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# ARBITRATION AWARD

Panelist/s: SM. Beesnaar  
Case No.: GPBC730/2022  
Date of Award: 21 November 2022

In the **ARBITRATION** between:

\_\_\_\_\_ PSA obo Tumelo Moea \_\_\_\_\_  
(Union / Applicant)

and

\_\_\_\_\_ DEPARTMENT OF SPORT, ARTS & CULTURE \_\_\_\_\_  
(Respondent)

**Union/Applicant's representative:** Mr Harry Thomas – PSA representative

Union/Applicant's address:

\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

Telephone:

Email:

**Respondent's representative:** Ms Rachel Dibane – Labour Relations Officer

Respondent's address:

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Email:

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## **ARBITRATION AWARD**

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### **PARTICULARS OF THE HEARING AND REPRESENTATION**

1. This is the award in the arbitration matter between PSA on behalf of Tumelo Moea, the applicant and the Department of Sport, Arts and Culture (DESAC), the respondent.
2. The arbitration was scheduled under the auspices of the General Public Service Sector Bargaining Council (GPSSBC). The referral is in terms of section 186(2) (a) of the Labour Relations Act, 66 of 1995 as amended (hereafter referred to as "the LRA") and the award is issued in terms of section 138(7) of the LRA.
3. The arbitration hearing took place on 4 November 2022 in Kimberley. Further that the parties filed their closing heads of arguments on 11 November 2022.
4. The applicant appeared in person and was represented by Mr Harry Thomas from PSA (Union). The respondent was represented by Ms Rachel Dibane in her capacity as Labour Relations Officer.
5. The parties submitted into evidence bundle of documents which were accepted as what they purported to be. For the purpose of the proceedings, the applicant's bundle will be Annexures "A" and the respondent's bundle will be Annexure "B".
6. The proceedings were conducted in English and were manually and digitally recorded.

### **ISSUE TO BE DECIDED**

7. I must determine whether the respondent committed unfair labour practice relating to a benefit, by failing to pay performance bonus to the applicant. The applicant's final score was 133,33 and qualified for 7% cash bonus for the 2020/2021 performance cycle.
8. However the respondent deviated from the policy provisions (EPMDS). The 7% he qualified for was brought down to 0.26% and a cash bonus of R 1 888.00 unjustly paid to him.

### **BACKGROUND TO THE DISPUTE**

9. The applicant has 15 years of unbroken service in the public service. In 2008 he was appointed as Assistant Director: HRA. In 2015 he was promoted to the position of Deputy-Director: HR, Strategy Planning and Organisational Design. He held this position to date. His current notch is R 876 705.00

per annum. The applicant was also appointed to act in various capacities, like in HRA for the period of 2018 to 2020.

10. The applicant was assessed for the PMDS cycle 2020/2021. At the time, his immediate supervisor was on a lengthy suspension and concluded his Performance appraisal/assessment with the Chief Director: Corporate Services (A13-17). He also signed for the 2021/2022 performance cycle (A27-30).
11. His final score, agreed with his supervisor for the 2020/2021 performance cycle was 133,33, and qualified for 7% cash bonus, equals to R 61 369.35 in monetary value. The respondent deviated from the policy provisions and reduced his score to 0,26%. A cash of R 1 888.00 was paid on 29 March 2022 into his account.
12. Aggrieved by this decision, the applicant lodged a grievance on 8 April 2022 which remained unresolved. The matter was referred to the Bargaining Council by PSA for conciliation on 31 May 2022. Conciliation was scheduled virtually on 23 June 2022 and failed to resolve the dispute. The matter was then referred for arbitration.
13. The relief sought by the applicant is that the respondent be ordered to pay him the 7% PMDS cash bonus that he qualified for, plus compensation for unfair conduct.

