PHSDSBC

PUBLIC HEALTH AND SOCIAL DEVELOPMENT SECTORAL BARGAINING COUNCIL

ARBITRATION AWARD

Panelist: **Adv PM Venter**

Case No: **PSHS938-13/14**

Date of Award: **18 August 2014**

In the arbitration between:

NEHAWU obo TLADI Applicant

and

DEPARTMENT OF HEALTH: FREE STATE Respondent

DETAILS OF HEARING:

1. The matter was arbitrated on 30 July 2014. The matter was scheduled to take place in Clocolan but parties agreed and informed me that they would not appear but rather submit written arguments only. I therefore visited the Respondent's offices on the day of the hearing only to obtain an attendance register.

2. The Applicant was represented by Mr. Mofokeng, an official from NEHAWU, whilst the Respondent was represented by their Labour Relations Officer, Ms. De Beer.

3. No interpreter was required and the matter was not recorded. The parties agreed to submit their respective written arguments no later than 15 August 2014.

BACKGROUND TO THE MATTER:

4. The matter was referred to the Bargaining Council in terms of Section 186(2)(a) of the Labour Relations Act, 66 of 1995 (hereinafter referred to as "the LRA").

5. The Applicant is employed in the Food Management component and claimed that she was not paid an acting allowance whereas she performed duties as an acting Food Manager at the JD Newberry Hospital in Clocolan.

6. She claimed that she acted in the position with effect from 31 December 2008 up to date.

7. The Applicant's case was not referred in terms of section 24 of the LRA but her claim was that the refusal to pay her an acting allowance constituted an unfair labour practice relating to benefits.

ISSUE TO BE DETERMINED:

8. I was called upon to decide whether or not the Respondent committed an unfair labour practice in terms of section 186(2)(a) of the LRA.

SURVEY OF EVIDENCE AND ARGUMENTS:

CASE OF THE APPLICANT:

Mr. Mofokeng submitted written arguments that were, in essence, as follows:

9. The Applicant was appointed to act as Food Manager from 31 December 2008.

10. The Respondent failed to pay her whilst she was performing more senior duties and benefitted from her performing these duties.

11. An acting allowance is a benefit and by refusing payment the Respondent is contravening the LRA.

12. I was requested to order the payment of an acting allowance.

CASE OF THE RESPONDENT:

Ms. De Beer submitted written arguments that were, in essence, as follows:

13. The dispute was not referred in terms of section 24 of the LRA and had to be considered under section 186 of the LRA. It is trite that the payment of an acting allowance is not a benefit within the ambit of the LRA.

14. Resolution 1 of 2002 had to be followed and adhered to and there are certain criteria in order to qualify for the payment of an acting allowance.

15. The Applicant was appointed by a Senior Administration Officer who had no authority to appoint the Applicant in an acting capacity. The CEO was the only delegated person to appoint the Applicant.

ANALYSIS OF EVIDENCE AND ARGUMENTS:

16 There were conflicting decisions on whether an employee needs to establish either a contractual right or a legal right before a finding may be made that an unfair labour practice occurred. Cases supporting the view that a contractual or a legal right needs to be established dealt with alleged unfair labour practices relating to benefits and they include:

- ***HOSPERSA & another v Northern Cape Provincial Administration*** (2000) 21 *ILJ* 1066 (LAC) at 1069-1070, paras [8] and [9]
- ***Gauteng Provinsiale Administrasie v Scheepers & other*** (2000) 21 *ILJ* 1305 (LAC); [2000] 7 BLLR 756 (LAC)
- ***G4S Security Services v NASGAWU & others*** (unreported LAC Case No DA3/08 dated 26 November 2009)
- ***S A Post Office Ltd v CCMA & others*** (2012) 33 ILJ 2970 (LC)

17 Cases supporting the view that a contractual or legal right, other than a right to fair labour practices, need not be shown are

- ***Protekon (Pty) Ltd v CCMA & others*** [2005] 7 BLLR 703 (LC)
- ***IMATU obo Verster v Umhlathuze Municipality & others*** (2011) 32 ILJ 2144 (LC); [2011] 9 BLLR 783 (LC)

18 These cases were supported followed the LAC judgment in ***Department of Justice v CCMA and others*** **(2004) 25 ILJ 248 LAC); [2004] 4 BLLR 297 (LAC)** a decision dealing with promotion in which it was found, in relation to unfair labour practices generally, that a contractual or a legal right, other than a right to fair labour practices need not be established. The relevant quotes appear hereunder:

Per Zondo JP (at 314 -315):

