

July



GENERAL PUBLIC SERVICE
SECTOR BARGAINING COUNCIL



Physical Address:
260 Basden Avenue,
Lyttelton, Centurion,
Pretoria

Postal Address:
PO Box 16663,
Lyttelton, 1040

Tel: 012 664 8132
Web: <http://www.gpssbc.org.za>

ARBITRATION AWARD

Panellist/s: Advocate Dorothy Khosa
Case No.: GPBC1424-2021
Date of Award: 7 July 2022

In the ARBITRATION between:

PSA OBO Petunia Parasi

(Union / Applicant)

and

Department of Economic Development, Gauteng Province

(Respondent)

Union/Applicant's representative: Ms Yolanda Ralawe

Respondent's representative: Ms Mamello Makhele

ARBITRATION AWARD

DETAILS OF HEARING AND REPRESENTATION:

1. The Arbitration was scheduled for a virtual hearing on 11 November and 1 December 2021, via the Zoom platform. The Applicant was present and represented by Ms Yolanda Ralawe ("Ralawe"), an official from the Public Servants Association of South Africa (PSA), on 11 November 2021. She did not attend the hearing on 1 December 2021 because Ralawe was sick and it was clear that the matter was not going to proceed. The Respondent was represented by Mr Peter Matli ("Matli"), its official.
2. The matter was further scheduled over several dates in 2022 on 24 January, 7 February, 19 April, 11 and 31 May. During these periods, the Applicant was represented by Ralawe and the Respondent by Ms Mamello Makhele because Matli had resigned. The proceedings were recorded both manually and electronically.
3. The Applicant shared its bundle at the initial stage of the hearing. There was no bundle from the Respondent. The Respondent's representative indicated that the Respondent was to use the Applicant's bundle. Therefore, both parties were to use a common bundle. Later the Respondent shared its bundle which was accepted. The proceedings then used bundles from both parties.

ISSUE TO BE DECIDED:

4. I must decide whether or not the alleged non-existence of the Applicant's performance agreement that should have been entered between her and the Respondent, was unfair or fair and/or constituted an unfair labour practice.

BACKGROUND TO THE MATTER:

5. The Respondent has a Performance Management and Development System (PMDS) which is utilised to manage performance of all its employees. This means that all government employees are expected to enter into a performance agreement with their line managers.

6. The Applicant occupies the position of Deputy Director, post level 11. She is also expected to enter into a performance agreement with her line manager. Therefore, her performance was to be monitored through the PMDS.
7. It is common cause that the Applicant did not have a performance contract signed between her and her line manager. Therefore, she was not assessed during the 2018/2019, 2019/2020 and 2020/2021 performance cycle. As a result, she was not eligible for pay progression and performance bonus during these cycles.
8. The Applicant's submission is that the Respondent failed to enter into a performance agreement with her. That also affected her pension and salary. The Respondent's submission is that the Applicant refused to enter into a performance agreement with her line manager. The refusal is a disciplinary matter.
9. At Arbitration, the parties were allowed to cross-examine and re-examine during the presentation of their evidence, as well as present closing arguments at the end of the hearing. Parties resolved to submit closing arguments on or before 13 June 2022. The Respondent's representative submitted the Respondent's closing arguments on the agreed date but the Applicant requested an extension and it was granted. The Applicant's representative submitted on 24 June 2022. 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.
10. In addition, it is a requirement of the Labour Relations Act, 66 of 1995, as amended ("LRA"), in section 138(7)(a), that the commissioner must issue an arbitration award with brief reasons, signed by the commissioner within 14 days of the conclusion of the arbitration.
11. 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.

SURVEY OF EVIDENCE AND ARGUMENT:

Evidence

The Applicant's bundle was marked A and the Respondent's marked B.

Applicant's Evidence

The Applicant called two witnesses who testified after having been duly sworn in.

