



# AWARD

Panellist/s: Annelie Bevan  
Case No.: GPBC 1364/2018  
Date of Award: 20 August 2019

In the ARBITRATION between:

PSA obo T L F MOKOKA  
(Union / Applicant)

and

DEPARTMENT OF PUBLIC WORKS & ROADS  
(Respondent)

Union/Applicant's representative: Mr K Moalosi (PSA)

Union/Applicant's address:

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Respondent's representative: Ms G M Sehume (Labour Relations Official)

Respondent's address:

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## **DETAILS OF HEARING AND REPRESENTATION**

1. This is the award in the arbitration between Mr T L F Mokoka, the Applicant and the Department of Public Works & Roads, North West Province, the Respondent.
2. This arbitration was held on 1 July 2019 at the offices of the Respondent in Mahikeng in terms of section 186(2)(a) of the Labour Relations Act, 1995 as amended ("the LRA") and the award is issued in terms of section 138(7) thereof.
3. The Applicant was represented by Mr K Moalosi of PSA and the Respondent was represented by Ms G M Sehume, one of its Labour Relations officials.
4. The arbitration was finalized on 1 July 2019 and the parties agreed to submit written closing arguments on 14 August 2019.
5. The hearing was electronically recorded.

### **Issue to be determined**

6. I am required to determine whether or not the decision of the Respondent to terminate the Applicant's acting appointment 45 days before the agreed upon term ran out constitutes an unfair labour practice relating to benefits in terms of section 186(2)(a) of the LRA, and if so the appropriate relief.
7. The Applicant is seeking the following relief: That the Respondent be ordered to pay out to the Applicant the remainder of his contract period, which will amount to 45 days.

### **Background to the issue in dispute**

8. The Applicant referred an unfair labour practice relating to benefits in terms of section 186 of the Labour Relations Act, No 66 of 1995 (LRA) to the Council on 29 June 2018.
9. The matter was unsuccessfully conciliated and a certificate of non-resolution was issued in terms of section 135(5) of the LRA on 30 July 2018. The matter was thereafter scheduled for arbitration on 15 January 2019.
10. On 15 January 2019 the parties agreed to pre-arbitration minutes on record. In the pre-arbitration minutes, the parties agreed that the following issues are common cause:
  - 10.1 The Applicant was appointed to act in the position of Deputy Director: HRP, Ngaka Modiri Molema District on 16 November 2015 by the District Manager.
  - 10.2 The Applicant was appointed to act in this position for a year from 16 November 2015 to 16 November 2016.
  - 10.3 The Respondent terminated the Applicant's acting position effectively from 30 September 2016.

- 10.4 The Respondent paid the Applicant his acting allowance in terms of the GPSSBC Resolution 1 of 2002 for the period that he was acting in the position.
11. In the pre-arbitration minutes, the parties agreed that the following issues were in dispute:
- 11.1 Whether or not the Respondent followed the correct procedure in terminating the acting position of the Applicant;
- 11.2 Whether or not the Respondent had substantive reasons to terminate the acting position of the Applicant.
12. The parties submitted bundles of documents. The Applicant's bundle was marked "A" and the Respondent's bundle was marked "R".

## SUMMARY OF THE PARTIES SUBMISSIONS AND EVIDENCE

### *The Applicant's evidence:*

13. **The Applicant, T L F Mokoka testified that** he is substantively appointed in the post Assistant Director Human Resources Planning (HRP).
14. He was appointed to act for one year in the position of Deputy Director, HRP in terms of Resolution 1 of 2002 (Bundle R, page 4).
15. According to the Applicant his acting contract was terminated 45 days prior to the termination date. The Respondent informed him in writing that it was terminated due to his behavioral patterns.
16. The Applicant was not happy with this outcome and he lodged a grievance. The grievance was not resolved and the Applicant then referred the grievance to the Public Service Commission (PSC).
17. The PSC gave the Applicant a feedback on his grievance and in terms of the feedback they stated:
4. *The Commission found your grievance to be substantiated for the following reasons:*
- 4.1 *The Department could not provide proof of any consultations and interventions made with you in relation to the reason cited in the submission and letter to terminate your acting appointment.*
- 4.2 *The Department alleged that you absented yourself, but could not provide proof of disciplinary steps taken against you in terms of the Disciplinary Codes and Procedures against these serious allegations of absenteeism, before termination of your acting appointment.*
- 4.3 *The Department alleged your incapacity, but the Department could not provide proof of the discussion of poor performance nor proof of investigations in terms of the Incapacity Codes and Procedures in the Public Service to evidence the allegations.*



4.4 *Based on the above, it is evident that no legislative framework was followed by the Department to proof any incapacity and absenteeism by yourself. The process to terminate your acting appointment was substantially and procedurally unfair and the acting appointment should not have been revoked before the investigations could be instituted in terms of the Disciplinary and Incapacity Codes. Therefore, your allegations that the reasons cited on the submission to the senior management and the letter of termination of your acting appointment were crass misrepresentation of facts, are therefore supported.*

5. *The PSC recommended that-*

5.1 *The Department should withdraw allegations of incapacity and behavioral patterns levelled against you in the submission and the letter to terminate your acting appointment and consider apologizing to you.*

5.2 *The HOD has to take a decision on the PSC's findings of the investigation into the merits of your grievance and should inform you accordingly within a period of 10 working days." (Bundle A, page 19, par 4 & 5).*

The Respondent did not implement the recommendations of the PSC.