" Counsel for the Department also submitted that a dispute such as the one in the present case was a dispute of interest and not a dispute of right and that item 2 (1) (b) contemplated disputes of right and not disputes of interest. The right he was referring to is a right ex contractu or ex lege. He submitted that an unfair labour practice is confined to disputes of right created ex contractu or ex lege. The answer to this argument is simply that item 2 of Schedule 7 is one of the statutory provisions that seek to give content to the constitutional right to fair labour practices… It creates a statutory right not to be subjected to an unfair labour practice that takes the form spelled out therein… The obligation that item 2 (1)(b) places on an employer is not to act unfairly towards an existing employee in relation to promotion, demotion, disciplinary action short of dismissal and the provision of benefits to an employee. The right… that an employee has under item 2(1) (b) is conferred on them ex lege. For that reason a dispute concerning whether the conduct of an employer relating to promotion is an unfair labour practice is a dispute of right and not a dispute of interest."

Per Goldstein AJA (minority judgment) at 334 -335:

"the view … that item 2 (1) (b) provided only for rights which arose ex contractu or ex lege, is clearly wrong. If that were so, the provision would have been redundant since such rights would have been enforceable in the absence of item 2 (1) (b)…. Just as the LRA provides for disputes arising from unfair dismissal in respect of which there are no contractual remedies or remedies at common law, to be resolved by arbitration, so was item 2(1) (b) designed for situations where neither the contract of employment nor the common law provided the employee with a remedy… A further relevant consideration is that it is difficult to conceive of a situation where there would be a contractual or statutory right to promotion. Clearly such a situation would be most unusual and the legislature must have intended for a remedy in the event of an unfair promotion or an unfair failure to promote."

The view criticized by Goldstein AJA was expressed in the ***HOSPERSA*** *case.* The relevant dictum in ***HOSPERSA*** (at 1069-70) was that item 2 (1) (b) of Schedule 7 to the LRA (the predecessor of the present

provisions) *" simply sought to bring under the residual unfair labour practice jurisdiction disputes about the benefits to which an employee is entitled ex contractu (by virtue of the contract of employment or collective agreement) or ex lege (the Public Service Act or any other Act)"* and that it was *never "intended to be used by an employee, who believes that he or she ought to enjoy certain benefits which the employer is not willing to give to him or her, to create an entitlement to such benefits through arbitration."*

19 In ***Protekon (Pty) Ltd v CCMA & others*** (supra) at 710 the Labour Court explained the dictum in ***HOSPERSA*** and remarked as follows at 710 B:

"The essence of the court's reasoning was that the unfair labour practice jurisdiction may not be used as a substitute for collective bargaining, to create new employment rights or to further collective bargaining demands….

It does not, however, follow from this that an employee may have recourse only in circumstances in which he has a cause of action in contract law. If that were the case there would have been little purpose in introducing the specific unfair labour practices contemplated in section 186 of the LRA."

20 In ***Protekon*** the Labour Court found that it was never the intention nor the effect of the ***HOSPERSA*** judgment to limit the enquiry in determining unfair labour practice disputes only to the question whether the employee was contractually entitled to the remedy sought. The following reasons were given for this view

- "*there are at least two instances in which employer conduct in relation to the provision of benefits may be subjected to scrutiny by the CCMA under its unfair labour practice jurisdiction. The first is where the employer fails to comply with a contractual obligation that it has towards an employee in relation to the provision of employment benefits. The second is where the employer exercises a discretion that it enjoys under the contractual terms of the scheme conferring the benefit."*

- "*The fact that an employer is entitled, by the terms of a benefit scheme or policy, to exercise a discretion as to the amount of the benefit to be provided, as to the terms upon which a benefit is to be provided, or as to whether as benefit is to be provided at all does not, in my view, take the benefit outside the ambit of the unfair labour practice jurisdiction provided by section 186(2)(a) of the Act. The existence of an employer discretion does not by itself deprive the CCMA of jurisdiction to scrutinise employer conduct in terms of the provisions of that section. On the contrary, it is clear*

that the provision was introduced primarily to permit scrutiny of employer conduct including the exercise of employer discretion in the context of employee benefits."

