



ARBITRATION AWARD

Commissioner:
Case No.:
Date of Ruling:

Ms Winnie Everett
WECT14216-19
9 June 2021

In Matter between:

PSA obo Pheiffer, GC and 15 Others

Applicant

and

South African Social Security Agency

Respondent

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PARTICULARS OF PROCEEDINGS AND REPRESENTATION

- 1) Arbitration of this matter took place on 8 April 2021 and 18 to 20 May 2021 on an online platform. The applicants were represented by PSA official Mr Angelo Fisher. The employer, South African Social Security Agency (SASSA), was represented by Adv Cecil Tsegarie, briefed by State Attorney Ms P Melaphi. The Department of Public Service and Administration was joined as a second respondent and it, too, was represented by Adv Tsegarie.
- 2) The proceedings were digitally recorded.
- 3) The parties agreed to submit written closing arguments and I received these on 4 June 2021.

ISSUE TO BE DETERMINED

- 4) I must determine whether the employer committed an unfair labour practice, relating to the provision of benefits, in terms of section 186(2)(a) against the applicant employees by appointing them and continuing to employ them at grade 9 and 11 as opposed to grades 10 and 12 as per the authorized 2005 job evaluation results from the period of their appointment until 2019 the 2016 job evaluation results were implemented in 2019.

BACKGROUND

- 5) The applicants referred an unfair labour practice to the CCMA on 31 July 2019 relating to the provision of benefits. In the referral form the union described the dispute as "Upgrading of SASSA Managers and Assistant Managers to salary levels 10 and 12, as from their date of appointment (i.e., Prior to the 2016 Job Evaluation results)." In the referral form the date the dispute arose was indicated as 30 July 2019.
- 6) Prior to that, the applicants had lodged a collective grievance on 10 June 2019 describing the dispute as follows:

"We, as Managers and Assistant Managers... have been informed that, based on the Labour Court judgment dated 2 May [2019], the employer (SASSA) only intends on upgrading Local Office Managers to salary level 12. We are aggrieved that the employer has decided to exclude us from being upgraded to salary levels 10 and 12 as per clause 18.1 of the PSCBC Resolution 1 of 2012. We are disputing the levels of our appointment because our posts were graded on level 10 and 12 respectively in 2005."

- 7) The conciliation was held on 16 August 2019 and the matter remained unresolved. A certificate was issued on 16 August 2019 and the matter was referred to arbitration on 28 August 2019. The description of

the dispute and the desired outcome indicated on the LRA Form 7.13 was the same as indicated on the LRA Form 7.11.

- 8) At the commencement of arbitration proceedings on 29 November 2019, a number of jurisdictional issues were raised and the parties agreed to make submissions on the following:
- a) Whether the CCMA or a bargaining council has jurisdiction to arbitrate;
 - b) The nature of the dispute, in particular whether it falls into an unfair labour practice relating to the provision of benefits;
 - c) The date the dispute arose and whether condonation for late referral is required; and
 - d) Whether the matter was "res judicata" in that it had been determined by the Labour Court.
- 9) I issued a ruling on 8 July 2020 as follows:
- a) "On whether the CCMA or a bargaining council has jurisdiction to arbitrate, I find that the CCMA has jurisdiction to arbitrate this dispute.
 - b) On the nature of the dispute, in particular whether it falls into an unfair labour practice relating to the provision of benefits, I find that this issue is central to the determination of the substantive merits of the dispute and not a jurisdictional question.
 - c) On the date the dispute arose and whether condonation for late referral is required, I find that the delay in referring the matter as an unfair labour practice is due to various forums refusing to determine the matter and finding that they lacked jurisdiction, and not due to delay on the part of the applicants.
 - d) On whether the matter was "res judicata" in that it had been determined by the Labour Court, I find that the matter is not res judicata in that the substantive merits of the dispute have never been determined. The jurisdictional point has also not been decided because this is the first time that the dispute has been framed and brought as an alleged unfair labour practice dispute."
- 10) A second preliminary ruling was issued joining the DPSA and dealing with the employer's contention that the CCMA lacked jurisdiction to arbitrate because a full and final settlement agreement was reached by seven of the applicant employees (Jeftha et al, who were also applicants in the Labour Court matter) and the agreement was made an order of court or incorporated in a judgement handed down on 2 May 2019 by Nieuwoudt AJ under case number 255/2017 in the Labour Court of South Africa, held in Cape Town. I found that there was no basis for finding that the matter had been settled or determined by the Labour Court and the CCMA had jurisdiction to arbitrate the dispute.

