

JURISDICTIONAL RULING

Panellist/s: Leonard van Leeuwen
Case No.: GPBC 1783/2021
Date of Ruling: 10 April 2021

In the MATTER between:

PSA obo Vilakazi, E
(Union / Applicant)

And

Department of Water and Sanitation
(Respondent)

Details of Hearing and Representation

1. The Arbitration Hearing with regards to an Unfair Labour Practice dispute in relation to promotion, referred in terms of Section 186(2)(a) the Labour Relations Act 66 of 1995, as amended ("LRA") was held by means of Virtual platform, on 31 March 2022.
2. The Employee, Mr Vilakazi, E (hereinafter referred to as the Applicant), was present and represented by Mr Flip van Der Walt a Union Official from the Public Servants Association (PSA). The Employer, The Department of Water and Sanitation (hereinafter referred to as the Respondent), was represented by Mr Ngobeni.
3. The proceedings were held in English and isiZulu and was both digitally and manually recorded. Interpretation services were rendered by Mr Daniel Jiyane and accredited Bargaining Council Interpreter.
4. The Respondent at the commencement of the Arbitration raised a point *In Limine*, stating that the Bargaining Council does not have the required jurisdiction to determine the matter based on the following point:
 - The referral is late as it was made outside of the required time frame and as such the Bargaining Council does not have jurisdiction to determine the dispute until such time as the Applicant had applied for condonation for the late referral of a dispute and such condonation had been granted.
5. It is common cause that that the Applicant referred an Unfair Labour Practice dispute regarding promotion to the Bargaining Council on 29 October 2021. The conciliation took place on 23 November 2021 but the matter remained unresolved and a certificate indicating that the matter could proceed to arbitration was issued where after the Applicant on 29 November 2021 submitted a request for arbitration.

Issue to be decided:

6. I am required to determine whether the Bargaining Council has the required jurisdiction to determine the dispute.

Parties' Submissions:

Documentary

7. Only the Applicant submitted documentation in support of their submission.

Respondent's Submissions

8. The Applicant lodged a grievance on 25 May 2021 in which he indicated that he had become aware of the issue in dispute on 15 February 2021.
9. They responded to him on 02 August 2020 indicating to him that his grievance is out of time as he had to lodge a grievance within 90 days and as a result they could not entertain the grievance.
10. Central operations however did compile a submission to head office regarding the matter pertaining to the Applicant and they are currently busy with an investigation trying to determine how he was omitted when drivers were upgraded from salary level 3 to 4.
11. As he was aware of the issue in February 2020 his referral is late and as a result the Bargaining Council lacks jurisdiction.

Applicant's Submissions

12. There is no need to apply for condonation as the matter relates to salary and is ongoing as the Respondent had upgraded all drivers and operators from salary level 3 to 4 in September 2019.
13. The issue is ongoing as the Applicant is every month still receiving the incorrect salary.
14. There were numerous verbal communications between the Applicant and his supervisor. He only received feedback from the Respondent in August 2020. Parties had then agreed to extend the grievance period to end November to await feedback on the submission that were made but to no avail.

Analysis of Submissions of Parties

15. In coming to a decision, I have taken regard of the brief oral submissions by both parties as well as the documentary evidence submitted.

16. The issue of whether the Bargaining Council has the jurisdiction to determine the Dispute is dealt with in terms of Rule 20 of the Rules for the Conducting of Proceedings before the General Public Service Sector Bargaining Council.
17. Jurisdiction is a legal concept which refers to, whether a Court or in this instance the CCMA / Bargaining Council can entertain a matter that has been brought before it. To decide whether a forum has jurisdiction to hear and decide a matter, the following must be determined:
 - Who are the parties involved in the Dispute and do they have the right of appearance in the forum in which they find themselves?
 - What is the cause of action; the nature of the dispute?
 - Where did the cause of action or Dispute arise?
 - When did the cause of action arise?
18. In this instance, the question that is to be asked is: When did the cause of action arise?
19. It was held in ***Bombardier Transportation (Pty) Ltd v Lungile Mtiya NO & Others (2010) 8 BLLR 840 (LC)***, that if a jurisdictional issue has not been dealt with at Conciliation, it must be dealt with at the Arbitration and a binding decision be taken through leading of evidence. It further held that a Certificate of outcome does not confer jurisdiction.
20. In ***IMATU and others v City of Johannesburg and other [2014] 6 BLLR 545 (LAC)*** the Court held that jurisdiction is a matter of law. This implies that a commissioner can entertain a jurisdictional point regarding the late referral for conciliation even at arbitration, even when a certificate has been issued. This was also confirmed by the Court in ***SAMWU obo Manentza v Ngwathe Local Municipality and others [2015] (LAC)***.
21. It is common cause as stated previously that a dispute was referred on 29 October 2021 and that the conciliation was held on 23 November 2021 and that both parties attended the said conciliation which remained unresolved. It was the Applicant's submission that the Respondent failed to raise the issue regarding jurisdiction at the conciliation. The Respondent did not give any reason as to why it failed to raise the issue at conciliation that the referral was late. This however does not preclude them from raising this at arbitration as it is a matter of whether the Bargaining Council has jurisdiction or not.

