



**PHSDSBC
PUBLIC HEALTH AND
SOCIAL DEVELOPMENT
SECTORAL BARGAINING
COUNCIL**

ARBITRATION AWARD

Panelist/s: Advocate Ronnie Bracks
Case No.: PSHS92-10/11
Date of Award: 9 September 2011

In the ARBITRATION between:

HOSPERSA obo +/-10 000

(Employee)

and

Department of Health- Gauteng Province

(Respondent)

Employee Representative: HOSPERSA obo +/-10 000
Employee's address: Jean Village Shopping Centre
29 Jean Avenue
Centurion
Telephone: (012) 664 1285
Telefax: (012) 664 1285
E-mail: _____

Company/Employer representative: Department of Health- Gauteng Province
Company's address: Private Bag 085
Marshalltown
2107
Telephone: (011) 355-3517
Telefax: (011) 355-3808
E-mail: _____

DETAILS OF HEARING AND REPRESENTATION

- A. The Arbitration was scheduled for hearing at the Respondent's office at Bank of Lisbon Building 14th Floor, cnr Sauer and Market Streets, Johannesburg on various dates culminating on 26th July 2011. The Employee was represented by Mr. S'busiso Khanyeza a union official. Mr. Ajay Makka, from Ajay Makka Inc Attorneys represented the Respondent. *The proceedings were recorded both manually and electronically.*

ISSUE TO BE DECIDED

- B. The Interpretation and/or Application of resolution 1 of 2004.

BACKGROUND TO THE ISSUE

- C. The Applicant referred a dispute to Council in respect of the interpretation and/or application of a collective agreement. The agreement is in respect of rewards and recognition for the Gauteng Provincial Government.
- D. The arbitration was set down on various dates when it was postponed to the 25th and 26th July 2011. The parties submitted and agreed that no viva voce evidence would be led but that they would address the issues by way of written submissions.

SURVEY OF EVIDENCE AND ARGUMENT

EVIDENCE

Documentary

- F An agreed bundle of document was submitted.

Employees' Evidence:

The Applicant's representative made the following submissions:

- In 2008/09 the Respondent had the obligation to set aside a budget to pay all its employees who qualified for an Incentive Bonus, the same way it did in the previous years being 2006/07 and 2007/08.
- The Respondent indeed put aside the budget for the payment of the Incentive Bonus for the qualifying employees in salary levels 1-12, in line with page 42 , paragraph 6 (Rewards and Recognition) of the bundle of documents "A" from the Applicant.
- The budget referred to above should be done in accordance to the provisions of CCPGP Resolution 1 of 2004 annexure A, where it refers to the fact that the budget was to be 1.5% of the total wage bill. Page 52 of the bundle of documents "A" item 5 and page 53 of the same bundle of documents "A" articulates it further.

- The Respondent's bundle of documents "B" does not present any explanation as to why it failed to pay the Incentive Bonus to the employees in the year 2008/09; it's for this reason that we declared a dispute in respect of those members of the union who qualified.
- The reason for stating this is that most of the issues referred to in that bundle are irrelevant to this dispute and one can only conclude that this is done by the Respondent to create confusion.
- The Applicant's case is clear. It is not about interpretation, it is about failure of the Respondent to implement / apply the Resolution as it has done previously. Please see pages 22-25 in bundle "A" of documents.
- This is further supported by the Respondent's bundle of documents "B", pages 69-70 which shows that only 88.7% of it was spent. The question is where it was spent. It needs to be recovered and be spent where it was supposed to be utilized.
- It is abundantly clear that the Respondent does not have grounds for failing or refusing to pay the Incentive Bonus to the qualifying union members for the period 2008/09.
- It is further important that Resolution 1 of 2004 of the CCPGP as attached to bundle of documents "A" from the Applicant is read, {pages 51 to 57 (annexure A) with pages 22-25 of the same bundle of documents} in order for the Commissioner to come to a logical conclusion.
- According to the Applicant's representative the desired outcome should be that Respondent is to pay its members who qualified for Incentive Bonus in 2008/09. This must be done as stipulated in the CCPGP Resolution 1 of 2004 (annexure A), page 54 according to their ratings and respective salary levels which is a continuation of page 53 item 3.4. See pages 58-60 of the Applicant's bundle of documents "A" as an example.

Employers' Evidence:

The Respondent's representative made the following submissions:

- The Resolution should be interpreted holistically. The Applicant's argument could not be followed as there was no argument. Reference was made to clause 3.4 of Resolution 1.
- The Resolution highlights the in-built flexibility permeating from the agreement. The payment of PMDS bonuses are subject to the availability of adequate funds and the departmental budget. As the Respondent's over-expenditure was astronomical it decided that it could not afford to pay the PMDS. This is permissible in terms of the agreement.

