



**IN THE GENERAL PUBLIC SERVICE SECTORAL BARGAINING COUNCIL**

**Held Virtually**

**Commissioner: Tau Hlongwane**

**Case No.: GPB1507/2021**

**Date of Award: 05 January 2022**

**In the Dispute between:**

**PSA obo Thenga & 5 Others**

(Union/Applicant)

AND

**DEPARTMENT OF CORRECTIONAL SERVICES**

(Respondent)

**Union/Applicant's representative: Mr Archie Sigudla**

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**Respondent's representative: Mr Lawrence Moela**

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## ARBITRATION AWARD

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### **PARTICULARS OF PROCEEDINGS AND REPRESENTATION**

1. The Arbitration was scheduled for one day, the 25<sup>th</sup> November 2021. Parties agreed to submit written arguments. The Respondent was represented by Mr Lawrence Moela, an Employee Relations Manager employed by the Respondent. The Applicant was represented by Mr Archie Sigudla, a Union Official from PSA.
2. The parties were allowed to cross-examine and re-examine witnesses during the presentation of their evidence as well as present closing arguments at the close of the arbitration. For the sake of brevity, the details of this will not be repeated in the award, but it should not be construed that it was not considered.
3. In addition, it is a requirement of the Labour Relations Act in section 138(7)(a) that the commissioner must issue an arbitration award with brief reasons, signed by that commissioner at the conclusion of the arbitration.
4. For this reason, only the salient points will be mentioned in the award. It is to be noted further, that despite this the submissions have been considered in detail in the writing of the award.

### **THE ISSUE IN DISPUTE**

5. Whether or not the Respondent conduct in appointing the Applicants at salary level 5 instead of salary level 7 was fair.

### **BACKGROUND TO THE DISPUTE**

6. The Applicants are Tshilisanani Thenga, Boipelo Dinga, Johanna Chaba Setho, Steven Mkhali Mthombeni, Mmakosha Debora Phetla, Motsatsi Victoria Rabothata.



7. The Applicants are employed in various positions within Baviaanspoort Management, within the corporate section.
8. The positions were created at salary level 7. Positions were advertised at salary level 5. The Applicants were appointed at salary level 5.
9. The dispute is about Unfair Labour Practice (Benefits) in terms of Section 186(2)(a).

## **SUMMARY OF EVIDENCE AND ARGUMENT**

### **EVIDENCE**

#### **The Applicant's evidence**

**The Applicant called the first witness who testified after having been duly sworn in.**

**Mr Tshesenani Thenga, who is an Applicant in the 1<sup>st</sup> instance, testified as follows:**

10. The Applicant is employed by the Respondent as an HR Clerk and resumed duties on the 01 August 2014. After appointment the Applicant was informed that the position the Applicant occupies is at level 7 and not salary level 5. Subsequent to the awareness, a grievance was lodged in 2014 through POPCRU, the Applicant's trade Union at the time. The matter was escalated to GPSSBC and was dismissed. A second grievance relating to the same issues was lodged in 2021 which is subject to this dispute.
11. The Applicants were employed in terms of Public Service Act of 1994 and not in terms of the Correctional Services Act. Salary advises of Ms Rabothata who is one of the Applicants reflected being appointed at salary level 7 in terms of the job title and was later changed to salary level 5 job title. There was no job evaluation done after appointment. The Applicants applied for a level 5 position, acknowledged and accepted the offer. The Respondent unilaterally changed information on the post establishment and downgraded it from level 7 to level 5

**The Applicant called the second witness who testified after having been duly sworn in. Mr Motlatsi Victoria Rabothata, who is an Applicant, testified as follows:**

12. The Applicant was employed by the Respondent since 01 September 2016 as a Clerk investigations, and currently at salary level 5. The Applicant's post was downgraded to salary level 5 by the Respondent. The Appointment letter reflects the Applicant as a Clerk investigator while the salary advise reflects the Applicant as an AO investigator. Investigators at Employee



Relations are at salary level 7. Mr Matshidza and Mr Fhedzisani are investigators and are at salary level 7, working at Employee Relations and Investigations doing the same duties. Where there is downgrading cannot be done before job evaluation is done.

