did not exchange any document.

SURVEY OF EVIDENCE AND ARGUMENT:

EVIDENCE BY THE APPLICANT.

6. Mbulaheni Samson Netshishivhe testified as follows:
7. He is the Deputy Director, Security and Risk Management. His immediate supervisor is Mr M.D Mhlanga, the Regional Manager. He was assessed by his supervisor. The score of 135% was agreed between him and the applicant.
The Moderating Committee set and reduced the score to 113% as reflected in page 47 of the Respondent's bundle without returning the reviews to the supervisor to ask for additional motivation.

He lodged an appeal as reflected in page 45 of the Respondent's bundle. The appeal committee confirmed the score of 113% as reflected on page 74 of the respondent's bundle.

His attitude is that the decision had already been taken before the appeal committee could sit.

8. He consequently, declared a dispute.

Under cross examination he testified as follows:-

9. He has 15 years of service. He started as a Deputy Director in 2015. He received the performance bonus three times before, since the Moderation Committee was in place.
10. He is familiar with the PMDS Policy. There is no clause in the PMDS Policy that says the Regional Head, Mr Mhlanga, must form part of the Moderating Committee. If the Regional Manager was not in the moderating room, he could have recused himself.

Faith Phala testified under oath as follows:-

11. She is a Senior Legal Admin Officer. She does not sit in the Moderating Committee meetings. She only do so when requested by her supervisor, Mthimunye. She recalls being part of the Moderating Committee that moderated the applicant's reviews. During the day in question, Mr Mhlanga was the chairperson of the Moderating Committee .
12. She cannot remember if Shakwane had signed as the chairperson.
13. She has no interest in the applicant's appeal. She also lodged an appeal for non- payment of performance bonus, as a result of the Moderating Committee's decision to reduce the score she agreed with her supervisor.

RESPONDENT'S SUBMISSIONS.

Landela Daismon Mhlanga testified as follows:-

14. He agreed with the applicant to the score of 135%.
15. Shakwane had chaired the meeting of the Moderating Committee when the applicant's Reviews were moderated. He denies that he was the chairperson, because if that was so, he could have appended his signature.
15. He agrees that he always sits in Moderating Committee meetings except, when his Subordinates or applicant's reviews were moderated.
16. He agrees that recommendations are sent to him in terms of the PMDS Policy.

ARGUMENT

APPLICANT'S CLOSING ARGUMENTS.

The respondent committed unfair labour practice both substantially and procedurally. The moderating committee is in terms of the policy, directed to return the reviews to the supervisor, which it did not. Appeals Committee did not consider the appeal, but simply copied and pasted the outcome of the Moderation Committee. The chairperson of the Appeal Committee was not called to testify. Mhlanga's evidence as it relates to Shakwane should be disregarded on the basis that it is hearsay. The policy does not authorise the Moderating Committee to reduce scores. Mr Phala lied when he said he recused himself. Phala, had no reason to lie since he had no interest. The applicant should be given performance bonus.

RESPONDENT'S CLOSING ARGUMENTS.

The respondent's closing arguments are as follows:-

The Applicant has a burden to prove unfair labour practice.

The Moderation Committee followed the policy to the latter when it returned the assessment reviews to the applicant as he is the one who was expected to provide additional information. The respondent's evidence is corroborated by documentary evidence. The commissioner is called upon to believe it as the most probable. The respondent prays for dismissal of applicant's dispute.

ANALYSIS OF EVIDENCE AND ARGUMENT:

