



ARBITRATION AWARD

Case No: **PSHS1006-19/20**

Commissioner: **Narissa Hiralall**

Date of award: **18 February 2021**

In the matter between:

PSA obo Joyce Webster

(Union/ Applicant)

and

Department of Health- Kwazulu Natal

(Respondent)

DETAILS OF HEARING AND REPRESENTATION

1. The applicant referred a dispute to the Public Health and Social Development Sectoral Bargaining Council (“the Council”) in terms of section 186(2)(a) of the Labour Relations Act 66 of 1995, as amended (the LRA”) in respect of alleged unfair conduct by the respondent in relation to benefits.
2. The arbitration took place on 19 February 2020, 1 September 2020, 17 December 2020 and 4 February 2021. There were delays due to postponements as a result of the Covid-19 lockdown and the passing on of the respondent’s first representative.

3. Ms. Joyce Webster (“the applicant”) was represented by Mr. Mbusi Shibe, a PSA official. The respondent was represented initially by Mr. SD Msane and thereafter Mr. MM Lembethe, the Deputy Director Labour Relations.
4. The proceedings were electronically recorded.
5. Both parties submitted bundles of documents; the respondent’s documents comprised bundle A, B, C and E while the applicant’s documents comprised bundle D.
6. The applicant testified on her behalf and Ms. Maphanga, the CEO of Northdale Hospital at the time of the incident testified on behalf of the respondent.
7. This award is issued in terms of section 138 (7) of the LRA, which requires a commissioner to provide brief reasons for the outcome.

ISSUE TO BE DECIDED

8. I must determine whether the applicant’s claim constitutes a benefit for the purposes of this unfair labour practice dispute or whether it is solely a salary dispute.
9. If I find that this is a benefit, I must then determine whether the applicant was subjected to an unfair labour practice by the respondent and if so, the appropriate relief to be awarded.

BACKGROUND

10. The applicant is employed by the respondent as a Nursing Manager at Northdale Hospital. She has been employed in this position since 1 July 2006.

11. At the beginning of each period, the applicant and her supervisor prepare a performance agreement which is discussed between them. This is where the Key Result Areas (“KRAs”) and Generic Assessment Factors (“GAFs”) are identified.
12. This agreement shows the percentage of weight to be allocated to each KRA and GAF respectively. The applicant is then assessed based on this agreement at half-yearly intervals. The half-yearly assessment is held in September each year and the annual assessment is held between March and May.
13. The scores obtained in the annual assessment have an impact on whether an employee would receive his/her pay progression for that year.
14. This dispute relates to the applicant being given a score of 2 in respect of KRA 3 “Provide oversight support in the reduction and management of disease burden thus ensuring better health outcomes.” (“KRA 3”) which resulted in the applicant not receiving a pay progression for the 2017/2018 financial year. Ms. Maphanga, the then CEO at Northdale Hospital was the applicant’s supervisor at the time of this incident.

SURVEY OF ARGUMENTS

15. The following constitutes a summarised version of the evidence of the parties. The fact that I have not captured the evidence verbatim should not be misconstrued as this not being taken into account.

APPLICANT’S EVIDENCE

16. The applicant testified that she referred this dispute to the Council as a result of the scoring she received in her Employee Performance Management Development Programme (“EPMDS”) in May 2018 which resulted in her not receiving a pay progression in that year.

