

IN THE GENERAL PUBLIC SERVICE SECTORAL BARGAINING COUNCIL (GPSSBC)

In the matter between

PSA obo MDLHULI S.N.

APPLICANT

And

DEPARTMENT OF WATER & SANITATION

RESPONDENT

Case NO: GPBC68/2019

ARBITRATION WARD

DETAILS OF HEARING AND REPRESENTATION

This matter was scheduled for arbitration on 29 January 2020 at the Offices of the Department of Water and Sanitation, Grootdraaidam in Standerton.

The employee party, Ms Mdlhuli SN (hereinafter referred to as the Applicant), was represented by her union official of PSA Mr Kobus Heyneke. The employer party, Department of Water and Sanitation (hereinafter referred to as the Respondent) was represented by its Labour Relations Director Mr Mulaudzi and Mr Derrick Mitileni.

The parties decided it was not necessary to lead oral evidence and opted to make written submissions to Council. The parties agreed on common cause issues on record.

ISSUE TO BE DECIDED

Whether, in the circumstances detailed hereunder, the Respondent has committed an unfair labour practice as set out in section 186(2) of the Labour relations Act 66 of 1995 ('the LRA') by not promoting the Applicant from the rank of Deputy Director level 11 to Deputy Director level 12.

Whether the Applicant has met the RDR requirement for promotion

BACKGROUND TO THE ISSUES

The Applicant, Ms Mdlhuli, is employed by the Respondent in terms of the Conditions of Service for employees employed in terms of Sections 76 of the National Water Act, Act 36 of 1998. The Applicant has been employed by the Respondent on 01 July 2006 and is currently in the position of Deputy Director: Human Relations at salary level 11. The Respondent is the national Department of Water and Sanitation.

The Applicant alleges that she has qualified to be promoted from the position of Deputy Director: Human Relations in terms of the Respondent's policy but that the Respondent has failed to promote her. She

lodged a grievance unsuccessfully and being dissatisfied referred the matter to Council for conciliation. The matter could not be resolved through conciliation and was referred to Council to this arbitration.

The Applicant is seeking to be promoted to a position of Deputy Director: Human Relations level 12. The parties submitted bundles A(Applicant's) and B(Respondent's) of documents. The parties indicated that there was no need to lead oral evidence and that they opt to send written submissions to Council. The parties further stated that they had no points *in limine* to raise.

COMMON CAUSE ISSUES

The parties agreed on the following common cause issues:

- The Applicant has unsuccessfully lodged a grievance
- There are seven requirements in terms of the RDR policy (see page 12 bundle A) to be met prior to one being promoted.
- The Applicant has a Diploma In Human Resources
- The Applicant is under the Chief Directorate: Construction Management and it is regulated by the National Water Act and not by the Public Service Act
- Section 76 gives the DG powers to determine conditions of service.
- The Applicant's supervisor recommended her for promotion but the Merit Committee did not.

ISSUES IN DISPUTE

- The Applicant contends that she has met all the requirements in terms of the RDR policy for promotion to DD salary level 12.
- The Respondent asserts that the Applicant did not meet 3 of the 7 requirements namely:
 - i. Requirement 2 bullet 6 which states "Develop, maintain and coordinate formulation of human resource policies
 - ii. Requirement 2 bullet 10 which states "Monitor training and development and employment equity processes
 - iii. Requirement 7 which states "Must comply with organizational structure needs"
 - iv. Lastly that the Merit Committee did not recommend the Applicant for promotion.

On requirement 2 the Applicant stated that both bullets 6 and 10 are in her current job description and that she is supervising Equity Officers and a Training Officer and there is no way it could be said she is not performing those functions.

On requirement 7 the Applicant stated that level 12 is already there as per page 12 bundle A; further that post names at level 11 and 12 are exactly the same; further, that the Moderating Committee has sat and decided after the assessments has been prepared or completed and therefore an expectation is already created; further, the Moderating Committee has no power to reduce the organogram especially after that time.