## **SUMMARY OF EVIDENCE AND ARGUMENT**

### **Applicant's evidence –**

#### **Two (2) witnesses testified as follows –**

14. Mr. Tumelo Moea is the applicant in the matter. He is the Deputy-Director: HR Strategy Planning and Organisational Design. He is responsible for operations management, organizational structures and JE in the Department among others. He has also been appointed to perform additional tasks of the Deputy Director: HRA. In that directorate he was responsible for conditions of service, recruitment and appointments, employee records like leaves and many other functions.
15. It was during the Covid-19 (C-19) hard-lock down. While most employees worked from home, he was expected to come to work for at least 4 days in a week as part of the skeleton staff. He did his work with distinction. His direct supervisor was on suspension and worked under the supervision of the Chief Director: Corporate Services. He concluded his performance assessment for the 2020/2021 cycle with him and they agreed on the score (A13-29). All the parties signed in that regard.
16. He later became aware that the respondent took a decision to deviate from the EPMDS policy. That was in terms of the memorandum dated 9 February 2022 (A41-42). He made a follow up with the

unions (NEHAWU and PSA) to confirm their concurrence, because there is no such a provision in the policy. That was essentially reducing his score percentage and affected his cash bonus.

17. On 29 March 2022 he was paid R 1 888.00. That was the cash bonus after his score was reduced to 0.26%. He appealed the decision but nothing came out of it. He maintained that was grossly unfair because he had some added duties he performed during the C-19 hard lock down. While most people worked from home he physically came to work and did that with distinction. His health and that of his family was put at risk.
18. He tested positive for C-19 and was admitted at the ICU. He has been suffering from C-19 co-morbidities. Some of his close family members were lost due to C-19 but those difficult circumstances did not deter him from his dedicated service for the benefit of the respondent.
19. His score was reduced irregularly as this was against the policy prescript. The policy makes no provision for a percentage score of 0.26%. Further that it is unfair to be awarded same score like those who comfortably stayed at home during the C-19 lock down while he was expected to come to work. After he was discharged from the hospital, he reported on duty the next working day.
20. Mr. Francios Clark works as Assistant Director: HRA. He started in 2008 as Chief Personnel Officer. He is also a Union Shop Steward for PSA in the department. He confirmed that he is conversant with the PMDS policy within the NCPA. As a union Shop Steward, they were not consulted when the decision to deviate from the policy was made (A31-38). They were just informed without having to make any inputs that there would be a blanket approach in awarding cash bonuses.
21. He confirmed what the applicant stated, saying what the respondent did was irregular and outside the policy prescripts. He intimated that if there was a need for such a deviation, the concurrence of the Minister: DPSA should be sought in terms of the Public Service Act (PSA) and Regulations. He held the strong view that this action by the respondent fundamentally undermined the policy as well as the Act.
22. Further that the final score agreed to between the applicant and his supervisor was 133,33% and the deviation from the agreed score was unfair. He stated that both the PMDS Intermediate Review Committee (IRC) and the Moderation Committees were suspended at the time and failed to understand how that decision was formulated.
23. He concluded that the object of the EPMDS policy is there to incentivize those employees who performed their duties with distinction and to motivate them. Depriving the applicant, in his view was not only unfair, but demoralizing at the same time after his dedicated service. He submitted that there

were no justifiable reasons not to pay 7% cash bonus for 2020/2021 performance cycle which the applicant was entitled to.

#### **Respondent's evidence –**

24. The respondent did not call witness/s to testify on its case nor present any evidence at the arbitration.

#### **ANALYSIS OF EVIDENCE AND ARGUMENT**

25. This is a referral in terms of section 186 (2) (a) of the LRA. The relief sought by the applicant is that the respondent be ordered to pay him the 7% performance bonus (2020/2021) that he qualified for plus compensation for unfair conduct for failing to pay what was due to him. In determining the dispute between the parties, I considered the provisions of the LRA, and the Northern Cape Provincial Administration (NCPA) Policy on Employee Performance Management and Development System (EPMDS).

26. The LRA entitles employees to institute action against an employer for what is termed 'unfair labour practice' in terms of section 186 thereof. One of the matters where an employee is entitled to take action because of the unfair conduct of the employer is in relation to benefits. In ***Appolo Tyres SA (Pty) Ltd v CCMA & others (unreported case DA1/11 [2013] ZALAC)*** a benefit was said to be any advantage or privilege to which an employee was entitled or offered, in terms of an existing policy or practice, and which was granted at the employer's discretion. The concept would seem to include discretionary and performance bonuses.

27. It is common cause that for the (EPMDS) performance cycle for 2020/2021 the applicant got a performance score equal to 133,33 and qualified for 7% cash bonus (see A26). It was after he entered into a Performance Agreement (PA) with the Chief Director: Corporate Services. His direct supervisor (Director: HRM) was on a prolonged suspension, when he approached the Chief Director to do his performance assessment (A18-19). That included the appraisal for 2021/2022 performance cycle while his immediate supervisor was still on suspension.