17. It was the applicant's version that her performance had not been correctly assessed in her annual assessment as she was incorrectly given a score of 2 on KRA 3 whereas she should have been given a score of at least 3. If she had received a score of 3, this would have allowed her to receive her pay progression.
18. She stated that KRA 3 requires her to provide oversight support which she does to the best of her ability. She is required to support her subordinates, give them feedback and action plans, ensure that priority programmes are implemented, attend meetings and provide feedback which duties she carries out to the best of her ability.
19. As a Nursing Manager, there are several people that report to her. She follows the same performance management procedure for her subordinates. During this assessment period, she was given a warning as a result of her submitting her subordinates' forms late. She stated that this was submitted late because she had given them a score of 2 for their KRA to align with the score of 2 that she had received. However, she thereafter felt bad and changed their score to a 3.
20. It was the applicant's version that the score of 2 that was given to her in respect of KRA 3 was not fair because she was not given an opportunity to improve her performance before the annual assessment.
21. If an employee is not performing at the time of their half-yearly assessment, the supervisor is required to create a performance development plan ("PDP") at that time and develop the employee. The supervisor and employee must jointly agree to a PDP which the supervisor would then monitor.
22. This would allow the employee to improve before receiving their annual assessment in or about March to May of the following year. The annual assessment impacts their pay progression.
23. This process was not followed with the applicant.

24. The applicant stated that she was not given a PDP at her half-yearly assessment in September 2017 which would have been monitored by her supervisor and which would have allowed her to improve her performance before the annual assessment in March 2018. Instead, her PDP was only done in or about May 2018.
25. It was further the applicant's version that the score given to her for KRA 3 was not fair because the EPMDS had changed and she was not trained on it.
26. The CEO and HR Director had attended a workshop on the changes but the managers had not been trained on the changes.
27. It was the applicant's version that this was the first time that employees were required to provide evidence for their EPMDS assessments. This is why she received a lower score for KRA 3.
28. The applicant stated that her supervisor had further unfairly changed the weighting allocated to each KRA without the applicant agreeing to this.
29. The applicant stated that she had allocated 20% to each KRA in her Performance Assessment Instrument for the period 1 April 2017 to 31 March 2018 (pages 1 to 3, bundle C). She completed this on 20 April 2018. However, in another copy of the Performance Assessment for the period 1 April 2017 to 31 March 2018 (pages 13 to 15, bundle D), the weighting allocated to each KRA had been amended.
30. There was no agreement between the applicant and her supervisor to change that weighting.
31. The Annual Performance Assessment Rating Calculator at page 18, bundle D also showed a rating of 20% for each KRA.

32. It was the applicant's version that the score of 2 given to her in respect of KRA 3 was further unfair because the whole district had underperformed on the KRA but only she was given a score of 2.
33. In the applicant's position, she tries to implement action plans but it was not fair to give her a score of 2 when she, as an individual could not improve the situation.
34. The applicant further stated that Ms. Maphanga received a score of 3 on the same KRA for which the applicant received a score of 2 which was not fair as their scores were linked.
35. Further, two other managers, the HR Manager and Systems Manager, who were in a similar situation to her as they had received a score of 2 on only one KRA had their scores changed to 3 at the Intermediate Review Committee meeting whereas her score of 2 was not changed. That allowed those managers to receive the pay progression whereas she did not.
36. She stated that she had lodged a grievance regarding this score but it was not properly attended to. There was no hearing held in response to the grievance she submitted.
37. During cross-examination, the applicant was asked whether she performed in terms of the KRA 'reduction of burden of disease'. The applicant stated that she attends meetings and gives feedback to Assistant Nursing Managers on a daily basis. She tells them where they are underperforming and what is required. However, she is unable to reduce the burden of disease on her own.
38. When asked what strategies she had come up with, the applicant responded that they had re-engineered "PHC" and their gateway clinic had been scored gold based on performance. However, she conceded that this was part of a different KRA.
39. The applicant was asked whether she discussed her concerns about the KRA 3 with Ms. Maphanga at the time of being issued with her performance agreement and job description. The applicant responded that it was not discussed, it was the first time

that evidence was required, and the PDP was only done in or about May 2018 whereas it should have been done in September 2017.

40. When she was asked about the PDP again, the applicant stated that it was given to her by Ms. Maphanga's personal assistant, not discussed with her by Ms. Maphanga as required.