EVIDENCE AND ARGUMENT

The Applicant's evidence

Paragraph 2 bullet 6 and bullet 10:

According to the RDR requirements, the very same wording that reflects under level 12 paragraph 2 bullet 6 and 10, is also reflecting under level 11. The RDR requirements for level 11 **paragraph 2 bullet 5** states the following:

“- Develop, maintain and coordinate formulation of human resource policies.”

Paragraph 2 bullet 9 states the following:

“- Monitor training and development and employment equity processes.” (See **Page 12 of bundle “A”**)

The Applicant is on level 11 currently and is already executing this functions. She is sitting in on national and local meetings where these matters are discussed. She is a Deputy Director Human Relations and this functions are also evident on the organogram. Sections that the Applicant is responsible for are Control Training Officer, Chief Training Officer, Control HR Practitioner, Chief HR Practitioner, ext. to name a few. (See **Page 31 of bundle “A”**)

The same requirements reflected in her 2016 assessments when she was promoted to level 11. The merit Committee recommended her for promotion, and all the RDR requirements were ticked that she do meet them. (See **Page 23 and 25 of bundle “A”**)

It can therefore not be true that the Applicant do not meet the RDR requirements in terms of the RDR requirements under level 12, **Paragraph 2 bullet 6 and bullet 10**, as she is already performing those functions under level 11.

Paragraph 7

“Must comply with the organizational structure needs.”

The Respondent during the arbitration indicated that a decision was taken by the MODCOM committee that: “Only the Contract Manager has to be at level 12 and Sectional Heads and DDA must remain at level 11”. (See **Page 27 of bundle “B”**). This Moderation Committee (MODCOM) meeting took place during 17 to 18 July 2018 and the minutes was signed by the Chairperson 2018 CD: CM MODCOM on 6 August 2018. (See **Page 41 of bundle “B”**).

The assessment period was for the year 2017/2018. A legitimate expectation exists, as the Applicant expected promotion, as she met the RDR requirements. The post names from level 11 to level 12 are exactly the same. Level 11 and level 12 is both a Deputy Director Human Relations. The RDR is promotion driven and not appointment in a post. Members are growing in salary levels due to promotion. If the Applicant meet the requirements she must be promoted to the next level. Even the Applicants Supervisor recommended her for promotion and also a legitimate expectation was created. (See **Page 12 and 13 of bundle “A”**)

The Committee cannot at the end of an assessment period decide to change RDR requirements or the organogram. The committee themselves acting unfair by disregarding the RDR requirements, or try to change the organogram, for the Applicant not to receive promotion. It is not the correct forum to change conditions of service, as the MODCOM committee function is to ensure that the assessment process was fair. (See **Page 49 paragraph 2 of bundle “B”**).

According to the organogram there are various managers and Deputy Directors on level 12 who was promoted from level 11 to level 12. The Applicant also need to grow on the same way as others have grown. Some of these member who did grow from level 11 to level 12 are: N Lutya, Mama FP and Wilkens J (See **Page 33 of bundle “A”**).

In the case of PSA obo Van Dyk and the Department of Water and Sanitation case number GPBC09/2018, the Applicant was also refused promotion. The case is the same as the current one. The Commissioner ruled that the Applicant must be promoted. The award was made an order of the court and unopposed under case number J126/19. The Applicant is now recently promoted in the very same department from level 11 to level 12.

The Respondent’s evidence

On page 11 of bundle B, there is a report which outlines what transpired in relation to this alleged promotion by the Applicant. The report clearly indicates that the Unit merit committee which the Applicant alleged in her opening statement to have recommended her for promotion actually stated that she “do not comply to all the RDR requirements”.

In bundle B page 13 there is a comparison of what the Applicant’s responsibilities are and what she has achieved and not achieved in the current rank. It is the submission of the Respondent that she did not meet all the requirements to be eligible for a promotion and she therefore cannot be promoted.

The Applicant was/is required to meet all the activities in bullet points 1 to 6 on page 13 bundle before she can be considered for promotion. Under bullet 2 she is required to be currently developing, maintaining and coordinating formulation of policies and she has not done that or achieved that requirement.