SUMMARY OF EVIDENCE AND ARGUMENT

Background and summary of the respective versions

- 11) The Applicants are employed as Assistant Managers and Managers by SASSA, appointed at various dates between 1 August 2012 and 31 July 2015 at levels 9 and 11 respectively.
- 12) At the time of SASSA's establishment, jobs were evaluated and graded (the 2005 job evaluation / JE) and the post of Assistant Managers were graded at salary level 10 (SL10) and Office Managers at salary level 12 (SL12).
- 13) A collective agreement, PSCBC Resolution 1 of 2012, was concluded between the employer and organised labour in July 2012 and extended to SASSA on 17 August 2012. Clause 18.1 of PSCBC Resolution 1 of 2012 stated that employees whose posts are graded on SL10 and SL12 were to be appointed and remunerated on SL10 and SL12.
- 14) **The union's case** is that this clause applied to the applicant Assistant Managers and Managers, yet the employer failed to apply the 2005 JE results, in effect retaining them on grades 9 and 11 which were not the correct grades of the posts. The situation was only corrected after the 2015/6 JE results were implemented, which results were not disputed by the union. The union's contention is that the employer should have used the 2005 JE results in conjunction with PSCBC Resolution 1 of 2012 to upgrade the applicants' posts just as it had done for Mr. Tau whose job was regraded from SL11 to SL12. The failure to do so amounted to an unfair labour practice relating to the provision of a benefit.
- 15) The union relied on the cases of *Apollo Tyres South Africa (Pty) Limited v CCMA & Others* (DA1/11) [2013] ZALAC (21 February 2013), and the case of *Eskom Holdings Soc Ltd v NUM obo Coetzee and Others* (C727/16) [2017] ZALCCT 56; [2018] 2 BLLR 176 (LC); (2018) 39 ILJ 828 (LC) (14 November 2017) which, it argued, supported the position that the issue of upgrading the posts and salaries of the applicants accordingly falls within the ambit of an unfair labour practice: benefit.
- 16) **The employer's version** is that a collective agreement specified that posts had to be advertised and filled at levels 9 and 11 respectively and there was no basis for appointment at 10 or 12. The subsequent collective agreement providing for regrading to 10 and 12 covered incumbents appointed in a specific period between July 2010 and July 2012 whereas none of the applicants were appointed in that period. The employer had subsequently graded and regraded posts in consultation with the DPSA (the 2016 JE) and the positions of local office managers came out at grade 12, and these were corrected following the outcome of the Labour Court case in 2019.
- 17) The Respondents contend that in the referral (under outcome) the Applicants seek the upgrading of SASSA managers and assistant managers to levels 10 and 12 from the date of appointment. The Respondents contend that the applicants were seeking new rights of being placed and paid on higher salary levels 10 and 12, respectively and that could not achieve this through a claim of unfair labour

practice relating to the provision of benefits. Upgrading of certain positions was the result of a scientific job evaluation process, in line with the employer's prerogative, which was finalized in or during May 2016.

- 18) The Respondents contend that the 2016 JE results also set out the reasons why the position of manager - grant administration should be retained on the same level. SASSA denied that it committed an unfair labour practice for purposes of section 186(2)(a) of the LRA. The employer had carefully distinguished between the roles of local office manager and other managers and it was incorrect for managers and assistant managers to claim that they should be upgraded along with the local office managers, retrospective to their date of appointment and based on the 2005 JE result.

Documents and chronology

- 19) In the determination of this matter there are a number of important documents that are worth citing, and which also reflect the chronology of the events giving rise to the dispute. Witnesses of both the applicants and respondents testified regarding these documents and their understanding or interpretation thereof. I believe it is helpful to record these documents and some of the chronology before summarizing the evidence of the parties to the dispute.
- 20) SASSA was established in terms of the South African Social Security Agency Act of 2004 in April 2006. In anticipation of SASSA's establishment, positions were created and evaluated in 2005 to ensure the appropriate staffing of SASSA.
- 21) The relevant document is dated **14 October 2005: JOB EVALUATION AND ADVERTISING OF NEWLY CREATED NATIONAL AND PROVINCIAL POSTS FOR THE SOUTH AFRICAN SOCIAL SECURITY AGENCY (SASSA). It identifies, among other posts, Local Office Managers as Managers Level 12 with a job weight score of 664.11 and Assistant Managers at salary level 10.**
- 22) On 14 March 2006 the Minister of Public Service and Administration extended the remuneration, grading and performance framework of the public service to SASSA.
- 23) The second significant document is the **Collective Agreement of 2009, Resolution 3 of 2009**. It is a collective agreement concluded in July 2009 between the State as employer and trade unions. The stated objectives of the Resolution 3 of 2009 were to give effect to a previous resolution of the PSCBC by introducing a revised salary structure for all occupational categories graded on salary levels 1 to 12 not covered by the Occupation Specific Dispensation (OSD) and to introduce a career pathing model and grade progression for identified salary levels.
- 24) Dated 24 July 2009 (with implementation of the relevant clause 1 April 2010): **RESOLUTION NO 3 OF 2009 – AGREEMENT ON A REVISED SALARY STRUCTURE FOR EMPLOYEES ON SALARY LEVELS**

