



GENERAL PUBLIC SERVICE
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ARBITRATION AWARD

Panellist/s: Dineo Palesa Seelane
Case No.: GBBC643-2021
Date of Award: 11 October 2021

In the ARBITRATION between:

PSA OBO K MNGEZANA

(Union / Applicant)

and

DEPARTMENT OF CORRECTIONAL SERVICES

(Respondent)

DETAILS OF THE HEARING AND ARBITRATION

- [1] The Arbitration proceedings in the above matter were virtually heard on the 22 September 2021 at 11h00 am.
- [2] The Applicant, Mr. Khanyisa Mnghezana, was represented by Mr. Thabo Papo, a Union Official of PSA. The Respondent, Department of Correctional Services, was represented by Mr. Mofutsana Simon Ndaba their Employee Assistant Manager.
- [3] The proceedings were both manually and digitally recorded. The Applicant submitted a bundle of documents which were admitted as Exhibit "A". The Applicant, Khanyisa Mnghezana was the only witness. The Respondent's documents were admitted as Exhibit "R". The Respondent's Representative, Mofutsana Simon Ndaba was the only witness. Parties submitted their written closing arguments on 28 September 2021.

ISSUE TO BE DECIDED

- [4] I am required to determine whether the Respondent committed an unfair labour practice by failing to implement the pay progression of the Applicant which amounted to R29 031. 66 for the financial year 2013 – 2014. Should I find it was unfair, I am required to determine the appropriate remedy by ordering the Respondent to implement the pay progression.
- [5] The Applicant is also seeking six months compensation as a relief.

BACKGROUND TO THE MATTER:

- [6] The Applicant was employed on 1 March 2007 as a Correctional Officer, CO3, Level 5. His salary was R 222 063.00 per annum. The Applicant held that the Respondent omitted to implement his 3 % performance bonus for the financial year 2013 – 2014. The bonus was due to be paid in 2015.
- [7] The dispute had a protracted history in that it was first set down as an arbitration on 19 August 2021. At the beginning of the arbitration process both the Respondent and Applicant representatives agreed that that the Applicant, Khanyisa Mnghezana, was assessed and that he qualified for the performance bonus. The Respondent made representations that he had submitted a Memorandum confirming the Applicant's

performance and sent it to the Regional Management. He further mentioned that the submission was approved and only needed the signatures of senior management. In conclusion, the Respondent stated that the Applicant's bonus was to be processed and implemented within fourteen (14) days.

- [8] Subsequent to the Respondent assertions, the arbitration proceedings were adjourned to 19 August 2021 in order to afford the Respondent an opportunity to process the payment of the Applicant's performance bonus.
- [9] On 19 August 2021 the Respondent was unable to connect with the link forwarded to him. He briefly explained that he was unable to connect to the arbitration process via the link sent to him and sent screen snippets in support of the technical error.
- [10] Following the Respondent's technical error it was agreed that the arbitration be postponed to 22 September 2021. On 22 September 2021, the Applicant's representative, Nceba Baardman was replaced with Thabo Papo from PSA.

SURVEY OF EVIDENCE AND ARGUMENT:

Applicant's Evidence and Argument

- [11] **Khanyisa Mnglezana** briefly testified under oath that he was assessed for financial year 2013 – 2014 and scored 3. The moderation committee finalized the assessment and confirmed the score as reflected on page 18 of A. The score automatically implied that he qualified for pay and grade progression as the two are interlinked. The Respondent did not pay him the bonus or upgraded him. He was also assessed in April 2020.
- [12] The Respondent did not have cross-examination questions.

Respondent's Evidence and Argument

- [13] **Mofutsana Simon Ndaba** briefly testified under oath that in December 2015, the Respondent decided to conduct an investigation after the Applicant was assessed. After the investigation was concluded, the Deputy Regional Commissioner, Mr Nyapotse took a decision that the Applicant should not be assessed and that decision was implemented.

- [14] In 2020, the Acting Human Resource Development Deputy Director nullified the outcome of the Chairperson of the Deputy Regional Committee and decided that the Applicant should be afforded an opportunity to be assessed. He was a junior and was not delegated to make that decision.
- [15] During cross-examination he testified that the Respondent's policy requirement was that all official in the employ of the Respondent should be assessed on a yearly basis as per the attached authority. The witness also confirmed that it was not a practice that the moderation committee be overruled and that he had not encountered such an instance.
- [16] The witness also agreed that all officials employed by the Respondent should be assessed. He further attested that there no was indication whether the Applicant's documents were handed or not. He confirmed that there was an attendance register which assisted in showing that the Applicant's Supervisor received his documents and submitted them to the relevant structures. He certified that he was not sure what informed the decision not to assess the Applicant.
- [17] He testified that the investigation report did not provide what steps the Respondent took to finalise the Applicant's assessment, The witness confirmed that there was a Memorandum which was approved to pay the Applicant's performance bonus but a decision was not yet taken.
- [18] There was no re-examination.
- [19] He clarified that the Memorandum was signed on 3 September 2020.