The Applicant is also required in bullet 9 to monitor training and development and employment equity processes. Those were also not achieved hence the argument or submission by the Respondent that she is not eligible for promotion to level 12.

On page 15 of bundle A, the block on the right hand side that indicates Work Description, it states amongst others that “advice management on policies”. Nothing is stated about the Applicant developing, maintaining and coordinating formulations of policies. There is nothing in terms of the Applicant’s handling of employment equity processes.

It is also a requirement that for promotion to take place, it should be in line with the organizational structure needs. That is outlined in bullet 7 for future rank, DD: Human Relations level 12. In this instance level 12 has been done away with for other levels and it only remains for Contract Managers who are in charge of Construction site.

Furthermore, on page 29 of bundle A under Remarks by Unit Merit Committee; it is clearly indicated that there is no future rank which means she is not eligible for promotion.

The Respondent submits that the Applicant's matter of promotion did not even make it to the Moderation Committee since her own unit has not recommended her for any promotions. The decision of the MODCOM to do away with level 12 for other officials and leave it for Contract Managers had nothing to do with the Applicant's promotional matter.

The decided case (PSA obo Van Dyk) referred by the Applicant does not have the same merits as the current Applicant's in that Ms Van Dyk met the primary requirements except that the issue of the organizational structure was also raised. With regards to the Applicant she not meeting all the requirements as outlined by her job description and the merit committee also did not recommend her whereas Ms Van Dyk was recommended. It is therefore incorrect to compare the two since the merits differ.

It is common cause that prior to the 2017/2018 MODCOM sitting other employees on SCM including other occupational streams were promoted to salary level 12. It was realized that such actions were not operationally viable where the manager of the Contraction Unit is on the same salary level with the heads of sections. It was decided that from 2018 employees should not be promoted to the same salary level with the Contract Manager across all five Construction Units.

The MODCOM was officially appointed by the Respondent's DDG to deal with promotions, increments and merit awards which are done in terms of the National Water Act 1998(Act 36 of 2998). Section 76(3) of the said Act states that "The Director General must, from time to time, after consultation with the Department of Public Service and Administration, determine the conditions of employment of such employees. In this instance there have been engagements between the Respondent, the DPSA and Unions in the Departmental Chamber wherein the Conditions of Service are being reviewed and several issues have already been reviewed and removed from the current conditions of services, such as leave policy, housing, medical aid and other matters that were found to be outdated. It is on this premise that in the MODCOM meeting, wherein both PSA and NEHAWU were present a decision to do away with level 12 for other occupational classes was taken (See page 27(4.3) of bundle B).

Even though the decision of the MODCOM is a secondary argument, the Respondent submits that it be looked at as an administrative decision taken by the Respondent as mandated by the law. As such until the decision is challenged, reviewed and set aside it must stand and be binding to parties thereto including the Applicant in this matter.

ANALYSIS OF EVIDENCE AND ARGUMENTS

I am required to determine:

- Whether, in the circumstances detailed hereunder, the Respondent has committed an unfair labour practice as set out in section 186(2) of the Labour relations Act 66 of 1995 ('the LRA') by not promoting the Applicant from the rank of Deputy Director level 11 to Deputy Director level 12.
- Whether the Applicant has met the RDR requirement for promotion

"The unfair labour practice definition includes unfair conduct by an employer relating to promotion of an employee...Employees may, amongst others, claim that the employer failed to follow agreed promotion policies and procedures or failed to adhere to advertised criteria...it is possible that in the absence of a satisfactory explanation from the employer an arbitrator will assume that the employer had acted in bad faith and therefore unfairly." (Grogan; Workplace law; 9th edition).

The onus to prove the facts on which an allegation of such an unfair labour practice falls on the Applicant.

The essence of the Applicant's case is that she has met all the requirements for promotion from level 11 to level 12 including the requirements which the Respondent claims she did not meet. The RDR requirements on page 12 bundle A which the Respondent insist that she did not meet are:

- **Paragraph 2 bullet 5** states "- Develop, maintain and coordinate formulation of human resource policies."
- **Paragraph 2 bullet 9** states "- Monitor training and development and employment equity processes."
- **Paragraph 7** which states that -"Must comply with the organizational structure needs."

