

ARBITRATION AWARD

Case Number: PSCBC 117-21/22

Commissioner: Kelvin Kayster

Date of Award: 15 October 2021

In the **ARBITRATION** between

PSA obo Nomsa Lukhele

(Union/Applicant)

And

Department of Health & 1 Other (DPSA)

(Respondent)

Union/Applicant's representative: Mr. Flip van der Walt (PSA)

Union/Applicant's address: _____

Telephone: _____

Telefax: _____

E-mail: _____

Respondent's representative: Mr. Kenneth Msiya; Ms. Esther Nkosi (DPSA)

Respondent's address: _____

Telephone: _____

Telefax: _____

E-mail: _____

DETAILS OF HEARING AND REPRESENTATION:

1. The arbitration hearing in this dispute was conducted on the Zoom virtual platform on 22 September 2021.
2. The Applicant is Ms. Nomsa Lukhele, and was represented by Mr. Flip van der Walt of the PSA.
3. The First Respondent is the Department of Health in Kwa-Zulu Natal, and was represented by Mr. Kenneth Msiya. The Second Respondent, the Department of Public Service and Administration was represented by Ms. Esther Nkosi.
4. The parties agreed that the factual background of the dispute is common cause. They would therefore submit an outline of the factual matrix, and then exchange their written closing arguments.
5. I received the last written arguments on 05 October 2021.

ISSUE TO BE DECIDED:

6. The matter was referred to the PSCBC as a dispute relating to the interpretation/application of PSCBC Resolution 3/2009 (Agreement on the revised salary structure). I am called upon to determine whether or not the Respondent correctly interpreted the said Resolution 3/2009.

AGREED FACTUAL BACKGROUND:

7. The background to this dispute is mostly common cause. Briefly, the Applicant is on salary level 7 since 01 October 2007. She submits that she performed above satisfactory from 2007 until 2021, which exceeds the period of 12 years cumulatively as required by the relevant clauses of the collective agreement for accelerated grade progression from SR7 to SR8 in terms of clause 3.6.12.1 of PSCBC Resolution 3 of 2009. The Respondent has however not approved such progression. The Respondent based the decision on the contention that the Applicant has performed above satisfactory only for 10 years, and needed 2 more years of above satisfactory performance to become eligible for accelerated grade progression.

SUMMARY OF ARGUMENTS:

8. The Applicant argued that the Respondent's interpretation of the relevant clause is incorrect, as its decision was based on whether she was paid a performance bonus for 2013/2014, and not on her actual performance. However, the requirement is not the payment of the performance bonus, but only the actual performance of an employee. Also, the Applicant argued that the Respondent's stance that it has already paid 30% of the employees for accelerated grade progression, cannot be accepted as it was not the reason given for the failure to grant the grade progression.

9. The First Respondent reiterated that in the 2013/2014 financial year the Applicant was not recommended and therefore not eligible for performance bonus. As a result, she only has a cumulative 10 years of above satisfactory performance. In order to qualify for accelerated grade progression, she requires 12 cumulative years of above satisfactory performance. In view thereof that she only has 10 cumulative years, she does not qualify for accelerated grade progression.
10. A further aspect is that the Applicant was not amongst the top 30% of employees in the 2013/2014 financial year. She has therefore not achieved a sustained above satisfactory performance for a cumulative 12 years, and do not qualify for the accelerated grade progression. With reference to clause 8.4.7 of the Mpumalanga Provincial Government Incentive Scheme Policy, the Respondent submitted that the "Department shall limit the progression of non-OSD employees based on accelerated progression to 30% of qualifying employees on a specific salary per annum. Therefore, if more than 30% of employees meet the qualifying criteria, only the top 30% performers qualify." The Respondent accordingly argued that the Applicant did not achieve a sustained above average performance for 12 years.
11. In advisory capacity, the Second Respondent, the DPSA, explained that clause 3.5 of PSCBC Resolution 3 of 2009 clarifies that posts are graded based on the outcome of job evaluation, recognition of performance, and completed continuous years of service on a salary level. With reference to the Incentive Policy Framework for employees on salary levels 1 to 12, the DPSA argued that for non-OSD employees, progression as per the result of job evaluation, means progression to the next higher permissible grade (salary level) after 12 years' service on the salary level of the post, based on at least above satisfactory performance for a cumulative (and not necessarily successive) period of 12 years. Only 30% of the employees **per year** may be awarded. If more than 30% meet the qualifying criteria, only the top 30% performers would qualify.