1 – 12 NOT COVERED BY AN OCCUPATION SPECIFIC DISPENSATION provides in clause 3.6.3, under the heading "grade progression model":

25) **Salary levels 9-10 and salary levels 11-12**

26) 3.6.3.2 *The commencing salary for all employees on posts not covered by any OSD as per PSCBC Resolutions 1 of 2007 and 3 of 2008, and appointed as Assistant Directors and Deputy Directors shall, with effect from 1 July 2010, be on salary levels 9 and 11 respectively.*

27) The third critical document is the 2012 collective agreement between the state and trade unions, **Resolution 1 of 2012**. The stated objectives were to provide for a multi-year salary adjustment and improvements to some conditions of service for employees for the financial year 2-12/13 and 2013/14, and to amend a particular resolution. Clause 18.1 deals with the second objective, namely amendments to resolution 3 of 2009.

28) Dated 31 July 2012: RESOLUTION 1 OF 2012 – AGREEMENT ON SALARY ADJUSTMENTS AND IMPROVEMENTS ON CONDITIONS OF SERVICE IN THE PUBLIC SERVICE FOR THE PERIOD 2012/13 – 2014/15 provides in clause 18:

29) 18. AMENDMENTS TO PSCBC RESOLUTION 3 OF 2009

30) *Clause 3.6.3.2 of PSCBC Resolution 3 of 2009 is hereby amended to allow employees whose posts are graded on salary levels 10 and 12 to be appointed and remunerated on salary levels 10 and 12 respectively.*

31) **The 2013 Directive:** On 25 February 2013, the Director-General of the DPSA addressed a Directive to all departments, including to SASSA. The subject matter of this Directive is the implementation of the amendment to PSCBC Resolution 3 of 2009 and the grading of jobs/posts at salary levels 9, 10, 11 and 12. This Directive provides for the grading of corporate services as well as core services. The 2013 Directive provides that the Department must still grade new posts and regrade existing posts in the core business (line function) with the job evaluation processes if the posts are not covered by an OSD. The directive states that "Salary levels 10 and 12 can be utilised as separate organisational levels in the core business (line function) environment to assist departments with the recruitment and retention of employees if supported by a job evaluation process." It also states: "This approach should however only be followed if justifiable from an organisational and job evaluation perspective and should be applied with circumspect."

32) **Circular 4 of 2014:** IMPLEMENTATION OF AMENDMENT TO PSCBS RESOLUTION 3 OF 2009 AND THE GRADING OF JOBS/POSTS ON SALARY LEVELS 9/10 AND 11/12. The circular states in para 3 that it should not be interpreted as a general upgrading of all posts/jobs from salary level 9 to 10 and 11 to 12. Para 5 directed that corporate services jobs had to be graded consistently across the public service. It set out that all (corporate services) posts graded on salary levels 10 and 12 between 1 July 2010 and 31

July 2012 and whose incumbents were appointed on SLs 9 and 11 be automatically upgraded to SLs 10 and 12, subject to the availability of supporting JE results. The circular also stated in para 8 that departments (including SASSA) must still grade new posts and regrade existing posts in the core business line function, if the posts were not covered by OSDs.

- 33) In January 2016: **Circular 1 of 2016**: This Circular deals with the implementation of Circular 2014. It directed that where departments had already upgraded employees who were appointed from 1 August 2012 and job graded at levels 10 and 12 in the corporate services without consultation with the Minister of the DPSA, these must be reversed, and overpayments must be recovered.
- 34) SASSA letter, 7 March 2016: letter from the previous Chief Executive Officer (CEO) of SASSA to the Director-General of the DPSA regarding SASSA's compliance with Resolutions and DPSA Circular 4/2014 and dealt with grading of corporate services posts.
- 35) **SASSA Submission 15 May 2019**: Upgrades of salary levels 9 and 11 to levels 10 and 12 respectively for core function based on Resolution 1 of 2012, Circular 4 of 2014, Job Evaluation results of May 2016 and the outcome of the Labour Court of South Africa case No: 256/2019. The submission recommended 45 assistant managers who were employed in the Local Offices at salary level 9 to be upgraded to salary level 10; 64 Local Office managers appointed at SL11 to be upgraded to SL12; and organizational structures to reflect the two upgraded posts of Local Office Manager at SL12 and Assistant Manager: Grants Administration at SL10. This document noted that Local Office Managers "was the only post that was upgraded from salary 11 to 12 since the inception of Resolution 3 of 2009 and Resolution 1 of 2012. This is the only post that was advertised on salary level 11 but equates at salary level 12 as per the consultation process.