18. The Applicant testified that his performance during this period was never in question and he even received a performance bonus in the same financial year.
19. The Applicant confirmed that the relief that he is looking for is to be paid out the remainder of his acting contract.
20. Under cross-examination the Applicant stated that although the Respondent requested an extension to finalise his grievance on 2 November 2016, the Respondent only attended to it after he had referred the matter to the PSC on 2 February 2017.
21. The Applicant denied being aware of the letter addressed to J L Mautlwa from Mr Sekopane dated 11 April 2017 which stated the following: *"This communique serve to confirm that in June 2016, a counseling session was held between Mrs Mathibe and Mr Mokoka and Mr Sekopane as a witness. The rationale behind this session was as a result of the unbecoming behavioral pattern of mr Mokoka. A decision was also taken in this meeting to penalize Mr Mokoka with a leave without pay."* (Bundle R, page 7).
22. The Applicant confirmed that on 28 June 2016 he applied for unpaid leave for 27 June 2016 as he attended the Imbizo of the Premier at the Civic Centre. When the Imbizo was finished he went straight home and did not first go via the office. The next day the District manager accused him of being absent without authorization he agreed that leave without pay can be deducted for the said day (Bundle R, page 8).

23. The Applicant denied being aware that his supervisor referred him to go and see a social worker (Bundle R, page 12). He stated that he went to see the social worker out of his own accord to talk about his personal problems. It is the first time that he has seen this document and was not aware of it. He denied being referred there because of alcohol abuse.
24. The Applicant agreed that he did receive a response from the Respondent in response to the recommendations of the PSC (Bundle A, pages 21-22).
25. The Applicant admitted that during his acting period he was booked off for depression. He further conceded that it is not wrong for an employer to remove additional responsibility from an employee whose health is deteriorating, to assist him with his stress levels.
26. Under re-examination the Applicant confirmed that he was booked off from 12 September to 23 September 2016 (Bundle R, pages 10-11) for 10 days and 17 October 2016 to 21 October 2016 for 5 days (Bundle R, page 18), but his acting period was terminated on 28 September 2016.
27. The Applicant testified that his depression was not a result of the additional workload due to the acting appointment, but was for personal reasons.

***The Respondent's evidence:***

28. **The Respondent's first witness, C Sekopane testified that** he is the Deputy Director HRM of the Respondent.
29. The Applicant was appointed in the acting position in November 2015 and there was an internal arrangement that the witness will mentor the Applicant.
30. According to the witness the Applicant was very dedicated in his acting duties. However, in June 2016 he displayed some unbecoming behavioural patterns. He absented himself from work without permission on 27 June 2016. This issue was addressed and after consulting with the Applicant he agreed that the day can be regarded as leave without pay. Thereafter the Applicant's conduct was acceptable.
31. On 12 September 2016 the Applicant reported to the witness that he will be taking his car for a service. He was granted permission to do that and he was expected back at work on 13 September 2016, however he did not return to work for a whole week. The Applicant only called the next week on 19 September 2016 to inform the witness that he is booked off and that he will bring the sick note.
32. When the Applicant brought the sick note on 19 September 2016 it was evident that he was not well and the sick note indicated that he was booked off for depression.
33. The witness then went to see the Acting Director to inform him that the Applicant is not doing well and that it might be a good idea to release him from the additional duties that came with the acting position.



34. The witness did not feel that disciplinary steps against the Applicant for the lax way in which he report his absence would have been fair in light of the fact that he suffered from depression during the time.
35. On the same date the witness then made a formal referral to the social worker so that the Applicant can be supported by the office. The Applicant was not aware of this referral. The social worker would have contacted the Applicant for an appointment. As far as the witness is aware the Applicant did honor his appointments with the social worker.
36. The Applicant's illness coincided with a time when many positions had to be filled. Because of this increased work load and due to the Applicant's illness and absence it was then decided to terminate his acting position and appoint someone who could do the work during this time.
37. Under cross-examination the witness confirmed that an employer must support employees who suffer from depression.
38. He confirmed that before the Applicant was diagnosed with depression his performance at work was never in question.
39. The witness confirmed that the Applicant was not given an opportunity to indicate why his action appointment should not be terminated before the Respondent terminated it.
40. The witness admitted that during the period that the Applicant was booked off sick a submission was made to relief him of his acting position. This submission was approved and a letter was issued and given to an intern to deliver to the Applicant. He denied however that the termination of the Applicant's acting appointment amounted to victimization of the Applicant.

