



PHSDSBC

PUBLIC HEALTH AND SOCIAL DEVELOPMENT
SECTORAL BARGAINING COUNCIL

ARBITRATION AWARD

Case No: PSHS1003-16/17

Commissioner: Anna Maria Fourie

Date of Award: 5 April 2017

In the matter between:

Lehlohonolo Winston Tau

(Union/Applicant)

and

Department of Health- Free State

(Respondent)

DETAILS OF HEARING AND REPRESENTATION

- [1] The Applicant referred a dispute regarding an alleged unfair labour practice relating to benefits for arbitration in terms of section 186(2)(a) of the Labour Relations Act, No 66 of 1995, as amended (the LRA). The matter was set down for arbitration at Bophelo House, Bloemfontein, on 23 March 2017 at 10h00. The parties requested to submit written heads of argument. They were given time until 1 April 2017 to submit their arguments.
- [2] The Applicant presented his own case. The Respondent was represented by Mr Molokoane, a Senior Labour Relations Officer employed by it.

ISSUE TO BE DECIDED

[3] I had to determine whether the Respondent committed an unfair labour practice against the Applicant by not paying him according to a PDMS that commenced on 1 April 2008. The dispute specifically revolved around the 2013/2014 financial year. In the event that I find that there was an unfair labour practice, I must award the appropriate relief.

BACKGROUND

[4] The Applicant was employed by the Respondent as Assistant Director: Finance at Pelonomi Hospital since 1 May 2012. He was remunerated on the first notch of level 9. In February 2017, he received payment from the Respondent for arrears salary as well as a salary adjustment for the years 2013 /2014. However, he was of the view that he was prejudiced as a result of the failure of the Respondent to implement the PDMS sooner, namely on 1 July 2014. He thus sought compensation to the equivalent of six months' remuneration.

[5] The facts of the case were not in dispute. I need to determine whether the Applicant was entitled to any relief.

SURVEY OF EVIDENCE AND ARGUMENT

[6] The parties relied on written arguments and documents only. The Applicant submitted his heads of argument on 28 March 2017, the Respondent filed responding arguments on 30 March 2017 and the Applicant filed a replying argument on 1 April 2017.

APPLICANT'S ARGUMENT

[7] He suffered prejudice in that the Respondent failed to implement his pay progression in terms of the PDMS from an amount of R311 784.00 per annum to R316 452.00 per annum. He thus could not settle some of his debts due to the fact that the salary he took home was less. His family, comprising of his wife and three children were also affected by this.

- [8] As a result of the Respondent's failure, he was unable to settle his Edu-Loan amount of R5 719.45 by the 20th of January 2017 and he could thus not re-enrol with the University timeously for the completion of the last semester of his qualification.
- [9] He further suffered prejudice in that the salary notch adjustments for the years 2014/2015 and 2015/2016, which would have placed him at R326 013.00 per annum, could also not be implemented. He further lost in terms of interest that could have accrued on his pension fund contributions, as the contributions actually paid, were less than it should have been, had the PDMS been implemented. He had suffered for a period of 31 months as a result of the Respondent's failure.
- [10] In reply to the Respondent's arguments, he submitted that, even after taxation, he still ought to have received R1 348.76 per month more which would have enabled him to pay his outstanding tuition fees. Thus, he was prejudiced by the delay in payment as he could not settle his tuition fees in time to register for the new academic year. Furthermore, the deduction in relation to pension, was not reflected on the document submitted by the Respondent. The amount deducted also did not reflect the percentage that the Respondent should have deducted in this respect. Thus, he did lose interest on his pension fund.
- [11] The programme that he wished to enrol for during the 2017 academic year was not included in the Respondent's list of priority courses for the academic period 2017/2018. He thus would not have qualified for a bursary. He did apply for financial assistance in 2016, but he did not qualify for a bursary as the courses he then undertook were also not considered as priority by the Respondent. That was why he took out a study loan.

RESPONDENT'S ARGUMENT

- [12] The Applicant was indeed assessed for the financial year in question. However, due to financial constraints, he could not be paid accordingly at the time. His case was not isolated. All employees were affected. Funds were since secured and the Applicant's pay progression for the financial year 2013/2014 was implemented in arrears on the 7th of February 2017.
- [13] The dispute is merely academic, as the Applicant was paid, even though payment was delayed.
- [14] As for the Applicant's argument that he was prejudiced in that he could not settle some of his debts, the difference between the notch he was on and that notch he should have received was R1 893.00

per month which was still subject to employee's tax. The other argument of the Applicant was that his pension fund contribution would be less. However, when the pay progression was implemented in February 2017, an amount was deducted for pension as well as for tax.