Oral evidence

- 36) The evidence at arbitration largely concerned the various witnesses' interpretation or understanding of the documents referred to above and it is only briefly captured.

The applicants' evidence

- 37) **Mr M Jeftha testified** that he was appointed as a local office manager in Eersteriver from 1 September 2012. The post was advertised and he was interviewed for a position at SL11. The correct salary level was in fact SL12 as per the 2005 JE results which was clear from the circular of 17 August 2012 that extended resolution 1 of 2012 to SASSA. The understanding was that the 2005 JEs which pegged the jobs at level 12 would apply and positions would be upgraded from 11 to 12.

- 38) Jeftha referred to the grievance filed by the applicants GC Pheiffer and others wherein the complaint was that the employer intended upgrading only Local Office managers, claiming that all managers and assistant managers at levels 11 and 9 should be upgraded to levels 12 and 10. The only JE results stemmed from 2005 and these should have been applied as they were the only JE results available.
- 39) Jeftha referred to the 2005 JE documents with the approved positions and weights for the jobs that would be established by SASSA. The post of local office manager was weighted at 664.11. Some of the posts were not specifically included such as that of manager beneficiary maintenance unit (occupied by Mr Richard Tau) but those appointed between July 2010 and July 2012 were in terms of the circular to be upgraded automatically as part of phase 1 of the implementation of Resolution 1 of 2012.
- 40) The DPSA document dated 21 August 2015 set out the requirement for all departments to consult with DPSA on corporate services posts. It set out the levels on which jobs would be advertised as agreed between SASSA and the DPSA.
- 41) Resolution 1 of 2012 amended clause 3.6.3.2 of Resolution 3 of 2009 which had indicated that all manager and assistant manager posts would be advertised at 11 and 9. This clause amended it to allow the posts to be advertised as graded. Circular 4 of 2014 provides for the implementation of the amendment to resolution 3 of 2009.
- 42) Another circular dated 25 February 2013 was issued by the DPSA to remove job weight overlap between SLs 9 and 10 and 11 and 12. The job weight of 664 was again indicated as the weight required for job grade 12.
- 43) In the circular dated 29 August 2013 the employer advised that it was engaged in a job evaluation process. A further circular of 25 August 2014 again indicated that the JE process was continuing.
- 44) SASSA circular dated 15 December 2014 referred to a two-phase approach and consultation with DPSA on corporate services. Core posts were still to be graded by the employer itself.
- 45) The circular of 21 September 2015 again distinguished between line and corporate services, and stated that SASSA would evaluate all posts.
- 46) Jeftha emphasized that the applicants did not dispute the employer's right to regrade posts. Their contention was that incumbents appointed in the period after 1 August 2012 could not be "in a vacuum" while JE processes were being conducted between 2013 and 2016. The posts in question were already graded as per the 2005 JE and those were the SLs that should have been applied.

- 47) **Mr Richard Tau testified** that he was employed as a manager: beneficiary maintenance unit (BMU) on level 12. He was initially appointed in the same post on SL11 in December 2011. His post was not listed in the 2005 JE results for SASSA's establishment.
- 48) Under cross-examination, Tau agreed that he was appointed in the period between 1 July 2010 and 31 July 2012, which according to the employer was the period covered by Resolution 3 of 2009 meaning that he fell into the group of employees that were automatically upgraded from SL11 to SL12. The employer stressed during cross-examination that the applicants, unlike Tau, were not appointed in the period from 1 July 2010 to 31 July 2012, which Tau conceded.
- 49) Under re-examination, Tau stated that he was upgraded from SL11 to SL12 in December 2014. There was no notification and he merely noticed that additional monies had been paid into his bank account. He was also not aware of any JE results.

