



PHSDSBC

PUBLIC HEALTH AND SOCIAL DEVELOPMENT
SECTORAL BARGAINING COUNCIL

ARBITRATION AWARD

Commissioner: **ARNE SJOLUND**

Case No: **PSHS601-17/18**

Date of award: **25 November 2017**

In the matter between:

NEHAWU OBO MODISA KB

APPLICANT

DEPARTMENT OF SOCIAL DEVELOPMENT- NORTH WEST

RESPONDENT

DETAILS OF HEARING AND REPRESENTATION

1. This matter was set down for an arbitration hearing by the PHSDSBC and was heard on 10 November 2017 at 10h00. The hearing took place at the Department of Social Development's offices situated in the Provident House building, Mafikeng.
2. Ms Modisa (hereinafter referred to as "the applicant") was represented by Mr Makwetu ("Makwetu") an official from the applicant's union, NEHAWU. The Department of Social Development (hereinafter referred to as "the respondent") was represented by Ms Kegakilwe ("Kegakilwe") employed as Employee Relations Manager by the respondent.
3. Two bundles of documents were submitted into evidence and utilized during the arbitration hearing.
4. The hearing was conducted in English and digitally recorded.

5. The matter was finalized on 10 November 2017 where after the parties agreed to submit their closing arguments by 24 November 2017. All arguments were well received and considered in my award.

ISSUE TO BE DECIDED

6. This matter is brought in terms of section 24 (2), [24 (5)] of the Labour Relations Act 66 of 1995, as amended (LRA) and relates the interpretation or application of a collective agreement. The parties agreed that clause 3.6.3.4.1 of PSCBC Resolution 3 of 2009 (hereinafter referred to as “the Resolution”) requires that an employee must perform above satisfactory for 12 years “cumulatively” in a salary level irrespective of the notch for the salary level to progress from salary level 9 to 10 or 11 to 12. The parties also agree that clause 3.6.3.4.1 of the Resolution is literally interpreted.
7. The applicant’s dispute emanates from the fact that the respondent refused to comply with the provisions of the Resolution as since the applicant had been appointed at salary level 9 in 2004 she had been performing above satisfactory for 12 years, but the respondent had failed to progress her salary from level 9 to 10. The respondent submitted that the applicant had not performed above satisfactory for 12 years cumulatively and was therefore not entitled to progress to salary level 10. The applicant also submitted that the respondent had applied the Resolution inconsistently. The respondent submitted that they have not been inconsistent in applying the Resolution. The parties agreed to deal with the issue of constancy in their arguments and no evidence was led on this issue during the arbitration hearing.
8. I am therefore tasked to determine whether the applicant had performed above satisfactory for 12 years cumulatively whereby she is entitled to progress from salary level 9 to 10. Should I find in favor of the applicant, order the appropriate relief. The applicant bears the onus of proof in this matter.

BACKGROUND TO THE ISSUE

9. The applicant submitted that she was employed by the respondent during 1981 and was promoted to the position of Assistant Director in 2004. After she was appointed as Assistant Director she performed above average for more than 12

years. At the time of the arbitration hearing she was earning a salary of R20 000.00 per month.

SURVEY OF EVIDENCE AND ARGUMENT

10. It is not the purpose or the intention of this award to provide a detailed transcription of all the evidence that was placed before me even though all evidence and arguments were considered. I have summarised the evidence that I found to be the most relevant to decide in this dispute.

Applicant's Case:

11. The applicant testified that she had performed above average from 2005 up to the date of the arbitration hearing and that the respondent had failed to progress her salary from level from 9 to 10 as per the Resolution. She testified that sometimes she would agree with her Supervisor that she was entitled to a performance bonus but due to budget constraints she did not receive the performance bonus. She testified that Hunan Recourses (HR) was the custodians of records and they should have all the records of her performing above average. The applicant referred to her bundle of documents and testified that her curriculum vitae (CV) was proof that she acted as Deputy Director from 2007 to 2008, and from 2014 to 2016 and therefore performed above average. During cross-examination the applicant was asked how the respondent could implement the resolution if there were no records of her performing above average, the applicant testified that the respondent should have the records. When the applicant was questioned what proof, she had that she performed above average she testified that the fact that she was acting as Deputy Director was proof.