Ms Petunia Parasi ("Parasi") testified as follows:

12. She is the Applicant in this case. She started working for the Respondent in March 2006 but from 1 April 2011, she was appointed to the position of Deputy Director: Operations at the Gauteng Liquor Board ("GLB"). She is responsible for, amongst others, administration within the licensing environment. She provides support to the finance unit and safe keeping of liquor licenses. She provides support to the GLB and manage stakeholder relationship.
13. The Respondent failed to conclude a performance contract with her. She approached her then line manager, Ms Mpho Mosing ("Mosing") about her performance contract not being signed. Mosing informed her that the chief director was to conclude one with her. That did not materialise and she lodged a grievance in May 2019 concerning this. She indicated that there being no signed performance agreements or being on suspension, she was not eligible for pay progression in 2011/2012, 2012/2013, 2017/2018, 2018/2019, 2019/2020 and 2020/2021.
14. During the 2018/2019 performance the Applicant stated that Mosing, her then line manager, indicated on the contract that she was not going to sign it and that she must contract with the Chief Director, Mr Raymond Martin ("Martin"). In his response, Martin indicated that Mosing should sign the contract with her. She was not sure why Mosing stated that but she is aware that their relationship was not fine and they did not view work operations the same way. She then lodged a grievance but it was not resolved. At the supposedly grievance meeting, Martin stated that Mosing did not sign the contract because the Applicant was performing functions of a post level 5, instead of 11. It must be noted that some of her quarterly reviews were not signed and reasons were not provided.
15. On 13 August 2018, the Applicant received a new performance agreement from Mosing. The Applicant discovered that the agreement had been changed and she was not provided with reasons for the changes. She then wrote to the then Director: Organisational Development, Ms Nkhensani Mabunda ("Mabunda") and Martin, and requested clarity. She requested a meeting between herself and them. Mabunda resigned before she could resolve the grievance. Ms Glory Makhubele ("Makhubele") acted in Mabunda's position but also failed to resolve the grievance.
16. On 27 February 2020 the Applicant received a letter from the Responded with alleged acts of misconduct and she was asked to furnish reasons as to why the Respondent should not take disciplinary action against her. She responded on 12 March 2020 and indicated that the grievances that she had lodged were not resolved. For example, reasons were not provided as to why Mosing was not willing to contract with her and why her job profile was

unilaterally changed by Mosing. The Applicant was never charged, even at the time of the arbitration hearing.

17. The Applicant was left redundant and her subordinates were not taking instructions from her. During the national lock down as a result of the COVID-19 pandemic, she was working from home and not allocated work to perform by her line manager. She was also not provided with tools to perform her duties. She stated that she took every step to make sure that she entered into a performance contract with her line manager. This has affected her pay progression, bonus payout and pension contribution. She was still on salary level 11 (notch 4). Had she not been subjected to the unfair treatment from her manager, she should have progressed to notch 11.
18. The working from home was gradually reduced and she went back to the office on 16 March 2022, like other employees. She reported to Mr F Manamela that she was not allocated duties. He then restored functions that were taken from her.
19. During cross examination, the Applicant stated that she had referred an alleged unfair labour practice: benefits dispute to the Council. The grievance that she lodged internally was about alleged unfair treatment that she was receiving from her line manager. The unfair treatment affected her notch and other benefits.
20. At re-examination, the Applicant stated that after she had sought assistance from the Organisation Efficiency unit ("OE"), the job description was prepared. She signed it but Mosing nor Martin failed to sign.

Ms Khanyiswa Nogomba ("Nogomba") testified as follows:

21. She joined the Respondent in November 2018 and occupy the position of Deputy Director within OE. She is responsible for, amongst others, design of the organisation's structure, job evaluation, development of job description, change management initiatives and facilitation of business processes.
22. Nogomba stated that staff members who are about to contract are aligned on what is on the job descriptions relevant to their positions. She became aware that the Applicant did not enter into any performance contracts with her line manager for the periods 2018/2019, 2019/2020 and 2020/2021. This was in 2018 when she was busy with job descriptions and that was when the Applicant approached her about her job description and performance assessment.