[15] As for the Applicant's argument that he was prejudiced in that he could not register with the University to complete his qualification, he could have approached the Respondent for a bursary or he could have applied to the Respondent to "take over" his studies, in which case, the outstanding tuition fees would have been paid. However, the Applicant apparently did not consider either of these options.

[16] The reasons advanced by the Applicant in support of his submission that he was prejudiced were not justified and did not substantiate his plea for compensation.

ANALYSIS OF EVIDENCE AND ARGUMENT

[17] The question I need to determine was whether it was unfair for the Respondent to only implement the Applicant's pay progression for the financial year 2013/2014 in February 2017. There was no dispute that the Applicant was entitled to a pay progression for the said financial year and that it was not paid by the Respondent at the time.

[18] The reason advanced by the Respondent for not implementing the pay progression at the time was that the Respondent had experienced financial constraints. It is commonplace that the Respondent had received media coverage at some stage for finding itself in a management crisis. However, no actual evidence was submitted in support of the submission that the Respondent had experienced financial constraints. I thus had no factual basis on which to conclude that the alleged financial constraints justified the Respondent's failure to implement the pay progression in question at the time. It has indeed become the default argument of the Respondent to raise financial constraints as an excuse for most instances where the Respondent failed to comply with PDMS or OSD. This is simply not a sufficient excuse in the absence of a factual basis in support of such an excuse.

[19] While I do acknowledge that financial constraints may indeed constitute an explanation for non-compliance on the part of the Respondent, I cannot simply ignore that, on the other hand, the Applicant suffered a great deal of inconvenience as a result of the Respondent's non-compliance. I do not believe that the Respondent is obliged to sponsor the Applicant's studies. However, the fact that the Respondent did not comply with its obligation to implement the Applicant's pay progression caused the

Applicant hardship in that he could not meet all of his financial liabilities timeously. He was thus inconvenienced as a result of the Respondent's conduct.

- [20] The question is whether the Respondent in fact had any valid excuse not to implement the pay progression as per the PDMS at the time. If indeed the Respondent had a discretion regarding the timing of the implementation, the question would be whether the Respondent exercised such discretion fairly. There was no submission or evidence before me in support of the Respondent's argument that financial constraints caused the delay in implementation. I am thus of the view that the Respondent indeed committed an unfair labour practice against the Applicant.
- [21] The next question is whether the Applicant is entitled to the relief sought, namely six months' compensation. In order to determine this question, I have to weigh the prejudice actually suffered by the Applicant against the amount of compensation sought. Any order for compensation must be justified. The purpose is to right a wrong, not to cause undue hardship on any party.
- [22] The Applicant submitted that he was prejudiced in that he could not meet his financial obligation to the University in terms of outstanding tuition fees in the amount of R5 719.45. He substantiated this submission by submitting a copy of his salary advice for 15 December 2016 on which the outstanding amount is reflected. He further submitted a copy of a letter from the University, dated 19 December 2016, in which payment of his outstanding tuition fees was demanded. He was unable to quantify the alleged prejudice he suffered with regard to his pension fund contributions.
- [23] I cannot ignore the fact that the Respondent did implement the pay progression, even though it was almost three years later. Thus, the only question is whether the Applicant should be compensated for being inconvenienced by the Respondent's conduct. I considered the fact that there is an on-going employment relationship between the parties. I also took into account the quantification of the actual prejudice substantiated by the Applicant. I am thus of the view that one month's remuneration, calculated on his present notch, as reflected in his salary advice for March 2017, would be fair compensation in the circumstances. The said amount would be R26 371.00, calculated as $R316\,452.00 \text{ per annum} \div 12 = R26\,371.00$

AWARD

[24] The Respondent, **The Department of Health Free State**, committed an unfair labour practice relating to benefits against the Applicant, **Lehlohonolo Winston Tau**. The Respondent should compensate the Applicant in the amount of R26 371.00 as calculated in paragraph 23, by no later than 26 April 2017.

[25] I made no order as to costs.

Signature:

A handwritten signature in blue ink, appearing to read 'AMF' followed by a flourish and the letter 'e'.

Commissioner: Anna Maria Fourie