

# ARBITRATION AWARD

Panelist: RG Pieterse \_\_\_\_\_  
Case No.: GPBC1561-2021 \_\_\_\_\_  
Date of Award: 10 July 2022 \_\_\_\_\_

## In the ARBITRATION between:

MJ Feni \_\_\_\_\_

(Union obo Applicant)

and

Presidency \_\_\_\_\_

(Respondent)

**Union/Applicant's representative:** Andre Eagar \_\_\_\_\_

Union/Applicant's address: \_\_\_\_\_

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**Respondent's representative:** Adv K Moodley \_\_\_\_\_

Respondent's address: Presidency \_\_\_\_\_

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## **DETAILS OF HEARING AND REPRESENTATION**

- [1] This is the award in the arbitration between MJ Feni, (hereinafter referred to as the Applicant) and the Presidency, (hereinafter referred to as the Respondent) that was held on 04 February 2022, 25 February 2022, 22 April 2022, and 03 June 2022 via the virtual platform, Zoom.
- [2] The arbitration was held under the auspices of the General Public Service Sectoral Bargaining Council (GPSSBC) in terms of section 191 of the Labour Relations Act 66 of 1995 as amended (LRA) and the award is issued in terms of section 138(7) of the LRA.
- [3] This award is not intended to be a verbatim transcript of the evidence led at the arbitration hearing but rather a determination with brief reasons for such determination.
- [4] Evidence relevant to the determination or to support any of the elements of fairness as required may be referred to. This however does not mean that I failed to consider other evidence or ignored such evidence in coming to my decision.
- [5] The arbitration was a virtual hearing. The Applicant was represented by Mr. Andre Eagar, an official from the Public Servants Association (PSA), and the Respondent was represented by Adv K Moodley, instructed by the State Attorney.
- [6] The Applicant submitted their heads of argument on 08/06/2022 and the Respondent submitted their heads of argument on 13/06/2022. I also requested the parties to submit supplementary arguments on the issue of the submission dates.

## **ISSUE TO BE DECIDED**

- [7] The issue is whether the Respondent committed an unfair labour practice relating to benefits by not paying the Applicant his incentives for the 2019/2020 performance cycle.

## **BACKGROUND TO THE ISSUE**

- [8] The applicant is an employee of the Respondent and holds the position of Chief Director: Corporate Services, salary level 14.

- [9] The Applicant is a Senior Management Service (SMS) member and the SMS Handbook, as published by the Department of Public Service and Administration applies to the Applicant.
- [10] He reports to the Deputy Director-General: Corporate Management (DDG).
- [11] The SMS Handbook requires SMS members and the Supervisor to submit the mid-year review on or before 30<sup>th</sup> November annually.
- [12] The Applicant submitted his mid-term review on the 28<sup>th</sup> of November 2019 via messenger and it was delivered to the office of the DDG on the 29<sup>th</sup> of November 2019.
- [13] On 25<sup>th</sup> March 2019, the Applicant was informed by the Respondent that his performance for the 2019/2020 performance cycle was highly effective; however, he forfeited his performance bonus and other benefits because of his alleged failure to submit his mid-term review on time.
- [14] The Applicant lodged a grievance in April 2021 which was investigated and dismissed in August 2021.

## **SURVEY OF EVIDENCE AND ARGUMENT**

### **APPLICANT'S CASE**

#### **MJ Feni**

- [15] The Applicant testified that he submitted his mid-term review on the 28<sup>th</sup> of November 2019 via messenger and it was delivered to the office of the DDG on the 29<sup>th</sup> of November 2019.
- [16] He testified that he complied with the provisions of the SMS Handbook.
- [17] The Applicant testified that he lodged a grievance in April 2021 which was investigated and subsequently dismissed in August 2021.
- [18] The Applicant testified that he disputes paragraph 6.2 of the investigation report which states that the DDG did not have enough time to apply her mind to the contents of the mid-term review of the Applicant. He testified that he sent the review to the office of the DDG on the 28<sup>th</sup> of November 2019 and could not foresee that it would only be received by the DDG the following day.