23. A meeting was convened to discuss the Applicant's query. In attendance were several senior managers, including Makhubele, Mosing, Martin and the Applicant. The meeting was to discuss the GLB staff refusing to contract. A comparative matrix for Deputy Director: Operations (position occupied by the Applicant) yielded a new job description. Nogomba stated that the Applicant was cooperative during this process but the line manager did not and was not supportive. Nogomba's role was to develop the Applicant's job description and performance contract guided by the matrix. Her line manager encouraged the two parties to reach an agreement but they failed.
24. The process highlighted that there were disparities between the Applicant's performance contract and what was proposed by Mosing. She emphasised that line manager and incumbent must reach an agreement during the contracting stage. Nongoma was aware that it was alleged that the Applicant refused to sign the performance contract. In 2019, a new job description was created and sent to parties to reach a common ground. The Applicant made inputs and proposed some rewording and the line manager made inputs too.
25. Nogomba highlighted some key performance areas which were above the Applicant's position. Mosing refused to accept the guidance from her and she resigned afterwards. The matter was escalated to Martin but he referred to the agreement that is in dispute. In 2020/2021, the Applicant signed the job description but the line manager failed to sign.
26. During the period of 2018 to 2021, the job description was incorrect until May/June 2021. There was no assessment because there was no contract. Therefore, there was no pay progression or performance bonus. Awarding of these is not automatic because one has to have obtained the required scores.
27. During cross-examination, Nogomba confirmed that prior 2018, the Applicant had a job description but it became outdated. The approved template was changed before she joined the Respondent. The Applicant's job description was in the old format. That also meant that her duties were outdated.

Respondent's Evidence

The Respondent called one witness who testified after having been duly sworn in.

Mr Raymond Martin ("Martin") testified as follows:

28. He is the Chief Director at GLB, of the Respondent. He joined the Respondent on 1 October 2016. He was aware of the Applicant as one of the employees of the GLB. At that

time the Applicant was reporting to Mr Max Matlake. All GLB staff members had job descriptions when he joined.

29. He was supposed to set up a data management project when he joined the GLB and he was referred to the Applicant. In turn the Applicant indicated that she knew nothing about the project and she failed to attend steering committee meetings related to the project. She was then removed from the project. He continued to work with the Applicant's subordinates.
30. The Applicant refused to sign her performance contract and he tried to convince her to do that. The Applicant claimed that her job description and contract were unilaterally changed. Makhubele's email of 15 April 2021, confirmed that a meeting was held between the Applicant and OD concerning her job description and that Mosing did not sign it. Martin requested the Applicant to sign it but she indicated that the job description was the one in dispute. After he had failed to convince the Applicant to sign the contract, he sought intervention from Human Resources (HR) and OD. Nongoma was part of this particular meeting but did not attend others. Some were attended by senior managers.
31. At cross-examination, Martin confirmed that the Applicant signed her performance contract on 12 April 2021 and he only signed it on 18 March 2022. He said that he signed after getting assurance from HR and OD. He had to sign because he was the new line manager after Mosing had resigned.
32. After the resignation of Mosing, the Applicant and another deputy director were to report to Martin. He indicated that he was aware of the contract that Mosing did not sign but the Applicant did. He stated that the reason was because the contract was not at a level that the Applicant occupied. It contained responsibilities of a post level 5 and the Applicant was on post level 11.
33. For about three years, the Applicant was not performing any duties and he had to institute disciplinary actions against her. He disputed that the Applicant was humiliated by the Respondent. The Applicant was not doing her job and her managers expected her to perform for what she was paid for. The Applicant would lodge grievances when her managers required her to perform her duties. Martin wanted to institute disciplinary actions against the Applicant when she failed to perform her duties but Employee Relations (ER) did not act and he did not know why that was done. He also does not know why the Applicant's grievances were not attended to fully.
34. He attended to the Applicant's grievances but emphasised that pay progression was for those who were performing their duties. That is those who have entered into performance

contracts and their performance assessed. Such was on a basis of performance by an employee.

35. The Applicant had signed the contract for the post that she holds on 18 March 2022, with her line manager (being Martin). That is what is expected for a post level 11.

ANALYSIS OF EVIDENCE AND ARGUMENT:

36. Section 185 of the LRA, stipulates that every employee has the right not to be unfairly dismissed or to be subjected to an unfair labour practice.
37. Section 186(2) of the LRA, *stipulates that “unfair labour practice’ means any unfair act or omission that arises between an employer and an employee involving-*
- (a) *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.”*
 - (b) ...
 - (c) ...
 - (d) ...”
38. It should be stated at the outset that although the LRA is silent on the onus of proof in disputes relating to unfair labour practice, it is trite that he or she who alleges must prove. Therefore, in the present instance, the Applicant bears the onus to prove on a balance of probabilities that the Respondent’s conduct constituted an unfair labour practice when it allegedly unilaterally changed the Applicant’s job description and refused to enter into a performance contract with her. According to the Applicant, that deprived her of a pay regression, performance bonus and other related benefits attached to the position that she occupies.
39. It is trite in labour law that the question whether an employer has committed an unfair labour practice is an objective standard. In ***Apollo Tyres South Africa (Pty) Ltd v CCMA and others [2013] 5 BLLR 434 (LAC)***, the LAC per Musi AJA stated that unfairness relating to benefits *“implies a failure to meet an objective standard and may be taken to include arbitrary, capricious or inconsistent conduct, whether negligent or intending.”*