## ANALYSIS

41. I intend to offer brief reasons in my analysis as per Section 138 (7) of the LRA as amended, which provides that, "*Within 14 days of the conclusion of the arbitration proceedings – the commissioner must issue an arbitration award with brief reasons*".
42. In terms of section 186 (2)(a) of the LRA, an unfair labour practice is defined as "any unfair act or omission that arises between an employer and an 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." The Applicant referred an unfair labour practice dispute relating to benefits to the Council.
43. It is now established law that advantages or privileges employees have been offered or granted in terms of a policy or practice subject to the employer's discretion constitutes a benefit as contemplated in section 186(2)(a) of the LRA (*Apollo Tyres South Africa (Pty) Ltd v CCMA & others (2013) 34 ILJ 1120 (LAC)*).
44. Whether the employer has committed an unfair labour practice is an objective, factual enquiry.

45. It is clear that the Applicant was appointed to act in a higher vacant position in terms of GPSSBC Resolution 1 of 2002 (the collective agreement) and therefore complies with the requirements of a benefit as set out in the *Apollo Tyres-case*.
46. The crux of this dispute is whether the early termination of this acting appointment was procedurally and substantively fair.
47. There is no guidance in the Resolution as to the termination of an acting appointment. It would therefore seem that as this is an agreement between the employer and the employee that the normal contractual principles should be adhered to.
48. It is clear that the Collective Agreement provides that the acting agreement will terminate on a specific date, akin to a fixed term employment contract. This means that at the specific date the acting agreement comes to a natural end. The question in this case is whether the Respondent was allowed to terminate this fixed term contract before the agreed upon date of termination.
49. The common law rule is that such a contract may not be terminated for any other reason than material breach or repudiation of the contract by the employee. Therefore, the employer may not terminate the contract before the time. The reason for this rule is that parties bind themselves in the contract for a specific time period and the commitment should be honored (*Nkopane & Others v Independent Electoral Commission (2007) 28 ILJ 670 (LC)*).
50. The reason forwarded by the Respondent as to why the acting contract was terminated, was according to the Respondent's witness, Mr Sekopane linked to various things i.e. the manner in which the Applicant informed the Respondent of his absence (two occasions); the Applicant's stress levels and the increase of work during the time that the Applicant was booked off. Procedurally he indicated that no process was followed in terminating the Applicant's acting agreement. The Respondent took a decision unilaterally and informed the Applicant thereof afterwards.
51. It seems clear that the Applicant's illness coincided (according to the Respondent's version) with a spike in the workload and that the Respondent was frustrated with the Applicant's absence and decided to terminate the acting agreement as a result thereof. The Respondent also under cross-examination explained that the contract was not terminated because of the Applicant's illness but because of the manner in which he reported his illness. This of course is a matter for discipline, should the Respondent have felt strongly about that.
52. I am not convinced that the reasons forwarded by the Respondent was sufficient to terminate the Applicant's acting appointment unilaterally. It seems that the Respondent used the termination of the Applicant's acting appointment as a disciplinary sanction for not reporting his illness in the correct manner, but without following a disciplinary process. The first incident of being absent without approval was resolved between the parties by the Applicant agreed to accept that one day a leave without pay. It would seem unfair that the Respondent is entitled to refer to a matter that was resolved between the



parties again in trying to support its case of the Applicant having a tendency not to report his absence in the correct manner. The other implied reason for the termination would seem to be incapacity due to the spike in work during the Applicant's illness. No evidence was presented by the Respondent to confirm this allegation that there was an increase in work during this time, but even if the Respondent's version is accepted, terminating an acting agreement unilaterally does not seem to be the sufficient, especially in light of the fact that the Applicant's performance during his acting appointment until this time was without reproach. The reason for termination could therefore not have been capacity as the Respondent did not follow the correct process in this regard.

53. Contractually the Respondent should have informed the Applicant that the fact that he is not at work is being regarded as a breach of contract and give him an ultimatum to report for duty and assist with the increase of work. If the Applicant in those circumstances remained in breach of the contract, then the Respondent might have been in a better position to terminate the acting agreement with the Applicant.
54. I therefore find that the reasons forwarded by the Respondent for terminating the acting agreement is not convincing and by its own admission the Respondent unilaterally terminated the acting agreement. Substantively and procedurally the actions of the Respondent were therefore unfair.
55. I therefore find that the decision of the Respondent to terminate the Applicant's acting agreement 45 days prior to the agreed upon date of termination constitutes a substantively and procedurally unfair labour practice.

Relief:

56. Section 193(4) of the LRA is clear on the relief that a commissioner can award for an unfair labour practice. It determines: "An arbitrator appointed in terms of this Act may determine any unfair labour practice dispute referred to the arbitrator, on terms that the arbitrator deems reasonable, which may include ordering reinstatement, re-employment or compensation".
57. The relief sought by the Applicant is to be paid out the remainder of his acting agreement of 45 days.
58. I find that it would be reasonable for the Respondent to pay the Applicant the remainder of his acting agreement.

**AWARD**

59. I therefore find that the conduct of the Respondent to terminate the Applicant's acting agreement 45 days before the agreed upon termination date constitutes a substantively and procedurally unfair labour practice relating to benefits as defined in section 186(2)(a) of the LRA.
60. The Respondent is ordered to remunerate the Applicant on/before 30 September 2019 the remaining 45 days of his acting agreement at the same rate as agreed upon for the acting period.



Alexander

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Annelie Bevan

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