21 ***Protekon*** opened the door for commissioners to interpret the word "benefits" more broadly and equitably:

- *…This Court has, in previous decisions, determined that a benefit for this purpose must be something other than remuneration: Schoeman & another v Samsung Electronics SA (Pty) Ltd (1997) 18 ILJ 1098 (LC) at 1102; Gaylard v Telkom SA Ltd (1998) 19 ILJ 1624 (LC). In reaching that conclusion, this Court was clearly concerned that if the notion of "benefits" is interpreted too widely, the effect of this would be to give parties the right to refer to arbitration a wide range of disputes that are in essence disputes about remuneration. The effect of this would, because of the provisions of section 65(1)(c) of the LRA, be to preclude industrial action over a range of disputes over remuneration that properly falls within the realm of collective bargaining.*

- *While it is not necessary for me to here consider whether those decisions were correct on their facts, the statement (in Schoeman v Samsung, supra) that a benefit is "something extra, apart from remuneration" seems to me to go too far. In my view there is little doubt that remuneration in its statutory sense (as defined in the LRA) is broad enough to encompass many forms of payment to employees that may, in the ordinary use of language, properly be described as "benefits".*

- *There is no closed list of employment benefits that fall within what is contemplated in section 186(2)(a). But there can be little doubt that most pension, medical aid and similar schemes fall within the scope of those terms. This is so despite the fact that employer contributions to such schemes fall within the statutory definition of remuneration.*

- *I have referred earlier to this Court's concern that if some forms of remuneration are found to fall within the concept of "benefits" as contemplated in the unfair labour practice definition, this might unduly curtail industrial action in an area typically regarded as the proper subject of collective bargaining. In the light of the decisions of the Labour Appeal Court, to which I refer below, this concern need not persist.*

- *Disputes over the provision of benefits may fall into two clearly identifiable categories: the first is where the issue in dispute concerns a demand by employees that certain benefits be granted (or re-instated) irrespective whether the employer's conduct in not agreeing to grant the benefit (or in*

removing it) is considered to be unfair; the second is where the issue in dispute is the fairness of the employer's conduct. No party has the right to refer disputes in the first category to arbitration, and there is consequently no barrier to industrial action at the point of impasse. The converse is true of disputes in the second category.

- *..the Labour Appeal Court cautioned against allowing parties to "convert" justiciable disputes into disputes in respect of which industrial action is permissible by changing the nature of the demand…. the court will look at the substance of the dispute and not the form in which it is presented, and that the characterisation of a dispute by a party is not necessarily conclusive. What is required is an assessment, on the facts of each case, of the true nature of the dispute in order to determine whether it is a dispute that the party has the right to refer to arbitration.*

- *Where disputes over benefits are concerned …there can be little objection to workers choosing to tackle the employer in the collective bargaining arena rather than trying to demonstrate unfairness in the sense contemplated in the unfair labour practice definition. The LRA does not appear to preclude them from doing so both at the same time (This is in contrast to the election to resort to either arbitration or industrial action in relation to organisational rights: section 21 read with section 65 (2) of the LRA; and the election to either resort to adjudication or industrial action now provided for in section 189A, with specific reference to section 189A (10).)*

22 In ***Umhlathuze Municipality*** the Labour Court did not agree with the finding in ***HOSPERSA*** that a claim relating to a "benefit" must be based on an existing entitlement in a contract, collective agreement or statute. The judgment in ***Department of Justice v Commission for Conciliation, Mediation & Arbitration & Others*** (supra) was preferred and it was found that it was a reviewable irregularity not to follow that case.

23 In ***Apollo Tyres SA v CCMA & Others (2013) 5 BLLR 434 (LAC)*** the Labour Appeal Court gave further guidance and has held that the distinction between benefits and remuneration is no longer sustainable. The proper approach would be to interpret the term benefit to which an employee is entitled (ex contracto or ex lege) as well as an advantage or privilege which the employee has been offered or granted in terms of practice subject to the employer's discretion. That discretion needs to be exercised fairly and judicially.

24 I have considered aforementioned dicta and in my view the payment of an acting allowance does not fall within the definition of "benefits". In the Public Service parties specifically entered into collective

agreements regulating the payment of acting allowances. This was specifically done to regulate the appointment and payment of acting employees and certain criteria was in order to qualify for payment.

25 The Applicant's claim can be described as an "ex lege" claim but she would only be entitled to payment in terms of a collective agreement. Without the collective agreement she would not have any entitlement to payment.

26 If one then accepts that the collective agreement has created certain rights, the terms and requirements of the collective agreement should be met in order to qualify.

25 The Applicant was not appointed in terms of the collective agreement and was therefore not entitled to payment of an acting allowance.

AWARD:

26.1 The Respondent, the Department of Health- Free State, committed no unfair labour practice by not paying an acting allowance to the Applicant and the matter is dismissed.

26.2 I make no order as to costs.

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Adv PM Venter
PHSDSBC Arbitrator