41. It was put to the applicant that even if she had not received formal training on EPMDs, she could have asked Ms. Maphanga to explain it to her. She responded that the Department of Health conducted a full day of training on this but the applicant was not given even one hour of training.

42. The applicant was asked whether she should be given a lower score if she was not performing well which she confirmed but stated that the lower score should have been awarded at the half-yearly review instead of the annual review.

RESPONDENT'S EVIDENCE

43. Ms. Buhle Maphanga, the CEO of Northdale hospital at the time of this incident, testified on behalf of the respondent.

44. It was her version that the applicant reported directly to her in terms of the reporting structure at the hospital.

45. It was further her version that the performance agreement was entered into with the applicant in May 2017. She prepared a PDP for the applicant in October 2017 (page 22, bundle A). She stated that she discussed this with the applicant and they both signed it. According to the PDP document, problem areas were identified, possible solutions were set out and the document stated that Ms. Maphanga was responsible for the applicant.

46. With regard to the annual assessment, the applicant was given a score of 2 in respect of KRA 3 because the applicant could not show the information or strategies she had used to perform in respect of that KRA nor could she identify the poor-performing indicators for the hospital. The applicant is required to have strategies in place to monitor outcomes and ensure departments have policies, protocols and guidelines. She is also required to ensure that these are implemented and re-strategise if necessary.
47. She is also required to be able to explain that she investigated incidents, identified the results, the reasons for the results and the specific plans to address it. The applicant would not be penalised for a national crisis or a district's non-performance as long as she could show the steps she had taken to perform in accordance with the specific KRA. The applicant had failed to show this at her annual assessment.
48. Ms. Maphanga acknowledged that KRA 3 is a broad one however, if the applicant could have shown the systems she had in place and shown her that she was monitoring the situation through daily reports, that could have been considered when giving a score for the KRA.
49. It was Ms. Maphanga's version that the applicant's annual assessment was discussed at the intermediate review committee at which her score of 2 in respect of KRA 3 was confirmed. The scores of 2 for the HR Manager and Systems Manager were changed to 3 after recommendations from the committee that those scores be reviewed. These managers' scores were changed because although a specific document was not in place, their actions showed that they had taken steps to perform in terms of their respective KRAs.
50. The HR Manager's KRA related to a risk management plan. Although the document was not in place, his activities relating to commuted overtime, call rosters and leave schedules etc indicated that he was substantially performing in accordance with the KRA. The committee therefore recommended the change.

51. The Systems Manager was scored low in respect of record management. When this was discussed, the committee found that there were identifiable systems he had implemented which included training regarding record management, space for files and disposal of files so his score was adjusted.
52. The applicant on the other hand, had not shown the steps taken to perform in terms of KRA 3 so her score did not change. If the committee had recommended that the applicant's score also be reviewed, she would have done so.
53. With regard to the applicant's job description (pages 15-16, bundle A), this was signed by the applicant and Ms. Maphanga in or about May 2017. The job description and performance agreements were vague in the past so Ms. Maphanga had amended them in line with the directives following on the State of the Nation address. Ms. Maphanga discussed this with all the managers before they signed it. She explained each indicator that they would be measured on.
54. During cross-examination, Ms. Maphanga was asked when the EPMDS policy was made and updated. She responded that it may have first been implemented in or about 2004/2005 but was occasionally updated. When she started working at Northdale hospital, the applicant was already a manager and she believed the applicant had already been trained on the EPMDS. When the EPMDS is amended, further training is not required, you are merely required to ensure that you have read it and understood it.
55. It was further put to Ms. Maphanga that she and the HR director had been trained on the amendments to EPMDS but the applicant had not been. Ms. Maphanga responded that the applicant is a Nursing Manager who has several people reporting to her. HR would be able to confirm whether she was trained.
56. It was put to Ms. Maphanga that the applicant completes the performance assessment instrument, signs it and then gives it to Ms. Maphanga to complete and submit. Ms. Maphanga disputed that stating that the applicant first completes it, then they would sit and discuss it before she fills it in and signs.