28. The final score was an agreement between the applicant and the Chief Director, and was signed by both parties (27-30). As indicated in paragraph 27 above, his final score was 133,33% and he qualified for 7% cash bonus. This is in terms of the qualifying criteria as outlined in the policy document (A75). Article 9.4 of the policy clearly articulates how performance bonuses are calculated based on the employee's actual notch (A73).

29. The 7% cash bonus (quantum in terms of the monetary value) that should have been paid to the applicant is R 61 369.35. Instead his score was irregularly reduced when the respondent deviated

from the PMDS policy without proper consultation, to 0.26%. The applicant's testimony that there is no provision in the policy for such a deviation remained unchallenged. That was corroborated by the testimony of Mr Clark who is also a Union Shop Steward within the department.

30. While the respondent was on this crusade, trying to find a justification to deviate from its own policy, I noted the contents of the Memo penned by the HEAD: HRD, Mr C. Du Toit. He said, '*The Office of the Premier advised against this approach indicating that the policy does not provide for this*'. Nonetheless they proceeded.
31. Mr Clark was equally scathing in saying that the conduct of the respondent sought to undermine the PSA and Regulations by failing to seek concurrence from the Minister: DPSA. Further that there was no consultation, but a decision top-down.
32. The applicant went in length to explain in his testimony on how unfair the conduct of the respondent has been towards him. There was so many additional duties that he performed at the time, that of Deputy Director: HRA, without being given an allowance. The Director: HRM was on suspension. One can imagine the weight of the two sub-directorates that he carried on his shoulders. The situation was further thrown into disarray by the pandemic. While almost everyone worked remotely during the C-19 hard lock down, he came to work and ensured that all HR functions are brought up to date, risking own health and that of his family.
33. The respondent did little to nothing to rebut the applicant's evidence. The onus is on the employee to demonstrate that the failure by the respondent to award performance bonus due is unfair. The respondent, on the same token, is obliged to defend challenges on the substantive and procedural fairness, if it wishes to avoid a negative outcome. There is an obligation on the employer to place evidence that it acted fairly and in good faith during that exercise. In the absence of such evidence it would be irrational and unreasonable to conclude that the employer acted fairly, regardless of where the onus lies.
34. Having regard to the full conspectus of all relevant facts and circumstances of the matter, I find that the applicant has established on a balance of probabilities that the conduct of the respondent in failing to award him 7% incentive bonus is tantamount to unfair labour practice in terms of section 186(2)(a) of the LRA
35. In light of the foregoing, make the award hereafter –

## **REMEDY**

36. For the reasons stated above I find that the respondent acted unfairly towards the applicant, by failing to pay him 7% performance bonus for the PMDS cycle of 2020/2021 he qualified for. It follows therefore that the applicant is entitled for payment in terms of the relief sought.
37. The applicant is accordingly entitled to 7% cash bonus in the amount equivalent to R 61 369.35, calculated at his annual salary.
38. The applicant also prayed for compensation should I find in his favour. In lieu of the respondent's unfair conduct towards the applicant, I will not hesitate to use my discretion and order that the applicant be paid compensation equal to Ten thousand rand (Ten thousand rand).

### **AWARD**

39. The respondent, the Department of Sport, Arts and Culture failure / refusal to pay Mr. Tumelo Moea 7% performance bonus for the PMDS cycle 2020/2021 is unfair labour practice in terms of section 186(2) (a) of the LRA.
40. The respondent is herewith ordered to pay the applicant performance bonus equal to R 61 369.35 as stated in paragraph 37 above. Further that the applicant is entitled to compensation amount equal to R 10 000.00 as per paragraph 38 above.
41. The cash bonus plus compensation amounts equal to Seventy-one thousand, three hundred and sixty-nine rand thirty-five cents (R 71 369.35) stated in paragraphs 37 and 38 *supra* must be paid by the respondent directly into the applicant's bank account (known to the respondent) by no later than 15 December 2022.
42. If an arbitration award orders a party to pay a sum of money, the amount earns interest from the date of the award at the same rate as the rate prescribed from time to time in respect of a judgment debt in terms of section 2 of the Prescribed Rate of Interest Act, 1975 (Act No. 55 of 1975), unless the award provides otherwise.



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**SM. BEESNAAR**

**GPSSBC ARBITRATOR**