

2 ARBITRATION AWARD



Panellist/s: **MPHO MOLELE.**

Case No.: **GPBC1509/2019**

Date of Award: **04-11-2019**

In the ARBITRATION between:

PSA obo SGM Maapola

(Union / Applicant)

And

Department of Education

Union/Applicant's representative: Mr Mike Mkhize

Union/Applicant's address: _____

Telephone: _____

Telefax: _____

Respondent's representative: Mr Rudzani Makhema

Respondent's address: _____

Telephone: _____

Telefax: _____

Details of hearing and representation

[1] The case was scheduled as conciliation and arbitration on 21 October 2019 at the District offices of Limpopo Department of Education in Lebowakgomo. The employee appeared and was represented by Mr Mike Mkhize from PSA which is a duly registered trade union. The employer on the other side was represented by its Labour Relations Officer, Mr Rudzani Makhema. The employee submitted two bundles which were marked A and B respectively, while the employer's document was marked C. Before commencing with arbitration, Mr Makhema on behalf of the employer raised a preliminary issue. The preliminary issue was to challenge the Council and the commissioner that they do not have jurisdiction to award what the employee had asked for. He also submitted that the council lacks jurisdiction in that the case was premature because parties were still trying to resolve the dispute internally.

[2] Mr Mkhize made his submissions that the council and the commissioner has jurisdiction to proceed with the case in terms of section 186 (2) of the Labour Relations Act. After considering the submissions of the two parties, I then made an ex tempore ruling that I do have powers to arbitrate in terms of section 186 (2) of the Labour Relations Act.

ISSUE TO BE DECIDED

[3] Since the dispute falls under Section 186(2) (b) of the Labour Relations Act 66 of 1995, I must determine whether the conduct of the employer towards the employee amounted to an unfair labour practice. Should I find that the conduct was unfair, I must then determine the appropriate relief in terms of what the applicant has prayed for.

BACKGROUND TO THE DISPUTE

[4] The employee was appointed as an administrative clerk on 1 April 2018 and was placed on a 12 month probation period. The probation started on 1 April 2018 and was supposed to end on 1 April 2019. At the end of arbitration, parties submitted their written closing arguments which I considered in my award.

SURVEY OF EVIDENCE AND ARGUMENTS

Employee's evidence

Shatadi Gaynor Maapola testified under oath as follows:

[5] She was appointed by employer on a 12 months' probation period. She started on 1 April 2018. The probation period was to lapse on 1 April 2019. She did not receive confirmation of permanent employment from the employer. The people who were on probation with her received permanent employment after the completion of 12 months' probation. She is still on probation but was already assessed for quarter four. She was also paid for a performance bonus to prove that she was correctly assessed. Proof of payment for the bonus is found on page 13 of the employee's bundle A. The performance bonus was paid after she had submitted her last report. The last report is the one that qualifies an employee to be permanently appointed.

She does not know how many months is she going to be on probation. She is now on six or seven months after her 12 months' probation period lapsed.

[6] She conceded under cross-examination that she does not know why her colleagues were permanently appointed. She also admitted that she took three weeks leave while on probation. She confirmed that she gave the last evaluation report to her principal. The principal was the one who was supposed to have submitted the report to the District Office. She denied that she took 36 days leave. She denied that her probation was extended by 36 leave days.

She does not know whether the bonus has got anything to do with her appointment, but confirmed that she was assessed and rated to qualify for a bonus.

[7] She confirmed in re-examination that she is still on probation eight months after her 12 months' probation period. She was also not notified about the extension of her probation period. She confirmed that she was assessed.

Respondent's evidence

Jane Ntsoane testified under oath as follows:

[8] She is employed by the employer as a Deputy Director Corporate Services. Her duties are to manage Human Resource Management, Employee Relations, PMDS and Human Resource Department. The employee was on a 12 months' probation. She needs quarterly reports from the supervisors of the employees. The employees who are on probation are required to submit four quarterly reports to assess their suitability to the post. The last report is the one which determines whether to confirm permanent appointment or to extend the probation. Permanent appointment can be affected by the report from the supervisor, or the employee's absence from work in the form of leave taken during the probation's period. She received only three reports from the employee. Employee was moved from one school to the other in the course of concluding her fourth quarter report. The releasing principal was not aware that she must prepare a final report to the employee. The receiving principal was also not aware of the report. The employee did not submit the fourth quarter report according to her. Page 13 A is only for PMDS and has got nothing to do with appointment of an employee.

[9] She admitted in cross-examination that the releasing principal was not aware of the report. She also admitted that she became aware of the non-submission of the employee's report on 17 October 2019. She confirmed that she did nothing about the report because she was not aware of it. She denied that the probation was extended by 36 days.

ANALYSIS OF EVIDENCE AND ARGUMENTS

[10] Section 186 (2) (a) of the Labour Relations Act define unfair labour practice as an unfair act or omission that arises between an employer and employee involving unfair conduct by the employer relating to the promotion, demotion, probation or training of an employee or relating to the provision of benefits to an employee. It is not in dispute that the employee was on a 12 months' probation period. It is also not in dispute

that six months has lapsed since the employee completed her 12 months' probation period. The employee's version is that she had successfully completed her probation period. She had also submitted her final assessment report. She needs to be permanently appointed like her colleagues who were confirmed after the probation. The employer's version is that the employee did not submit the final report and therefore it is difficult to appoint her.

[11] The employer's only witness testified that she was not aware that the final report was not submitted. She became aware on 17 October 2019 and that was five days before this arbitration date. This clearly shows that the employer failed in its capacity to evaluate the employee. The purpose of probation is to evaluate the employee to see if indeed he or she is the correct and competent applicant to the position. The two principal were also not aware of the final report and it shows that they were also not competent to evaluate the employee. The employer must always make sure that they get the right person to do the job. In this case the employer folded its arms and waited for the employee to assess herself. What happened between the end of probation's period and now on 22 October 2019? Is the employee on extended probation? Is the employee on permanent employment? Was the employee called to be informed of her extended probation period? The answer to these questions is that the employee was never notified of the extension. The employer's witness testified that the employee's probation was extended.

[12] **SCHEDULE 8, CODE OF GOOD PRACTICE** item 8 (g) and (h) provide that the period of probation may only be extended for a reason that relates to the purpose of probation. An employer may only decide to extend the probationary period after the employer has invited the employee to make representations and has considered any representations made. The employee was never invited to make representations. She is also not aware that her probationary period was extended. If it was not for this case, for how long would the employee be on probation? The answer is that she was going to be on probation for as long as the employer was waiting for a final assessment report and that was to the disadvantage and prejudice of the employee.

[13] It is therefore my finding that the employer made an omission and acted unfairly by not appointing the employee on a permanent basis after she successfully completed her probation period.

AWARD

[14] The employer has acted unfairly by subjecting an employee to a lengthy probation without reason or consultation.

[15] I order the employer to appoint the employee retrospectively from 2 April 2019 as a permanent Administrative Clerk level 5.



COMMISSIONER.

MPHO MOLELE.