- [19] The Applicant testified that his mid-term review was sent back to him on the 2<sup>nd</sup> of December 2019 for more motivation.
- [20] He further testified that his mid-term review never reached the Directorate: OD by the 29<sup>th</sup> of November 2019, but he was not aware of that at the time.
- [21] He further testified that his mid-term review was still in the office of the DDG by the 7<sup>th</sup> of July 2020 despite him having submitted the additional motivation as requested.
- [22] The Applicant testified that he agrees with paragraph 9.3 of the report in respect of the shared responsibility to submit the assessment by the 30<sup>th</sup> of November each year and that there were no discussions between himself and his supervisor, however, he testified that the onus was on his supervisor to engage him timeously if she had any concerns.
- [23] The Applicant testified that he did motivate his scores above 3.
- [24] The Applicant disputed the findings in paragraph 9.6 which states that he failed to submit a motivation for scores above 3.
- [25] The Applicant further testified that SMS members are not moderated on the mid-term assessments, but only on the year-end assessments and the submission of the mid-term assessment was merely for compliance purposes.
- [26] He testified further that it was unfair for the DDG to delay attending to his assessment timeously as he already submitted it on the 28<sup>th</sup> of November 2019.
- [27] The Applicant testified that it was unfair to deny him his performance benefits as he was not responsible for the delays.
- [28] During cross-examination, the Applicant reiterated that he had indeed motivated his scores above 3 and according to him it was sufficient. He continued to testify that; his supervisor was of the view that the motivation was insufficient and upon receiving the e-mail from the office of the DDG on the 2<sup>nd</sup> of December 2019, he expanded on the motivation already submitted on the 3<sup>rd</sup> of December 2019.

- [29] He testified that he could not have submitted his mid-term review a month earlier as he was working on the inauguration of the President and he was involved in the arrangements for this event.
- [30] He testified that it was up to the DDG to set up an appointment with him if she was not in agreement with his review and the onus was on the DDG to submit his assessment in time to the Directorate: HRM.
- [31] He further testified during cross-examination, that, in the event of the supervisor not being satisfied with his scores, she could have reduced the scores and submitted them to Director: HRM. Had the DDG done that, he would not have been prejudiced with such an action, because the SMS members do not get moderated on the mid-term reviews, but only on year-end reviews.
- [32] He testified that the responsibility to submit his assessment to HRM rested on the DDG (supervisor) and not with the Applicant (the employee).

**Nazeem Mahatey**

- [33] This witness testified that he was a Chief Director at the same level as the Applicant and he had been in the Presidency for quite some time and reported to the DDG: Corporate Management, the same supervisor as the Applicant.
- [34] He testified that SMS members are required to submit a mid-term performance assessment by 30 November each year followed by an annual assessment by 31 December annually.
- [35] He testified that there is a practice in the Department that SMS members would normally submit their mid-term performance assessment by 30<sup>th</sup> November each year and thereafter the supervisors would sign the assessments and submit them to the Directorate: OD (HRM).
- [36] He further testified that for scores of 4, there needs to be a motivation or portfolio of evidence.
- [37] He also testified that the DDG also failed to submit his performance assessment timeously after which he received a warning, but he elected not to dispute it then.

## **RESPONDENT'S CASE**

### **Ms. Matsietsi Mekoa**

- [38] The witness testified that she is the DDG: Corporate Management at the Presidency and her duties are performance, managing and coordinating management systems, and supervision and coordination of performance-related matters for all Chief Directorates.
- [39] She has been the supervisor of the Applicant since 2018.
- [40] She testified that HR will send notifications to the SMS members through i-notices and management committees of the assessment periods where they discuss timelines and the submission dates.
- [41] She testified that, if a member scores himself/herself higher than 3, in other words, a 4, the member exceeded the requirements of the job and it is mandatory to submit a portfolio of evidence to justify the a score of 4.
- [42] She testified about the SMS Handbook to wit clause 12.3.2 that states, the SMS member and the supervisor must finalize and submit the mid-term review to HRM on or before 30 November annually.
- [43] She continued to testify that she receives the assessments and then goes through the scoring and the motivations which the members have submitted and if there is an issue, she will call them in to have a discussion and finalize the issues before they can be submitted to HRM.
- [44] She testified that the 30<sup>th</sup> November 2019 fell on a Saturday and therefore the reviews were due on the 29<sup>th</sup> November 2019.
- [45] She received the mid-term review of the Applicant on the last day, which is the 29<sup>th</sup> of November 2019.
- [46] She testified that, in terms of the PMDS, if the score is a 4, the member needs to provide a profile of evidence or a detailed motivation to justify the score of 4.
- [47] The witness testified that she was not provided additional motivation to justify the scoring of 4 and he was sent feedback on Monday, 2<sup>nd</sup> December 2019. The Applicant submitted the additional information on Tuesday, the 3<sup>rd</sup> of December 2019.
- [48] According to her testimony, the mid-term review was therefore incomplete because the Applicant did not provide additional motivation or a portfolio of evidence.