The employer's version

- 50) **Mr Victor Sakala, DPSA director: job evaluation and post provisioning testified** that collective agreements apply to SASSA which is part of the public service. The Minister of DPSA issues circulars to elucidate on clauses of collective agreements.
- 51) Resolution 3 of 2009, signed 24 July 2009, gave effect to Resolution 1 of 2007 which dealt with a revised salary structure. Clause 3.6.3.2 provided that assistant directors and deputy directors would be appointed at levels 9 and 11 and not 10 and 12. SASSA (or departments) appointing assistant directors or deputy directors after that clause took effect would have to appoint at grades 9 and 11.
- 52) Equate was a job evaluation system used to grade jobs in the public sector and SASSA used the system to evaluate jobs prior to its establishment. The position of Local Office Manager was evaluated at 664.11 in 2005 which was a grade 12.
- 53) Resolution 1 of 2012 amended Resolution 3 of 2009 to allow employees whose posts are graded on salary levels 10 and 12 to be appointed and remunerated on salary levels 10 and 12 respectively. There was no clause on retrospectivity which was where elucidation would come in so that there was consistency in the implementation of the agreement.
- 54) According to Sakala's 2013 circular of 25 February 2013, departments were advised that when implementing resolution 1 of 2012 they had to take into account the job weight ranges which had been given to the various jobs and that no regrades should be regraded retrospectively. The DPSA wanted to ensure consistency and remove the situation where similar posts are graded differently in the public service as a whole.

- 55) Paragraph 5(a)(iv) provided that only employees serving in posts that were graded on 10 and 12 since the implementation of Resolution 3 of 2009 up to and including 31 July 2012 should be automatically upgraded from 1 August 2012, provided that the jobs were previously evaluated and graded at SLs 10 and 12 in terms of the revised job weight ranges, specified in Circular 16/P dated September 2011. These were the employees who had been affected by resolution 3 of 2009 and resolution 1 of 2012 corrected the situation. Those appointed before or after this period were not affected by resolution 3 of 2009 and hence there was no "blanket upgrading". The circular in para 5(a)(v) provided that posts of those appointed before 1 October 2011 and after August 2012 job evaluation processes according to job weights had to be followed.
- 56) **Mr Clint Baron Titus, senior manager organizational development for SASSA, testified that he commenced employment in July 2008. His responsibilities include HR planning, capacity, JEs, and profiling of all posts, including both line and corporate services positions. At the time he commenced employment, there was a system for remuneration and grading and performance management in place, which was a framework extended to SASSA by the MPSA.**
- 57) Titus's understanding of resolution 3/2009 was that, as per clause 3.6.3.2, assistant managers and managers would be appointed on SL09 and SL11 irrespective of prior JE results. This meant that grades 09 and 10 would now be 09 only and grades 11 and 12 would be 11 only. The agreement came into effect on 1 July 2010. This meant that any position of assistant manager or manager would be advertised at SL09 and SL11 from that date.
- 58) Subsequently, resolution 1 of 2012 was signed on 31 July 2012 and it provided in clause 18.1 that clause 3.6.3.2 was amended to allow those graded on 10 and 12 to be appointed and remunerated on 10 and 12.
- 59) Titus explained that SASSA originally used the Equate JE system, and moved over to Evaluate in about 2014. The DPSA had delegated JE of core posts to SASSA whereas corporate services posts had still to apply the DPSA evaluation. However, core or line posts still had to be graded in line with the public service.
- 60) Employees with appointment dates falling in the period 1 July 2010 to 31 July 2012 fell into phase 1 of the staggered approach and they were automatically upgraded. Tau was said appointed on 1 December 2011 and hence he fell into the group that were automatically upgraded. Hence his salary increased and he was paid out backpay for the period as stipulated in the resolution.
- 61) The applicants fell into the group of employees appointed from 1 August 2012 to the present and referred to as Phase 2. There was extensive consultation with the DPSA and most corporate services jobs were downgraded, although two were upgraded. The core posts were returned to SASSA to evaluate but DPSA

had made it clear that there should not be a blanket or automatic upgrade of posts. A blanket upgrade would cost millions and it would be irregular because it would lead to labour disputes about which upgrades were warranted and which not. If the 15 applicants were upgraded, it would be unfair on others and the employer would have to re-evaluate the grades and scope of the jobs of other employees in similar posts.