Respondent's case:

12. Mr Gaobuse ("Gaobuse") testified that he was employed as an Assistant Director by the respondent and dealt with PMDS. He testified that an application was received for the accelerated grade progression for the applicant in terms of the Resolution due to the applicant completing 12 years' service whilst performing above average. He testified that the matter was investigated where they found that the applicant was appointed into her current position during 2004. They could not find any proof that the applicant had performed above average for the period 2005 to 2008. He testified that the Resolution stipulated that an employee had to perform above average for 12 cumulative years to qualify for the accelerated pay progression. He testified that where an employee performed above average such

employee would receive a performance bonus. The respondent was guided by their PERSAL system, this system was informed by documents. He testified that the PERSAL system showed that the applicant had not received performance bonuses for the period between 2005 and 2008. The applicant did receive performance bonuses during 2002 to 2003, and from 2009 onwards. Gaobuse testified that the fact that an employee was acting was not proof that such she performed above average and that acting was in terms of a different policy and did not relate to PMDS. He testified that prior to the respondent centralizing employee's performance records employees were responsible to keep their own records. During cross-examination it was put to Gaobuse that employees were not responsible to keep their own records, Gaobuse testified that during 2010 when he was appointed there was no centralized registry and employees had to keep their own performance records.

ANALYSIS OF EVIDENCE AND HEADS OF ARGUMENT

13. As stated in par 8 *supra*, the applicant bears the onus of proof. This means the version of the applicant must be more probable than the version of the respondent on the balance of probabilities. In the matter of *Cooper and another v Merchant Trade Finance Ltd 2000 (3) SA 1009 (SCA)* the Court found that the approach to be adopted when inference is sought to be drawn from other facts was summarized. The Court in drawing inferences from the proved facts, acts on a preponderance of probability. The inference of an intention to prefer is one in which is on a balance of probabilities the most probable although not necessary the only inference to be drawn. If the fact permits of more than one inference the Court must select the most plausible or probable inference. If it favors the party on whom the onus rests, he is entitled to relief. If on the other hand an inference in favor of both parties is equally possible, the party who bears the onus will not be entitled to relief. It is common cause that clause 3.6.3.4.1 of the Resolution states that an employee must perform above average for 12 years cumulatively to qualify for the accelerated pay progression. It is the applicant's case that she performed above average for 12 years cumulatively. This was disputed by the respondent. The period in dispute is the three-year period between 2005 and 2008. The respondent relied on the testimony of Gaobuse who testified that when an employee performed above average such employee would receive a performance bonus. It is common cause that the applicant did not receive a performance bonus for the period in dispute which is confirmed by the respondent's PERSAL system. The applicant submitted that she was acting as Deputy Director for the period 2007 to 2008 and

that this was proof that she was performing above average. Gaobuse testified that acting was guided in terms of its own policy and did therefore not prove that the applicant was performing above average. I accept the respondent's version that the fact that the applicant was acting as Deputy Director does not prove that she was performing above average and should the applicant rely on this issue alone it would not prove that she performed above average from 2005 to 2007. The final issue raised at the arbitration hearing was the issue of records and who was responsible for them. The applicant submitted that HR was the custodians of records, in this case performance records. The respondent submitted that prior to these records being centralized employees were responsible to keep their own performance records. The applicant testified that sometimes she would agree with her Supervisors that should she had performed above average where her Supervisors would inform her that there was no money for performance bonuses. The applicant failed to provide the names of the Supervisors or when such comments were made, it is also unlikely that she would not have challenged such decisions at the time and have proof of this. I find that on the balance of probabilities that the version of the respondent is more probable than the version of the applicant and the applicant failed to dispose of the onus to prove that the respondent committed an unfair labour practice. The applicant submitted that the issue of consistency would be dealt with in their closing arguments in order for the respondent to reply. The applicant failed to deal with this issue as agreed and merely referred to pages in their bundle of documents that provide no real evidence of such. This issue was again denied by the respondent in their arguments. Accordingly, I order as follow:

AWARD

14. The applicant has not performed above average for 12 years cumulatively as per the Resolution and is therefore not entitled to relief.

15. The matter is dismissed.

16. No order as to cost is made.



Arne Sjolund

Commissioner