ANALYSIS OF EVIDENCE AND ARGUMENT:

- [20] Section 186(2) of the Labour Relations Act (LRA) defines an unfair labour practice as any unfair act or omission that arises between an employer and an employee involving, the unfair conduct of the employer relating to promotion, demotion or training of an employee or relating to the provision of benefits to an employee. This section gives effect to section 23 (1) of the Constitution which provides that everyone has the right to fair labour practices.
- [21] In ***Apollo Tyres South Africa (Pty) Limited v CCMA*** the Labour Appeal Court postulated the new definition as follows

“In my view, the better approach would be to interpret the term benefit to include a right or entitlement to which an is entitled (ex contractu or ex lege including rights judicially created) as well as an advantage or privilege which has been offered or granted to an employee in terms of policy or practice subject to the employer’s discretion. In as far as Hospersa, GS4 Security and Scheepers postulate a different approach they are with respect, wrong”.

[22] Moreover, the LRA states that the provisions of the Act must be interpreted to give effect to its primary objects, in compliance with the Constitution and in compliance with the public international law obligations of the Republic.

[21] During the arbitration process the following facts were established:

- (a) In 2013-2014 the Applicant was scored 3 which automatically qualified him for a performance bonus, viz, salary and grade progression, which had to be implemented in 2015 which amounted to R 222 063.00
- (b) At the date of the arbitration, 22 September 2021 the Respondent had not implemented the pay and grade progression of the Applicant.
- (c) There was a memorandum that was approved and submitted on 3 September 2020 to the Regional Offices for the implementation of the Applicant’s pay and grade progression.
- (d) The Applicant’s evidence remained uncontested.
- (e) The evidence of Mr. Mofutsana Simon Ndaba was hearsay.

[22] My next question is to determine whether the Respondent acted unfairly by failing to implement the Applicant’s pay and grade progression. The arbitration is about failure by the Respondent to implement the Applicant’s benefit as enshrined in their policy. Section 186(2)(a) of the LRA only applies to benefits disputes where it is alleged the employer has acted unfairly. Unfairness triggers the cause of action in the section.

[23] It is not in dispute that the Applicant was assessed based on the Respondent’s Performance Management Development System Policy and that he qualified as he scored 3.

[24] The Respondent testified on hearsay and failed to call in witnesses to corroborate his version. There are instances where, hearsay evidence can be admitted, however it should be corroborated by other evidence. The inherent difficulty I have with the Respondent’s hearsay evidence is that it has material and internal inconsistencies. For example, there is a Memorandum which the Respondent confirmed was approved and sent to Regional Office for signatures. Furthermore, he failed to submit the investigation report he testified that the Acting Human Resource Development Deputy Director rejected. The same was tested in cross –

examination. This renders the record he wants to rely on for the Respondent's failure to implement the Applicant's pay progression unreliable, inaccurate and incomplete. It is from this background that I find the hearsay evidence inadmissible.

[25] In addition, the Respondent failed to give justifiable and acceptable reasons given by "Nyapotse" which deprived the Applicant of his Constitutional right. There is no shred of evidence to support the Respondent's capricious actions against the Applicant.

[26] During cross-examination, the Respondent agreed that there were no instances where the moderation committee's outcome was overruled by management. That on its own makes the Respondent's omission grossly unfair and unconstitutional. Furthermore, the Respondent failed to lead evidence whether the salary and grade progression was discretionary. On the contrary he clarified that this policy was applicable to all employees of the Respondent. This evidence suggests that the Applicant derived his right for benefits from policy. "Nyapotse" had no right to deny the Applicant this right as he also remained subordinate and subject to rules and policies of the Respondent. The only difference between "Nyapotse" and the Applicant was that he was employed in a more glorified position than the Applicant. On a balance of probabilities I find that the Respondent committed an unfair labour practice against the Applicant.

[27] In awarding compensation, I considered the delay it took to have the matter finalised, and that the Respondent failed to give *prima facie* evidence for their failure to implement the Applicant's pay and grade progression. I also reflected on the impact the prolonged non-implementation and the Respondent's failure to justify it had on the Applicant. It probably impaired his dignity, humiliated him and impacted negatively on his livelihood.

[28] I order the Respondent, Department of Correctional Services, pay the Applicant, Khanyisa Mngezana an amount of **R 29 031.66** and also implement his salary and grade progression from year of omission 2015.

[28] It is from this background and to censure the Respondent's unfair conduct that I find five (5) months compensation equitable and fair. The five months is to be calculated as follows:

R 222 063.00 per annum / 12 months = **R 18 505.25** x 5 months = **R 92 526.25**

TOTAL = R 29 031.66 + R 92 526.25 = R 121 557.91

AWARD:

- [29] The Respondent, **Department of Correctional Services**, committed an unfair labour practice against the Applicant, **Khanyisa Mnghezana** by failing to implement his pay progression.
- [30] The Respondent, **Department of Correctional Services**, is ordered to implement the pay and grade progression of the Applicant, **Khanyisa Mnghezana** retrospectively from 2015.
- [30] The Respondent, **Department of Correctional Services** is ordered to pay the Applicant, **Khanyisa Mnghezana** an amount of **R 121 557.91** on **30 November 2021**.



Name

Dineo Palesa Selelane

Arbitrator

General Public Service Sector Bargaining Council