- [49] She testified that she did not have enough time to go through the review to satisfy herself that the rating was justified. She was not given sufficient time by the Applicant as he submitted the review on the last day.
- [50] She stated that the supporting evidence submitted by the Applicant was merely a few sentences and not enough to justify the scoring of 4. The motivation provided by the Applicant was sufficient if he scored himself a 3, but not sufficient for scoring of 4.
- [51] She confirmed in her testimony that the review was not submitted to HRM before the due date because when she submits to HRM, she is confirming concurrence to the documents and not just submitting for the mere fact of submitting.

### **Sydney Mashiloane**

- [52] Mr. Mashiloane is a Director for Organizational Development.
- [53] He testified that any score above 3 in a mid-term review must be supported by a portfolio of evidence or additional motivation in terms of Chapter 4 of the SMS Handbook, clause 14.1. Without an additional motivation or a portfolio of evidence, the review is incomplete.
- [54] He continued to testify that the Applicant's review was incomplete as it lacked additional motivation to justify the scoring of 4, it can only be sufficient for a scoring of 3, but not for a scoring of 4.
- [55] In respect of the grievance of the Applicant, he testified that the outcome of the grievance was fair as the Applicant submitted an incomplete review.
- [56] In respect of the warning, he testified that the warning was fair because the Applicant did not comply with the SMS Handbook and any non-compliance will be met with a disciplinary sanction.

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

- [57] It is common cause that the mid-term reviews need to be submitted no later than the 30<sup>th</sup> of November each year in terms of the SMS Handbook, clause 12.3.2.
- [58] It is also common cause that the applicant did submit the 2019/2020 mid-term review before the 30<sup>th</sup> of November to his supervisors. He submitted the review on the 28<sup>th</sup> of November 2019 which was received by the DDG on the 29<sup>th</sup> of November 2019.

- [59] The applicant submitted a grievance in April 2021 and the grievance was dismissed in August 2021.
- [60] The Applicant's case is that he submitted his mid-term review in time, in other before the 30<sup>th</sup> of November and that he did provide additional information for the scores above 3.
- [61] The Respondent's case is that although the review was submitted on the 28<sup>th</sup> of November and received by the DDG on the 29<sup>th</sup> of November, it was not sufficient time for her to apply her mind properly to the review and the Applicant did not provide additional motivation for the scores above 3, therefore the review was incomplete.
- [62] What struck my mind is that nowhere in the SMS Handbook does it make any mention that the review needs to be submitted earlier than the 30<sup>th</sup> of November to enable the Supervisor to go through it, although the Respondent can request from the SMS members to submit earlier but in this case the Respondent did not, they merely informed and reminded the SMS members to submit their reviews on time, in other words before the 30<sup>th</sup> of November. The Applicant was thus in time with his submission and did comply with the provisions of the SMS Handbook. The DDG in her testimony made it clear that they did not inform the SMS members previously to submit their reviews earlier than the 30<sup>th</sup> of November, but they realized the "loophole" as she referred to it and they only now started to request the SMS members to submit the reviews earlier.
- In other words, there is a loophole (as she referred to it), and the loophole was never addressed. They realized the loophole later and started to address the loophole by requesting members to submit their reviews earlier. The Applicant is not the drafter or the author of the SMS Handbook and any "loopholes", uncertainty, or vagueness in the SMS Handbook can certainly not be interpreted against the Applicant. If there is any vagueness or "loopholes" for that matter, it should be interpreted against the drafter or the author of the SMS Handbook.
- [63] The Applicant was informed on the 2<sup>nd</sup> of December via e-mail from Katlego Shilakwe that "Kindly note the DDG has noted that you have submitted the mid-terms review and where scores have exceeded 3, motivation had not been provided". What strikes my mind, is that nothing was said in this e-mail that the review was submitted late or that the DDG did not have enough time to attend to the review.
- The Applicant then submitted more information on the 3<sup>rd</sup> December 2019. The Respondent argued that the Applicant did not submit the additional information required for scores above 3 and that the Applicant only did that after he was alerted to that on the 2<sup>nd</sup> of December and that is why he submitted the additional information on the 3<sup>rd</sup> of December. There are no set criteria of what "additional information" should be like. In other words, what constitutes additional information seems to be a broad