The Applicant argues that on page 12 bundle A which shows the requirements of RDR, the very same wording that reflects under level 12 paragraph 2 bullet 6 and 10, is also reflecting under level 11. This means she is on level 11 currently and is already executing this functions. The Respondent does not substantively dispute this assertion but only gives a bare denial that the Applicant does not meet those requirements. The Respondent says page 13 bundle B is a comparison of what the Applicant's responsibilities are and what she achieved or not achieved in the current rank. It is clear in that page that the two requirements were part of the tasks performed by the Applicant. However the Respondent does not indicate how she did not achieve those requirements. The Applicant further argued that the same requirements reflected in her 2016 assessments when she was promoted to level 11 and that the merit Committee recommended her for promotion, and all the RDR requirements were ticked that she do meet them as per pages **23 and 25 of bundle "A"**. This was not disputed by the Respondent. I am unable to understand why the Respondent would contend that the Applicant does not meet the above two requirements when it is clear from evidence that she performs those tasks. The Respondent points to a handwritten Work Description on page 15 bundle A and argues that, in it, there is nothing stated about developing, maintaining and coordinating formulations of policies and further, there is nothing about the Applicant handling of employment equity processes. The Applicant on the other hand argues that the hand written block is incomplete and that her supervisor who knew that she has met all the requirements has recommended her for promotion. I however still find the hand written Work Description not sufficient to disprove that her tasks included the 2 requirements and that she did not perform those tasks.

The third disputed requirement is in paragraph 7 of the RDR requirements and is about complying with the organisational structure needs. The Applicant contends that the Respondent took a decision through by the MODCOM committee that: “Only the Contract Manager has to be at level 12 and Sectional Heads and DDA must remain at level 11”. (See **Page 27 of bundle “B”**). The Applicant contend that this meeting took place during 17 to 18 July 2018 and the minutes was signed by the Chairperson 2018 CD: CM MODCOM on 6 August 2018. (See **Page 41 of bundle “B”**). The Applicant argues that the assessment period was for the year 2017/2018 and therefore a legitimate expectation exists, as the Applicant expected promotion, as she met the RDR requirements and that the Committee cannot at the end of an assessment period decide to change RDR requirements or the organogram. She further argues that the committee themselves acting unfair by disregarding the RDR requirements, or try to change the organogram, for the Applicant not to receive promotion as it is not the correct forum to change conditions of service, as the MODCOM committee function is to ensure that the assessment process was fair. (See **Page 49 paragraph 2 of bundle “B”**). She further argues that the post names from level 11 to level 12 are exactly the same and that level 11 and level 12 is both a Deputy Director Human Relations and that the RDR is promotion driven and not appointment in a post and that members are growing in salary levels due to promotion.

The Respondent on the other hand does not address the issue of the timing of the decision as raised by the Applicant. The Respondent does not address the issue that the decision to cancel the level 12 promotions for other employees was made when the Applicant was already assessed by her supervisor and unit merit committee. The Respondent only claims that such decision was taken by the MODCOM and therefore from 2018 employees should not be promoted to the same salary level with the Contract Manager across all five units. The Respondent does not specify when it was taken and whether it was to be retrospective in nature. I therefore find the action of the Respondent, on a balance of probabilities, to be unfair.

From the circumstances outlined above, I therefore find on a balance of probabilities that the Applicant has met all the RDR requirements for promotion and that Respondent has committed any unfair labour practice by not promoting the Applicant.

AWARD

1. The Respondent is ordered to promote the Applicant to a position of Deputy Director: Human Relations level 12 retrospectively from the date of finalisation of 2017/18 assessments.
2. The Respondent is ordered to implement clause 1 above on or before the 15th June 2020.
3. I make no order as to costs.



MARTIN SAMBO
PANELLIST
05 May 2020