22. It was the Respondent's submission that the Bargaining Council lacks jurisdiction to determine the Dispute as the Applicant's referral was late and that he first had to apply for condonation of the late referral and such lateness had to be condoned before the Bargaining Council would have jurisdiction to determine the dispute.
23. In terms of section 191(1)(b) (ii) of the LRA a dispute relating to an unfair labour practice must be referred within 90 days of the date of the act or omission that constitutes an unfair labour practice, or within 90 days of the date on which the Applicant had become aware of the act or occurrence.
24. It is common cause that the Applicant had become aware of the alleged unfair Act or omission on 15 February 2020 and that he on 25 May 2020 submitted a grievance in this regard. It is also further common cause that he received feedback with regards to the grievance on 02 August 2020 in which the Respondent had indicated that they were unable to resolve the dispute as his grievance was submitted late namely outside of the 90-day period.
25. On a strict interpretation of section 191(1)(b)(ii) of the LRA it appears that the Applicant had to refer the dispute to the Bargaining Council before 16 May 2020 as he had become aware of the act or omission on 15 February 2020 and as a result it would then have been referred outside of the said time frame as it had only been referred on 29 October 2020.
26. PSCBC Resolution 14 of 2002 deals with the Grievance Rules for the Public Service as contained in bundle "R" and Part C: Grievance Resolution Levels states that should the grievance in relation to an unfair labour practice not be attended to within 30 days the aggrieved employee has the right to refer the matter to the relevant sectoral council to deal with it in terms of the dispute resolution procedures. If one should take this into consideration and work from the assumption that he should have referred, it within 90 days from the expiry of the 30 days since he had lodged the grievance which would have been 25 June 2020 as he submitted a grievance on 25 May 2020. As a result, he then had to refer the dispute before 25 September 2020 which would still render the referral late.
27. It is however the Applicant's submission that the dispute was ongoing as it is relating to him allegedly not being upgraded from salary level 3 to 4 after the Respondent had had decided to upgrade al driver and operators to level 4 in September 2019. The upgrading from one salary level to another in essence entails a salary dispute which is thus ongoing for as long as the Respondent fails to correct his salary level which results in him being paid the incorrect salary.

28. The Respondent in their submission conceded that they in spite of claiming that his grievance was submit late instituted an investigation as to determine why the Applicant was not upgraded together with all the other employees in this category and that they are still waiting for the finalization of the said investigation.
29. From the Applicant's grievance which is contained on page 10 of the Applicant's bundle he clearly states that prior to having submitted the grievance he had engaged his supervisor with regards to his upgrading / salary issue which intern informed him that a submission had been made by HR to Head office in December 2019 and that they are still waiting feedback. From this it is clear that the Applicant had not been idle but had at all times being pursuing the issue. It is further also confirmed on page 11 of the Applicant's bundle that parties had agreed to extend the grievance period to the end of November 2020 to await feedback on the submission that had been made.
30. An upgrade from one level to another entails that the Applicant would then earn a higher salary.
31. The issue in ***National Home Builders Registration Council v NEHAWU obo Siza Nghulele and others [2016] LC (JR2026/13)*** was an unfair labour practice dispute relating to promotion in 2013 in which he claimed his advancement to grade 5 should have taken effect on 11 May 2010. The Court in its judgment referred to the matter of ***SABC Ltd V CCMA & others [2010] (LAC)*** in which the Court stated the following.
- "While an unfair labour practice/ unfair discrimination may consist of a single act it may also be continues, continuing or repetitive."*
32. The Court found that although the employees claim to higher grading and remuneration was squarely based on the applicability of the Applicant's career path and retention Strategy for Technical Staff policy, the principal of the continues nature of the alleged unfair labour practice in its view was similar in nature to the SABC case and accordingly found that he was entitled not just to raise the claim within 90 days of not receiving the advancement but for as long as he was denied it.
33. Further the said Court having regard ***to Appolo Tyres SA (Pty) Ltd v Commission for Conciliation, mediation & Arbitration & others*** found that a dispute in the form of an upgrading could constitute an unfair labour practice dispute relating to promotion.
34. The case in ***Mandla Lionel Mngadi v Garth Jenkin No and Others [2020] LAC (DA7/2019)*** was in relation to an unfair discrimination dispute referred in terms of the Employment Equity Act in terms of

section 10 of the Act alleging discrimination on an arbitrary ground. He claimed that he was discriminated against as he was paid less than his subordinates and does not qualify for certain benefits since his promotion in 2008. He only referred the dispute in 2016. The Applicant in this matter again with approval referred to the case of **SABC Ltd v CCMA and Others** and stated that there was no need for condonation as the matter related to remuneration and benefits and was ongoing. The Labour Court and Commissioner held that condonation was required for the late referral of a dispute, but the Court disagreed as it was of the view that both had failed to appreciate the Applicant's argument that the dispute was ongoing or repetitive and found having regard to the matter of **SABC Ltd v CCMA and others** that the dispute was ongoing and or repetitive at least in relation to the payment of his salaries.

35. Having regard to the above, I subsequently find that the Applicant's dispute is similar in nature as the cases referred to above as it relates to the failure of the Respondent to remunerate the Applicant on the correct salary level and as such it is ongoing or repetitive in nature for as long as the Respondent continues to pay the Applicant on the wrong or incorrect salary level and as such find that there is no need for condonation and as a consequence that the Bargaining Council does have the required jurisdiction to determine the dispute.

36. I make the following ruling.

Ruling

37. The Bargaining Council does have the jurisdiction to determine the Dispute.

38. The Bargaining Council to reschedule the matter for arbitration.

Signed and dated at **Emalahleni** on this the **10TH** day of **April 2022**.



Leonard van Leeuwen

Panelist