13. Since the appointment the code allocated was for salary level 7, and the changes thereof was made in March 2019 wherefore the Applicant was never paid for the initial code of salary level 7.
14. The Applicant is a successor of a person who occupied the Applicant's position at salary level 7. GPSSBC Resolution 2 of 2009 directs the Respondent that entry level position for Correctional Officers should be level 5 in line with Correctional Services Act. The Applicants are not employed in terms of Correctional Services Act but in terms of Public Service Act. There was no Response on the Applicants grievance requesting to be placed on the correct salary level.

**The Applicant called the third witness who testified after having been duly sworn in. Ms. Mmakosha Deborah Phetla, who is an Applicant, testified as follows:**

15. The Applicant is employed as an HR Personnel Clerk since 01 March 2016. The Applicant lodged a grievance after appointment on the post advertised at level 5 and on the system the post is graded at level 7. Prior to appointment the Applicant was on an internship program from 2014 to 2016, which post prior to application was advertised at salary level 5.
16. The Applicant lodged a grievance assisted by POPCRU, which matter was escalated to the GPSSBC and dismissed for jurisdiction. The Respondent did not follow the required procedure prior to downgrading the post from level 7 to level 5.

### **The Respondent's evidence**

**The Respondent called the first witness who testified after having been duly sworn in.**

**Ms. Uzelda Ketu Montshitshi, testified as follows:**

17. The witness occupies a position of Assistant Persal Controller.
18. Personnel in the Department is based on the structure of the Department, which structure is budgeted and funded. The posts were downgraded due to cost containment to meet budgetary requirements. The posts were advertised at level 5 to ensure that costs are managed. The process of advertising was fair and appointment procedures were followed. The Respondent has a prerogative to advertise the position that the Respondent deems it appropriate at a particular level. Codes refers to the naming of the post. It is a classification of the post, not a salary level of



the post. The prerogative of pitching the salary level of the post rest with the Respondent. AO is an abbreviation for Administration Office. No post can be advertised without the approval of the DPSC, and the posts in question were approved by the DPSC.

### **ANALYSIS OF EVIDENCE AND ARGUMENTS**

19. In terms of section 191(1)(b)(ii) states that: *referral must be made within 90 days of the day of the act or omission which allegedly constitutes the unfair labour practice or, if it is a later date, **within 90 days of the date on which the employee became aware of the act or occurrence.***
20. I have noted discrepancies after the Applicants submissions on the date of the dispute being the 16 August 2021, while from the witnesses' submissions the Applicants became aware of the omission long before the 16 August 2021. In the survey of evidence post the hearing, I established that there is no condonation ruling for late referral. The matter of jurisdiction was not canvassed by either party before and after evidence has been submitted. Based on the long history of the dispute, and that is a collective dispute for ULP, also that the dates the six Applicants became aware differs from one to the other and in the interest of justice, I elected on my own accord not to address the jurisdictional point of late referral to conciliation in my award.
21. *Section 186(2)(a) of the LRA as amended defines an Unfair Labour Practice 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, (excluding disputes about dismissals for a reason relating to probation) or training of an employee or relating to the **provision of benefits** to an employee;*
22. In order to determine the unfairness of the conduct or omission, a determination of an objective standard is required. A conduct should be guided by a right acquired through legislation, contract of employment, policies and practice and or a collective agreement.
23. In this case the Applicant acquired rights through contract of employment, and according to both the Applicant and the Respondent, the dispute is the dispute of right emanating from the contract of employment that the Applicant has willingly accepted the offer, and such offer established the rights giving way to the benefits attached thereof. The salary level on the advert and the offer has always been at level 5. It is at the Applicant's interest that should have advertised the posts at salary level 7. However, the Respondent had only budgeted for salary level 5 for all six posts, and the latter was not disputed.
24. The Applicants had an option to decline the offer. The Applicants accepted the offer.
25. There is a comparison by the Applicant's 2<sup>nd</sup> witness of fellow employees occupying similar position and or performing similar duties are irrelevant on this dispute as the conditions and background of appointment differs.
26. This real dispute is not about the existence of an acquired right. The real dispute is about a creation of a new right which is a dispute of interest and not a dispute of right.



## AWARD

27. The Respondent proved the fairness of its conduct.
28. The claim for unfair labour practice relating to benefits is dismissed.
29. There is no order of costs.
30. The matter is finalized.



**GPSSBC Commissioner: Tau Frans Hlongwane**