57. When she was asked about the discrepancy in the Performance Assessment Instrument document at pages 1 – 4, bundle C compared to pages 13-16, bundle D, Ms. Maphanga responded that they were the same document but the weighting attached to the KRAs in the document in bundle D had been scratched out and amended. She stated that she had not done that, Dr Moolla had submitted for her as she had gone on leave before the submission date but the weighting in this document should correlate with the weighting specified in the performance agreement (page 4, bundle A). The weighting did correlate.
58. She disputed that the weight allocated to the KRAs would affect the overall rating which the applicant received and her pay progression. She stated that the applicant's pay progression depended on the scores between 1 to 5 allocated to each KRA.
59. Ms. Maphanga was asked what she did to assist the applicant to improve her performance during the year. She responded that she had taken her through the 'DHIS' report, 'tier.net' and sent her to management, leadership and mentoring courses. She did not have proof of that as she no longer works at the hospital but stated that HR should have proof.
60. Ms. Maphanga was questioned about the applicant's grievance form which she had lodged in response to her rating of 2 for KRA 3 and responded that she had amended the applicant's job description in her performance agreement as it had been too vague. The applicant signed that as well as the October 2017 PDP. The dates that the performance documentation was signed were different because the score is first given and discussed and then she takes some time to prepare the PDP before discussing it with the employee.
61. It was put to Ms. Maphanga that the entire district was not performing in respect of KRA 3 but Ms. Maphanga received a score of 3 and the applicant did not. Ms. Maphanga responded that the applicant did not know certain information that she should have known so Ms. Maphanga used to have to go to the ground to obtain it. Further, in her capacity, Ms. Maphanga oversees the applicant, the HR manager,

systems manager and medical manager. On a regular basis she would meet with them to discuss issues, she would get records and check where they were performing well and point out areas of weakness. She also conducted investigations and when she was being assessed, she showed her supervisor the steps she had taken in her investigations and explained the strategies she had implemented. This showed that she was performing in accordance with the KRA.

62. Ms. Maphanga was asked whether the applicant would have been given a score of 3 if she had provided proof of her actions. Ms. Maphanga responded that it would have assisted her in getting a better score because it would have shown that the applicant was performing her functions.

63. During re-examination, she stated that as Nursing Manager, the applicant had people who reported to her and the applicant entered into performance agreements with them. She was therefore familiar with performance agreements.

64. She stated that the HR manager had shown that he had been performing continuously. There was a weekly meeting at which these things were discussed. He had not provided a document as risk plan but there was documentary proof of these steps that he had taken so his score was changed.

65. Ms. Maphanga further stated that the payment of the pay progression is dependent on the score between 1 to 5 allocated to each KRA. The weight percentage allocated to each KRA did not affect the scoring.

66. Both parties submitted closing arguments which have been duly considered but will not be retyped in this award.

ANALYSIS OF EVIDENCE AND ARGUMENT

67. Section 186(2)(a) of the Labour Relations Act 66 of 1995, as amended (“LRA”) defines an unfair labour practice as, *inter alia*, any unfair act or omission that arises between and an employee involving unfair conduct by the employer relating to the provision of benefits to an employee.
68. The applicant’s dispute relates to pay progression which she claimed is due to her in terms of the respondent’s performance management system. The respondent had the discretion whether to award the pay progression in terms of a policy or practice.
69. The respondent argued that this dispute related to a salary issue, specifically a pay progression therefore the Council had no jurisdiction to deal with the dispute.
70. The applicant’s version was that the respondent failed to provide her with a score of 3 in KRA 3 during the 2017/2018 annual assessment and consequently, failed to award her a pay progression which she was entitled to. This amounted to an unfair labour practice.
71. In the case of *Apollo Tyres SA (Pty) Ltd v Commission for Conciliation, Mediation and Arbitration & others* (2013) 34 ILJ 1120 (LAC), the Labour Appeal Court held that the interpretation of a benefit included “*a right or entitlement to which the employee is entitled (ex contractu or ex lege including rights judicially created) as well as an advantage or privilege which has been offered or granted to an employee in terms of a policy or practice subject to the employer’s discretion.*”
72. In light of the above interpretation of a benefit, it is clear that the applicant has correctly asserted that the dispute in question relates to a benefit which falls within the ambit of an unfair labour practice dispute.
73. I now need to determine whether the respondent’s decision not to award the applicant the benefit, was fair.