ANALYSIS:

12. Herewith brief reasons for my award. This dispute relates to the interpretation/application of PSCBC Resolution 3 of 2009 (The Collective Agreement on a revised salary structure for employees on salary level 1-12 not covered by an OSD), and specifically with the interpretation of clause 3.6.12.1. The Applicant referred the dispute to the PSCBC after the Respondent refused to grant her accelerated grade progressions from SR7 to SR8.
13. Clause 3.6.12.1 states that "An employee who has performed above satisfactory for 12 years cumulatively in a specific salary level, shall grade (salary level) progress from salary level 4 to 5 or from

level 5 to 6 or from salary level 6 to 7 or from salary level 7 to 8. Only 30% of the employees per year may be awarded grade progression in this regard”

14. The Applicant contends that she has achieved a cumulative above satisfactory performance for a cumulative 12 years since her appointment on SR7 in October 2007. Conversely, the First Respondent argued that since the Applicant did not achieve an above satisfactory performance in the 2013/2014 financial year, she does not have a cumulative 12 years, and does therefore not qualify for accelerated grade progression. The First Respondent was at pains to argue that the required 12 years must be a sustained above average performance for the entire 12-year period.
15. The difference in interpretation therefore lies in the question whether the alleged failure by the Applicant to achieve “above satisfactory performance” in the 2013/2014 financial year “interrupted” the required sustained period of performance. The First Respondent did not submit a copy of the Mpumalanga Provincial Government Incentive Scheme Policy, in which, according to his submissions, a sustained period of performance is required.
16. The relevant clause 3.6.12.1 refers to a cumulative 12 years, and not consecutive 12 years. The effect thereof is that it should therefore be **a total of 12 years**. It need not be “sustained” or consecutive. The DPSA confirmed this interpretation. Ms. Nkosi of the DPSA clarified that the 12 years need not “necessarily be successive.” The collective agreement does not require a “sustained above average performance.” Therefore, even if the Applicant did not achieve an above satisfactory performance in the 2013/2014 financial year, she has by now completed 12 years of above satisfactory performance since her translation to SR7 in 2007.
17. It therefore follows that the 30% requirement cannot be made applicable to the entire 12-year period, but only to a specific year. Clause 3.6.12.1 confirms that only 30% of the employees per year may be awarded grade progression in this regard. I was not given sufficient information to determine how the 30%-benchmark is interpreted and applied. I am therefore not in a position to interpret it with reference to the Applicant’s situation. I am required to interpret clause 3.6.12.1 of Resolution 3 of 2009 in respect of whether a sustained (12 consecutive years) of above satisfactory performance is required to entitle the Applicant to accelerated grade progression. My discussion above shows that it need not be for 12 consecutive years. It is accordingly my finding that the Respondent did not interpret the provisions of PSCBC Resolution 3/2009 correctly. In the premise I make the following award:

AWARD:

18. The First Respondent did not correctly interpret clause 3.6.12.1 of PSCBC Resolution 3/2009.
19. The Applicant is entitled to accelerated grade progression from salary level 7 to salary level 8 with effect from 01 October 2020.

A handwritten signature in black ink, appearing to read 'Kelvin Kayster', is positioned above a horizontal line.

Signature: _____

PSCBC Panelist: **Kelvin Kayster**