concept and wide open for interpretation and debate.

In this case, the Applicant argued that he did submit additional motivation for his scores above 3.

In other words, since there are no set criteria of what additional motivation should be like, how can the Respondent say the information provided was not additional motivation in terms of the provisions of the SMS Handbook but merely a few sentences? Did the Respondent measure the information provided by the Applicant against a certain criteria or a standard to come to that conclusion?

[64] Looking at paragraph 9.2 of the investigation report, it states "The investigation established that the said Midterm assessment was referred back to Mr. Feni for more motivation on 02 December 2019." It does not state the assessment was sent back to submit additional information or that no additional motivation was submitted by the Applicant in the first instance; it says it was referred back for more motivation. This, in my view, means that the Applicant needs to supplement the additional information already submitted. If the Applicant did not submit additional information at all, the investigation report would have revealed that, but that is not what is stated in the investigation report. The investigation report stated that more motivation was needed; hence the assessment was sent back to the Applicant to merely supplement his additional motivation. The evidence of the witnesses of the Respondent is that the Applicant did not submit additional information at all to support the scores of 4. I do not agree with that.

[65] There is a difference between not submitting additional motivation at all and submitting insufficient additional motivation. It is my considered view that the argument of the Respondent that the Applicant did not submit his additional motivations is incorrect. The Applicant did submit his additional information or motivation on the 28<sup>th</sup> of November and, on the 3<sup>rd</sup> of December, he merely supplemented the additional motivation already provided. The Applicant testified that he did submit additional motivation for his scores above 3. I do not believe that the mid-term review was incomplete because there was no additional motivation as argued by the Respondent.

[66] Dealing with the issue of who has to submit the review to HRM, is it the Applicant or the Supervisor, or both of them? Certainly, they cannot do it both, there needs to be only 1 person who will finally submit to HRM and in my view, it would be the supervisor, it cannot be otherwise.

[67] I am convinced that the Applicant submitted his 2019/2020 mid-term review in time and before the due date, which is 30<sup>th</sup> November annually.

[68] The Applicant was unfairly denied his performance incentives for the performance cycle 2019/2020.

[69] The Respondent committed an unfair labour practice in terms of Sect 186(2)(a) of the LRA by not paying the Applicant, a performance bonus for the 2018/2019 and 2019/2020 performance cycles.

**AWARD**

[70] In the premises I make and deliver the following award:

[71] The conduct of the Respondent by withholding the Applicant's performance incentives for the performance cycles of 2019/2020, constitute an unfair labour practice in terms of section 186(2)(a) of the Labour Relations Act.

[72] The Respondent is hereby ordered to pay the Applicant as follows:

Performance bonus which is 2% of the Applicant's salary notch in 2019/2020.

$2\% \times R\ 1\ 308\ 345 = R\ 26\ 166,90.$

Pay progression: New salary notch of R132 974 per annum with effect from 1 April 2020.

[73] The amount to be paid for the 2019/2020 performance cycle is R26 166.90.

[74] The Respondent is ordered to pay the amount referred to in paragraph [72] above to the Applicant not later than 29<sup>th</sup> July 2022.

[75] There is no order as to costs.



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Panellist: RG Pieterse