74. The onus is on the applicant to prove the entitlement to a benefit and further, to show that the conduct of the respondent in respect of that benefit, was unfair.
75. It is common cause that the applicant and her then supervisor, Ms. Maphanga used to enter into annual performance agreements. In this instance, such performance agreement was entered into in or about May 2017 but at the end of May 2018, the applicant was given a low score for KRA 3 in her annual assessment which resulted in her not achieving a pay progression for the period.
76. The applicant challenged this on numerous grounds.
77. She stated that the score of 2 for KRA 3 was not fair because she was not given an opportunity to improve her performance on the said KRA. This was disputed by the respondent on the basis that a half-yearly assessment was done in or about October 2017 at which stage the applicant was given a score of 2 in this KRA as well as in one other KRA. At that stage, Ms. Maphanga prepared a PDP for the applicant in which she highlighted the areas for improvement and the possible solutions. It was the respondent's version that this was discussed with the applicant and she signed for receipt of the PDP.
78. The applicant's version in this regard was not consistent. She initially stated that she was only given a PDP in May 2018 but later referred to a PDP which she had received in October 2017.
79. According to the documents, the applicant was assessed at her half-yearly assessment in October 2017, as per the half-yearly review form and the PDP signed by the applicant contained at pages 20 – 22, bundle A. This shows the applicant received a score of 2 in respect of KRA 3 at her half-yearly assessment. In light of the PDP dated October 2017, the applicant's version that she had not been given a PDP at her half-yearly assessment cannot be accepted.
80. Instead, it seems that the applicant was given a PDP at her half-yearly assessment at which stage she would have been aware that her performance had to improve

before the annual assessment. She further disputed having received any assistance from Ms. Maphanga to improve her performance however, I find the respondent's version that training was provided, more probable. The applicant was not consistent in her version regarding the sequence of events pertaining to her performance assessments whereas Ms. Maphanga had testified in a clear and forthright manner.

81. The applicant stated that there were changes made to the EPMDS in the 2017/2018 period for which Ms. Maphanga and HR Director had attended a workshop but the applicant and other managers had not. Had she received that training, she may have understood the changes and performed better.

82. Ms. Maphanga's version was that she believed the applicant was trained on EPMDS as she is employed in a managerial position. It was further her version that when the EPMDS is updated, it is not necessary for staff to be trained on this.

83. The applicant failed to specify the changes to the EPMDS policy which she was not properly trained on. The applicant is a Nursing Manager who has many subordinates that report to her. She is therefore required to implement the EPMDS for her subordinates, which she did do in the 2017/2018 period. This indicates that she was able to apply the EPMDS to her own subordinates without having received training thereon.

83 The applicant's version was that the weighting percentages accorded to each KRA had changed. This was not disputed by the respondent and the same percentages are shown in the applicant's job description and the October 2017 half-yearly review. The May 2018 Performance Assessment instrument shows the same percentages but these were handwritten into the document. The Annual Performance Assessment Rating Calculator however, showed a different weighting percentage.

84 Although this was not clarified by the respondent during cross-examination of the applicant, the documents indicate that the applicant's performance agreement entered into in May 2017 and her half-yearly assessment both indicated the 'adjusted'

weightings. The annual assessment then had handwritten adjustments made to the weightings to bring it in line with the performance agreement and half-yearly assessment. Although the respondent and applicant could not agree on who wrote in the adjustments, it takes the issue no further as the awarding of a pay progression is dependent on the allocation of a minimum score of '3' for each KRA rather than the weighting percentages allocated to the KRAs.