- 62) Titus sat on the JE committee which used the Evaluate system to decide on grades of jobs in 9 to 12. The local office managers for large and small offices came out at SL12 and SL10 respectively, while the rest of the grades remained unchanged. Seven incumbents were affected and their upgrades took effect from 2016.
- 63) Titus confirmed that the job evaluation results were completed in May 2016 but due to ongoing legal dispute about, amongst others, Resolution 1 of 2012, SASSA elected to delay the implementation thereof. He also confirmed that the parties (employees and SASSA) agreed that the implementation date of the job evaluation results was June 2016. The results were binding on all employees of SASSA including the Applicants.
- 64) It is common cause that Jeftha was one of the employees whose post was upgraded from level 11 to 12 in accordance with the above job evaluation results. It is also common cause that 109 of employees' posts were upgraded from level 11 to 12 across the country. The post of manager – grant administration, occupied by, amongst others, Pfeiffer, was always regarded as a support post and the grading remained at 11.
- 65) According to the job evaluation results of SASSA the following seven employees' posts in the Western Cape were upgraded from level 11 to salary level 12, namely those of Morne Nortje; Munroe Jaftha; Pieter Burger; Alfred Freddie Sebothoma; Norman N Rasivhetshela; Kenneth Williams; and Johan Bernard Moffat (upgraded to level 12 perform local office management functions).
- 66) The outcome of the reevaluated posts was based on phase 2 of Circular 3 of 2014 dated 1 February 2014. The DPSA letter to all departments dated 26 June 2014 and Circular 4 2014 dated 5 August 2014. The outcome of the posts was evaluated by a job evaluation panel and approved the recommendation on 6 May 2016 for the core posts. The support posts were reevaluated and confirmed by DPSA on 21 August 2016.
- 67) During the outcome of the job evaluations process, the results indicated that certain posts were retained on their respective levels, being those of Griffin Pfeiffer, Wendy Melwich, Nazli du Toit who were retained on salary levels 11. The grade was a result of several considerations, including the thinking demands and degree of control and decision-making which rated very low as opposed to the local office manager post.

68) Titus confirmed the reasons referred to in the submission. He was doing so by explaining the difference between the post of a local office manager and the post of a manager-grant administration. Titus concluded that the results were based on an objective process which were followed to grade the respective posts.

69) The following employees' posts were not upgraded and retained on salary level 9: Lindelwa Nyongo (level 9); Enid Rhode (level 9); Siviwe Mgedezi (level 9); and Eunice Potgieter (level 9). The following three incumbents' posts were regraded and retained on salary level 9, being those occupied by Marius Pieter Murray (level 9); Mthathelwa Nyawosi (level 9); and Nonkosi Mgijima (level 9). The following employees were no longer employed: Faith Njinjama; and Mario Boesak.

ANALYSIS OF EVIDENCE AND ARGUMENT

70) I start with the question whether a dispute concerning grading falls into the category of an unfair labour practice relating to the provision of benefits as provided for in section 186(2)(a). The recent Labour Appeal Court case of **National Union of Mineworkers obo N Coetsee and Four Others v Eskom Holdings SOC Ltd and Others** [2020] 2 BLLR 125 (LAC) is instructive. The LAC dealt briefly but decisively with the issue when considering a cross-appeal against the finding of the Labour Court that the dispute involved an unfair labour practice related to a promotion. The LAC, per Murphy ALA held:

The failure to properly grade an employee is related to the provision of benefits for the simple reasons that benefits (including status, remuneration, eligibility for promotion etc.) are normally determined by grade. ...[A]n employee who complains that his or her job is wrongly graded does not seek promotion to a new, higher or different job. Any re-grade of the job to coincide with the actual work done does not change the job contents. A re-grade does not promote an employee into a new position it merely recognises the correct value to be attached to what the employee, in fact, is already doing. A promotion gives an employee a different or revised task. A dispute about an unfair incorrect grading is thus an unfair labour practice dispute relating to the provision of benefits over which the CCMA will normally have jurisdiction."

71) On the basis of this case as well as *Apollo Tyres* case (above), I am satisfied that grading is a benefit as envisaged in section 186(2)(a) of the Labour Relations Act 66 of 1995, as amended.

72) Before proceeding to determine the issues in dispute, there is an aspect that needs to be addressed. This is that the formulation of the dispute at the point that the applicants filed a grievance with their employer is not quite the same as the formulation in the request for arbitration or as articulated during the arbitration. What appears to have prompted the grievance was the decision of the employer to upgrade only Local Office Managers to SL12, and not other incumbents appointed as managers and assistant managers, as it

emerged in the Labour Court decision. However, it is clear from the wording of the proposed solutions (in the grievance document) that the desired outcome was that all managers and assistant managers on the attached lists be upgraded retrospectively to salary levels 12 and 10 as from the date of their appointments prior to the 2016 job evaluation results. They went on to demand back pay, including all bonuses and performance bonuses.