- The purpose of the Public Finance Management Act (PFMA) is to ensure that there is transparency and efficiency in State spending. The PFMA defines a host of relevant terms. Two terms are relevant for present purposes; namely “irregular expenditure” and “fruitless and wasteful expenditure”.
- Irregular expenditure is defined as –
 - “..expenditure, other than unauthorized expenditure, incurred in contravention of or that is not in accordance with a requirement of any applicable legislation ...”¹
 - Fruitless and wasteful expenditure is defined as –
 - “..expenditure which was made in vain and would have been avoided had reasonable care been exercised.”
- The Respondent’s head of department (the equivalent of a Director-General) is the accounting officer in terms of the PFMA. She is ultimately responsible for the way in which the Respondent’s budget and finances are spent. Section 38(2) of the PFMA reads as follows:
 - “(2) An accounting officer may not commit a department ... to any liability for which money has not been appropriated.”²
- The Applicant union, as well as other public sector unions, is fully aware of the Department’s precarious financial position. In fact, the public at large is aware of this as this issue has been receiving extensive media coverage for many months. The Respondent introduced a host of austerity measures aimed at achieving massive savings and reducing its exorbitant over-expenditure as per Circular letter 16 of 2010. The purpose of this circular was to inform all role-players of the Respondent’s cost containment and austerity measures.
- A very instructive and useful case is that of *PSA and Department of Health (2004) 13 PSCBC 4.2.3*. In this matter the PSCBC was faced with a very similar referral as in the present matter. The relevance of the 2004 PSA case to the present referral is the following: the right that is conferred *vis-à-vis* PMDS is the right to be considered for a performance bonus based on work *performance* and affordability. It is a right that is subject to managerial prerogative. In essence, management has discretion to grant the performance bonus based on performance and affordability.
- A performance bonus is not an automatic right. It is an additional amount paid based on performance. Not all employees qualify – only those whose performance is exemplary as measured by the Department. This is exactly the Respondent’s argument in opposing this referral.
- Another instructive and relevant case is that of *MEC for Health, Gauteng v Public Service Coordinating Bargaining Council & Others (2006) 27 ILJ 2638 (LC)*. The Department’s argument in that case, which reflects the Department’s argument in the present arbitration, is the following: “The Applicant (Department) argues that it has to adhere to stringent treasury regulations and cannot incur irregular expenditure, or exceed the amount appropriated for a particular vote or a main division within a vote; that personnel expenditure may not be increased without approval; that an accounting officer may not overspend by exceeding the amount appropriated for a particular vote”..

- In that case the arbitrator was also asked if the Department was obliged to make payment of the notch increases. The current Resolution that the learned arbitrator is required to interpret also refers to a notch increase. The fact that the notch increases and the performance bonus (PMDS) are combined in one agreement – as with the present dispute before the council – is very important. The Labour Court and the PSCBC has held that the payments of the notch increases are discretionary based on financial affordability. Similarly the payment of performance bonuses must be held to be discretionary based on financial affordability and performance.
- The Respondent submits that all the authorities and the legislation – the PFMA – oblige the learned arbitrator to dismiss the referral.

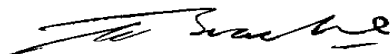
ANALYSIS OF EVIDENCE AND ARGUMENT

1. I am called upon to consider the Application and/or interpretation of Resolution 1 of 2004. I have considered the evidence presented and I will not be repeating it in the award.
2. The objective of Resolution 1 of 2004 is to provide uniform mechanisms through which to provide:-
 - The link of the uniform performance management system to pay
 - A framework to reward meritorious performance through cash bonuses
 - For the notch progression system
 - For the need to establish non-financial and team awards frame works within GPG departments.
3. The scope of the agreement binds the employer and employees who are in range 1 to 12 in the Gauteng Provincial Government. In addition the GPG committed itself to minimum standards for notch progression and performance bonuses in the GPG are determined and are mandatory to all GPG departments within the scope. Further the rewards and recognition should serve as a tool to motivate staff and enhance efficiency and effectiveness. The reward and recognition should be easy to manage and minimize administrative burdens on the supervisors and employees. It further speaks of transparency and that 1% of the wage bill shall be budgeted for notch progression and 1, 5% for performance bonuses. The reward should be based on assessment results and in line with minimum requirements in the Public Service Regulations, 2001. There is a minimum requirement of 12 months.

- 4 In respect of performance bonuses it is stipulated that the public service regulations 2001 Chapter 1 Part VIII empowers heads of department to introduce financial incentive schemes if the department budgets and the MTEF provide adequate funds in respect of the cash merit scheme.
5. In the present case I am called upon to determine whether or not the Applicant's members who qualify in terms of the resolution should be paid their performance bonuses for 2008/9. On A22 the parties concluded an agreement to pay incentive bonuses for 2007/2008. This agreement was concluded as per the stipulation of resolution 2001. On pages 58 to 60 a letter was written obtaining approval for the payment of the performance bonuses. The Applicant relies on the agreement for the payment of the 2007/8 for similar payment in 2008/2009 and the fact that mention was made in a Multilateral Meeting on 24 April 2009 that there was a budget of R135 million for performance bonuses.

- 6 I have considered this view and my candid view is that when the performance bonuses for 2007/8 were paid a specific process was followed. There is no evidence before me that the parties followed a similar process such as among other that the Applicants and the Respondent had concluded an agreement as per A22. Nor is there any evidence as to who the qualifying members are. As per my understanding of resolution 1 of 2004 paragraph 3.2 rewards and recognition is to be based upon performance assessment results from the uniform performance management and development system's annual assessment results. The fact that a budget had been set aside for this does not necessarily mean that the performance bonuses will be paid as paragraph 3.4 requires that there be adequate funds in respect of cash/merit bonuses.
- 7 In addition similar as was the case in 2007/8 there was no recommendation as per A58 to 60 obtaining the necessary approval for the performance bonuses. Again this clearly indicates that approval should be obtained for the payment of incentive bonuses.
- 8 For the reasons stated above it is my view that there is nothing in Resolution 1 of 2004 which requires the automatic payment of incentive bonuses solely because the Respondent had budgeted therefore. The requirement in terms of paragraph 3.2(7) is that reward and recognition is based on performance assessment results. No evidence of such results or any agreement in respect of such results has been placed before me. Hence there is no requirement on the Respondent to pay such bonuses.

AWARD



Adv. RONNIE BRACKS

1. The case against the Respondent is dismissed.

PSHSBC Panelist