85 It was not disputed that the percentage weighting did not affect the awarding of a pay progression, instead the employee needs a minimum score of 3 on all KRAs to qualify for a pay progression.

86 The applicant further stated that the whole district had underperformed on the particular KRA but only she was given a low score of 2. Ms. Maphanga responded to this stating that the district's performance would not have been changed solely by the applicant so the applicant was not assessed based on that. When assessing the applicant's performance, she required some indication from the applicant of the steps taken by the applicant to fulfil the objectives of KRA 3 within the hospital, which the applicant had not provided.

87 It was apparent from the respondent's version that even if employees did not have the specific documentation to support their performance as per the cases of the HR and Systems Managers, if they had some proof or record to show that they did perform actions in line with the respective KRA, that would have assisted when evaluating their performance.

88 The applicant stated that Ms. Maphanga received a score of 3 on the same KRA for which the applicant received a score of 2 which was not fair as their scores were linked.

89 Ms. Maphanga's version in this regard was that she had performed in terms of what was expected of her with this KRA. During her assessment, she was able to demonstrate to her superior that she had fulfilled the requirements to receive a higher score in this KRA. Further, some of the information that the applicant was supposed

to provide her with, Ms. Maphanga had to obtain herself because the applicant had failed to provide it.

90 The applicant had further contended that two other managers, namely the HR Manager and Systems Manager, who were in a similar situation to her as they had received a score of 2 on only one KRA had their scores changed to 3 at the Intermediate Review Committee meeting whereas her score of 2 was not changed. That allowed those managers to receive the pay progression whereas she did not. The respondent's version on this point was that the Intermediate Review Committee, after discussion thereon, recommended that the scores of these two managers be reconsidered. Their actions indicated that they were deserving of a higher score but this was not the case with the applicant.

91 I have further considered that during the cross-examination of Ms. Maphanga, the applicant had not specified the work she had done in respect of KRA 3 to warrant a higher score.

92 She stated that she had lodged a grievance regarding this score but it was not properly attended to. It was common cause that no grievance hearing was scheduled in response to this. The respondent's previous representative submitted that the applicant had referred the dispute prematurely. The later representative submitted that the matter was already at arbitration and he was not pursuing the point. In any event, the fact that the respondent did not deal with the applicant's grievance does not take the matter any further since the issue of her pay progression is the subject of this arbitration.

93 I have perused the case law referred to in the applicant's closing argument.

94 I have considered the arbitration award in the matter between *NEHAWU obo P R Zako v Department of Agriculture, Forestry and Fisheries* GPBC 134/2016, and the weight to be attached to same. That case is distinguishable from the present case. In that case the applicant's supervisor had not submitted any work plan or KRAs for the applicant whatsoever.

- 95 The applicant further referred to the case of *Tshishonga v Minister of Justice and Constitutional Development and Another* (2007) 28 ILJ 196 (LC), para 112 stating that an adverse inference can be drawn from a party failing to call a witness who is available to testify.
- 96 The applicant in this case argued that the respondent's decision to call only one witness after initially stating that he would call 3, should also be viewed in this light. The above case is also distinguishable from the present case on the basis that the respondent there called no witnesses to testify. The respondent in the present case however, exercised its discretion and elected to lead the evidence of only 1 witness instead of 3 as originally anticipated.
- 97 Based on the evidence before me, I am not satisfied that the applicant has discharged the onus of proving that the respondent committed an unfair labour practice by giving her a score of 2 in her annual assessment for the 2017/2018 period which resulted in her not receiving a pay progression for the period.
- 98 In the circumstances, I find that the respondent has not committed an unfair labour practice.

AWARD

- 99 The respondent did not commit an unfair labour practice.
- 100 The application is dismissed.



Narissa Hiralall
Commissioner