- 73) I am satisfied that the claim for grading and back pay at the higher levels was based on the claim that the 2005 JE grading should apply, and not that the applicants were alleging unfair treatment or unfair grading between some of the applicants (who were upgraded on the 2016 JE results) as opposed to others who were not upgraded on the 2016 JE results.
- 74) I turn now to the nub of the matter. The union's contention is that the jobs of assistant managers and managers were graded at SL10 and SL12 in the 2005 JE prior to the establishment of SASSA. There is no evidence of any subsequent JE until the 2016 JE, the results of which are not in dispute.
- 75) It is clear that Resolution 3 of 2009 applied to the applicants as they were appointed after 1 July 2010. This means that, despite the positions having originally been graded at 10 and 12, they were downgraded, by a collective agreement, to grades 9 and 11.
- 76) The union did not attempt to argue that the collective agreement was not binding. Its argument, rather is that when that collective agreement was amended by Resolution 1 of 2012, the applicant employees fell into the net of those that should be appointed and remunerated on salary levels 10 and 12. The amendment was to allow employees whose posts are graded on salary levels 10 and 12 to be appointed and remunerated as such.
- 77) The 2012 collective agreement does not set out when the positions must have been graded as 10 and 12, nor when the employees occupying the positions had to have been appointed or whether the higher grades would apply if they had yet to be appointed. This is because the agreement referred to grades of posts, and not the incumbents and it is broadly accepted that posts, not people or incumbents, are graded. Hence, even if a post, once graded, is vacant, the grading remains the same and by rights, the next suitably qualified incumbent would be appointed at the same grade, unless there is some clear justification for a lower entry grade, for example if the incumbent needs to develop skills in order to meet all the requirements of the job.
- 78) The wording of clause 18 is as follows: ***Clause 3.6.3.2 of PSCBC Resolution 3 of 2009 is hereby amended to allow employees whose posts are graded on salary levels 10 and 12 to be appointed and remunerated on salary levels 10 and 12 respectively.***
- 79) The employer's approach was to limit this amendment to those employees who were impacted or downgraded as a result of resolution 3 of 2009, effectively those appointed between July 2010 and July

2012 and to exclude employees appointed after 1 August 2012. In doing so it relied on the implementation circular.

- 80) This reliance was flawed. The circular dealt with grades of jobs in corporate services and it specifically required SASSA to “still grade new posts and regrade existing posts in the core business line function with the job evaluation processes, if the posts are not covered by the [OSD]”.
- 81) The resolution (1/2012) refers to appointment and remuneration which suggests that even a new appointment had to be in line with the SL as per the grading that resulted from the last JE. The posts the incumbents occupied had been graded at 10 and 12. They had been appointed at 9 and 11 despite this grading because of a collective agreement. When the collective agreement was amended to allow appointment and remuneration as per the grade, the posts of the incumbents should have been adjusted to reflect the original grading of the posts irrespective of the date of appointment. What the employer effectively did was downgrade posts without conducting the necessary job evaluations. This was acceptable for the period covered by Resolution 3 of 2009 because the downgrades were brought about by a binding collective agreement, but once the relevant clause of that collective agreement was amended, the grading had to revert to what it was as per the last job evaluation process and the posts could be downgraded only after a new JE process. In doing so the employer undermined its own objective, as articulated by Sakala, of ensuring that similar jobs in the public service are graded similarly. The result of this was that the employer acted unfairly in downgrading certain positions or, put more accurately, certain positions occupied by certain people appointed into the lower grades after 1 August 2012.
- 82) As already mentioned, it is basic principle of grading that the post, and not the person, is graded. The grade is also not normally determined by the date of appointment. Parity is another principle of grading: If two people are performing the same or similar job their grade or salary level should be the same. By breaching these principles and placing employees appointed after 1 August 2012 on a lower grade than their colleagues performing the same or similar job, the employer conduct was, on the face of it, unfair.
- 83) To my mind, there are, however, two considerations that have the effect of justifying the employer's conduct. First, there is no reason why ALL appointments at grade 9 and 11 after 1 August 2012 would be incorrect or unfair. The grades 9 and 11 still existed, and if the job had not been given a weight and graded at 10 or 12, the post cannot, just because of a broad title of manager or assistant manager, be regarded as having been graded at a particular grade. If the position had not been graded and the incumbent was appointed at 9 or 11, then that is the valid and agreed grade. It is only where the job had in fact been graded at 10 or 12 with the associated job weight that the appointment and remuneration had to be at that level, bar the period during which a collective agreement provided otherwise. This factor accordingly limits the unfair conduct regarding grading to those positions which had actually been evaluated and graded.
- 84) The second factor is that the position must have been correctly graded to begin with in order for incumbents to benefit from upgrading. The job the employee was performing had to be, so to speak,

worthy of the grade. To illustrate the point, if an employee is appointed at level 9, but claims that the post should be upgraded to a 10; and it then turns out after a proper grading exercise that the job was in fact only worth a grade 8, it would be irrational to find that the employee appointed and remunerated at level 9 was unfairly treated.