17. In my analysis, I have considered the closing arguments made by both parties
18. Section 186(2) (a) of the LRA defines unfair labour practice, as *"any unfair act or omission that arises between the employer and an employee involving unfair conduct by the employer relating toof provision of benefits to an employee"*.
19. The applicant's case is based on the ground that he agreed with his supervisor to the score of 135% and that the Moderating Committee had no authority to reduce that score, that the Respondent should have rewarded her with a performance bonus and that the Respondents failure to do so amounts to unfair Labour Practice relating to benefits.
20. In the converse, the Respondent's case is that the Moderating Committee had authority in terms of the PMDS policy, to reduce the applicant's score, and that there was no automatic entitlement to a performance bonus.
21. It is not in dispute that payment of a performance bonus falls within the category of what is defined as benefits in terms of section 186(2) (a) of the LRA. It is once again not in dispute that the Applicant was allocated a score of four 135% by his supervisor, that would prima facie, entitle him to the payment of a performance bonus, if the Moderating Committee had allowed that original score to stand.
22. The Respondent furnished the Applicant with the outcome of the Appeal Committee informing him that the score of 135% was reduced to a score of 113% and that he was as a result, not entitled to payment of a performance bonus. It is that decision that led to the Applicant's declaration of the dispute.
23. The applicant did not present evidence to suggest that the Moderating Committee had no powers in terms of the PMDS Policy, to reduce the scores. In the absence of such an averment, one would not expect the respondent to give testimony about the powers of the Moderating Committee. The only submission made by the applicant relates to the duties and functions of the Moderating Committee. That piece of evidence did not assist the hearing as envisaged, because it could not assist in determining whether the Moderating Committee had such powers or not.
24. In the absence of such evidence, I have got no option, but to believe on a balance of probabilities, that the Moderating Committee, had powers to recommend reduction of the scores. It was submitted on behalf of the respondent that before such a recommendation could be made, the Moderating Committee shall return the performance assessment with reasons back to the supervisor in the case where they found the appraisal to be unacceptable and request for review with additional information. In terms of clause (viii) of the PMDS Policy, the Moderating Committee shall review the submitted additional motivation.

25. It is common cause that all these steps were followed by the Moderating Committee, with the exception of one, i.e. referring the performance assessment to the supervisor. It had been the applicant's consistent testimony that the reviews were given back to him, and that he submitted the additional motivation as required. He did not involve his supervisor. Surely, his argument that the Moderating Committee committed a procedural flaw is without basis. Even if it can be accepted that the Moderating Committee did not comply with the PMDS Policy, he would also share the blame. His conduct begs a question: why did he not refuse to take the reviews, or at least involve his supervisor before providing additional motivation, if he knew that is what was required by the policy. When the submitted additional information did not yield his desired results, he is all of a sudden not happy about the decision of the Moderating Committee not to have furnished the performance assessment to his supervisor. If the applicant had truly objected to the powers conferred to the Moderating Committee, he should not have complied with its request to submit additional motivation.
26. I do not agree with the applicant's submission that the Moderating Committee reduced the score. What is evident is that the Moderating Committee made a recommendation to have the scores reduced as provided for by clause (ix) of paragraph 7.7 of the PMDS Policy. If the Moderating Committee had taken a final decision to reduce the score, the applicant would not have had an opportunity in terms of the PMDS Policy to appeal the decision. In terms of clause 8.1 of the PMDS Policy, the powers of the Central Appeal Committee involve amongst others, reviewing the outcome of the Moderation Committee for non-SMS members. If the Moderating Committee had no powers to recommend the scores, there would be no need to have clause 8.1 inserted in the policy. Once more, if the Moderation Committee had nothing to do with the scores agreed to between employees and their supervisors, clause 7.7 (iii) of the policy will be without force and effect. This clause empowers the Moderating Committee to set up a moderating criteria for the moderation process. It would be unreasonable to expect the criteria not to affect the scores, either negatively or positively. I doubt if the applicant would still raise the same concern if his scores were instead added.
27. I find the evidence of Faith Phala not to be reliable. She had in fact not appeared to be a credible witness. She consistently testified that Mr Mhlanga was the chairperson of the Moderating Committee when the applicant's performance assessment were moderated. She testified as such despite the apparent signatures of Shakwane who signed as the chairperson. Her evidence is therefore rejected in toto.
28. I do not agree with the applicant's representative when she submitted in her closing arguments, that the appeal authority did not consider the applicant's appeal. That is a bare statement which was not supported by evidence. What is evident is that there is a feedback letter from the Central Appeal Committee which was directed to the Applicant. There is no contrary evidence before me.
29. Section 186 (2) of the LRA requires of employers to act fairly when they decide on awarding benefits to employees. Unfair conduct or omission relating to benefits is Unfair Labour Practice. The question is whether or not a decision to reduce the score and not to award performance bonus, to the Applicant was fair. In *Apollo Tyres South Africa (Pty) Ltd v CCMA* the Labour Appeal Court held "*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” I find the Respondent’s decision to reduce the score, to be fair.

30. There is no evidence before me that the respondent’s moderating criteria had failed to meet the objective standard, or that it was arbitrary, capricious or inconstant.
31. On the basis of the reasons provided above, I do not find any rationality to interfere with the Respondent’s decision not to pay the Applicant a performance bonus.
32. I therefore find that the applicant had failed to prove on a balance of probabilities, that the respondent had committed an unfair labour practice relating to benefits.

AWARD.

33. The applicant’s dispute is dismissed.



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MAHASHA TM
GPSSBC PANELIST.