40. An analysis of the Applicant's evidence, through her witnesses, revealed that in the present instance the Applicant's main case is two-fold, namely;
- (a) The Respondent should not have unilaterally changed the job description that is for the position that the Applicant occupies.
 - (b) The Respondent should not have refused to enter into a performance agreement with the Applicant after and even before the meeting with HR and OD.
41. It is not in dispute that the Applicant had a job description prior to 2018 but it was outdated afterwards. It is also not in dispute that all government employees are expected to enter into performance contracts with their line managers. The same contract is the one used to assess the performance of employees. Such assessment could yield to a pay progression and/or performance bonus depending on the outcome of the performance reviews.
42. It is not in dispute that the Applicant did not contract with the Respondent during the 2018/2019, 2019/2020 and 2020/2021 financial years and she had lodged a grievance or grievances. The Respondent failed to deal with the grievances fully and Martin indicated that he was not sure why this happened. Mosing's resignation should not have stopped the Respondent from dealing with the grievances. The same applies to Makhubele's resignation. The Respondent has competent managers who could have been tasked with handling the grievances.
43. It was confirmed that Mosing failed to sign the Applicant's performance contract for the period 2018/2019 and indicated that Martin was to play that role. In turn Martin encouraged the Applicant and Mosing to enter into a performance contract but that did not materialise. Martin then testified that Mosing could not sign the contract because the content of the job description was for a post level 5 instead of post level 11 that is occupied by the Applicant. Nogomba's evidence seems not to support this because she testified that the Applicant's contract or job description was in an old format and did not capture what was relevant to the position that she occupies. As such, the Applicant had a case when she requested that her contract and job description be aligned accordingly.
44. From Nogomba's evidence it was not disputed that she can be regarded as a custodian in crafting job descriptions. It must be noted that her advice was not taken by Mosing when they convened a meeting to discuss the Applicant's alleged refusal to contract with her line manager. Martin did not dispute this too. This refusal should not have deprived the Applicant from entering into a contract with the employer.

45. In the Respondent's defence, the evidence from Martin indicated that the Applicant refused to contract and as such could not be assessed. Therefore, she could not qualify for a pay progression and/or performance bonus. The Applicant did not refuse but she wanted the Respondent to act in a reasonable manner by not accepting that Mosing unilaterally changed her job description. It is not clear why the Respondent decided not to discipline the Applicant, for failure to contract, after the intention was communicated to her.
46. From the evidence presented, I am compelled to believe that there were justifiable reasons for the Applicant to question her job profile and the performance contract. I have noted that the Applicant's line manager has resigned and Martin might not be in a position to respond to all the contracting financial years in dispute.
47. It is possible that there might not be documents to be used to assess the Applicant. Even if I was to rule that the Applicant be assessed, that was not going to be possible. That should not be used to deprive her of her benefits that she should have received during the period in dispute. I am therefore, compelled to believe that the Applicant could have qualified to receive the benefits that she wished for.
48. Having considered the parties' evidence and arguments in totality as well as the aforesaid legal principles, the decision at which I have arrived is that the Applicant has managed to discharge the onus of proving on a balance of probabilities that the Respondent's conduct constituted an unfair labour practice.

AWARD:

49. In light of the above analysis of material evidence and arguments in totality, I make the following award:
 - a) The Respondent did commit an unfair labour practice in terms of section 186(2)(a) of the LRA, when it failed to enter into a performance contract with the Applicant.
 - b) The Respondent is directed to award pay progression to the Applicant for the periods in which she was not contracted with. That is 2018/2019, 2019/2020 and 2020/2021.
 - c) The Respondent is further directed to pay the Applicant an average of performance bonus corresponding to post level 11, in line with the pay progression, specified in paragraph 49(b) of this award.
 - d) The Respondent is directed to finalise the process, that is, calculations and implementation of the award on or before 8 August 2022.

e) I make no order as to costs.

A handwritten signature in black ink, appearing to read 'Dkhosa', with a large circular flourish at the beginning.

Name: Advocate Dorothy Khosa
(GPSSBC) Arbitrator