- 85) The employer argued that neither Jefftha or any of the other Applicants submitted any evidence to show that since the date of their respective appointments in or during September 2012 and 2014 that Jefftha or anyone of them (the Applicants) despite being appointed on levels 9 and 11, respectively, were, always, functioning and/or performing work on levels 10 and 12. It was not the union's case that the incumbents deserved upgrades because they were performing work at higher levels. On the contrary, the union's case is that the jobs they were performing had already been graded in 2005 and that grading applied until revised following a subsequent JE process and this argument has merit.
- 86) It is common cause that the employer embarked on a JE process in 2013 and the results were eventually available in 2015 (for corporate services positions) and 2016 (for core positions). The positions of local office managers came out at grade 12. These positions had always been evaluated at grade 12, with a job weight of 664.11 as from 2005, and it was unfair for the employer to appoint and remunerate local office managers (or managers who perform these duties) at a lower grade in the period from 1 August 2012 to May 2016. The employees who occupied these positions are M Nortje; M Jefftha; P Burger; AF Sebothoma; N Rasivhetshela; K Williams; and JB Moffat.
- 87) Three manager positions (occupied by G Pheiffer; W Melwich and N Du Toit) came out after the job evaluation at grade 11, and this was the grade on which the incumbents were appointed and remunerated. Since the position was never worthy of a grade 12 salary level, and in line with the considerations mentioned above, I find that the employer's conduct in respect of these three employees was not unfair.
- 88) As regards the corporate services jobs, some remained at the same grade after the 2015 DPSA consultation process and some were graded lower. It was common cause that incumbents were not negatively affected by downgrades. Since the positions in question were never worthy of a grade 10, I find that the employer's conduct in respect of these employees was not unfair. The incumbents are L Nyongo; E Rhode; S Mgedezi and E Potgieter.
- 89) There were additional core posts occupied by M Murray, M Nyawose and N Mgijima which, when evaluated, came out at the same or a lower grade. Again, the positions were never worthy of a higher grade and I find that the employer's conduct in respect of these positions was not unfair.

Remedy

- 90) In determining the appropriate remedy, I have taken into account that the grading of managers performing local office manager duties was corrected in accordance with the completed 2016 JE result. The period in

question goes back to the period 1 September 2012 to May 2016 and it is unquestionably difficult to determine the difference in salary levels that incumbents were paid compared to what they ought to have been paid, let alone benefit contributions. I have also taken into account that the employees accepted their positions at the advertised grade and the burden on the state to now retrospectively correct the grading and salary levels is onerous, especially since these amounts would be unbudgeted. The employer argued that what applied for incumbents in this case, based in the Western Cape, would have to apply nationally and this would entail a considerable financial burden.

- 91) I should mention that I requested the union to provide a comprehensive list of the applicants with their current grades, date of appointment, salary and what was claimed. The union failed to provide this and I have had to rely on the information provided by the employer to establish employment details such as dates of appointment.
- 92) In the circumstances, I find it appropriate to order a flat amount of compensation, as a solatium, to the seven managers who have been upgraded to level 12 in two categories according to the dates of their employment – those appointed in 2012-13 and those appointed in 2014-15. The following:
- a) Managers appointed in 2012/13 – R60 000.00 (Sixty Thousand Rands);
 - b) Managers appointed in 2014/15 – R30 000 (Thirty Thousand Rands).
- 93) These amounts are awarded as once-off payments, less applicable taxation.

AWARD

- 94) I find that the employer, South African Social Security Agency, committed an unfair labour practice relating to benefits, in particular grading in respect of M Nortje; M Jeftha; P Burger; AF Sebothoma; N Rasivhetshela; K Williams; and JB Moffat.
- 95) I find that the employer did not commit an unfair labour practice in respect of the remaining applicant employees.
- 96) The employer must pay compensation in the form of a solatium as follows:
- a) Munroe Jaftha, appointed on 1 September 2012, once-off compensation in the amount of R60 000.
 - b) Morne Nortje, appointed on 1 June 2015, once-off compensation in the amount of R30 000.
 - c) Peter Burger, appointed on 1 September 2012, once-off compensation in the amount of R60 000.
 - d) Alfred Freddie Sebothoma, appointed on 1 November 2014, once-off compensation in the amount of R30 000.
 - e) Norman Rasintetshela, appointed on 22 September 2014, once-off compensation in the amount of R30 000.
 - f) Kenneth Williams, appointed on 1 October 2012, once-off compensation in the amount of R60 000.
 - g) John Moffat, appointed on 1 September 2012, once-off compensation in the amount of R60 000.

- 97) The amounts referred to in paragraph 96 above, less applicable taxation, must be paid on or before 15 July 2021.
- 98) In respect of the remaining applicants, I find that there was no unfair treatment relating to benefits or grading and no relief is granted.
- 99) I make no costs award.



SENIOR COMMISSIONER: WINNIE EVERETT

