



PHSDSBC

PUBLIC HEALTH AND SOCIAL DEVELOPMENT
SECTORAL BARGAINING COUNCIL

ARBITRATION AWARD

Panellist: C S Mbileni

Case No: PSHS1034-13/14

Date of award: 5 August 2014

In the ARBITRATION between:

HOSPERSA obo MAKHUBELA Roy V

Applicant Party

and

Department of Health: Mpumalanga

Respondent Party

Details of hearing and representation:

- [1] The arbitration was convened in terms of s186(2)(a) of the Labour Relations Act [the "LRA"] 66 of 1995 as amended. The hearing was held over three intermittent dates, i.e. 23 April 2014, 6 June 2014 and finalized on 15 July 2014. The hearings were conducted at Tintswalo Hospital at Acornhoek in Mpumalanga.
- [2] Mr. S. Mahlangu of HOSPERSA appeared for the Applicant, Mr. Roy V. Makhubela whereas the Respondent was represented by the resident Labour Relations Officer, Mr. Owen Mnisi at the arbitration proceedings.
- [3] Mr. Makhubela and Mr. Mlambo, a witness for the Respondent were requested to testify under oath and they agreed to it. At the close of the arbitration proceedings, parties agreed to be afforded an opportunity to prepare written closing arguments and to submit them to the Council on Friday, 18 July 2014. The arbitration award, the bundle of documents and electronic version of the award were submitted to the Council.

Issue to be determined:

- [4] The issue to be determined is whether or not the Respondent committed an unfair labour practice relating to benefits as defined in s186(2)(a) of the Labour Relations Act, 66 of 1995 as amended.

Background to the issue:

- [5] The Applicant is a member of HOSPERSA and it is stated that he was assessed for the financial period 2009/2010 during which period he managed to submit all the quarterly reports and he was recommended for incentive cash bonus and pay progression.

- [6] The Applicant contends that out of all the four quarterly reports he submitted as required by the PMDS he got 79% of which qualified him to get incentive cash bonus and pay progression. However, the Respondent only gave him pay progression and omitted an incentive cash bonus, for which he was unfairly treated.
- [7] Two bundles of documents, marked Annexures A and B were discovered by the parties. Annexure A is a print-out from the PMDS Section of the Respondent. Annexure B is the PMDS Policy which is currently being used.

The Applicant's case and argument:

- [8] Mr. Mahlangu submitted that the Applicant, Mr. Roy Makhubela submitted all the four quarterly reports and are confirmed by Annexure A and the final assessment is 79%. Clause 9.1.4 of the PMDS Policy (Recognition and Reward) on page 8 states that employees may be rewarded as an individual based on the outcomes of the evaluation.
- [9] Clause 9.3.2 on page 9 of the PMDS Policy confirms that the Applicant has completed the Four Quarterly Report cycle as required by Annexure A.
- [10] Under cross-examination by Mr. Mnisi, the Applicant testified that his understanding is that there is a group that works together and excels in a task together. It means these people will be recognised as a group. When a person excels as an individual in a particular task, therefore he is going to be recognised as an individual.
- [11] The Applicant submitted that the PMDS Policy is a legal document known by the employer and employee simply means that when an employee's performance is outstanding, the same employer shall not hesitate to recognise the employee. The Applicant admits that Clause 9.1.4 gives an employee an opportunity to receive bonus at the discretion of the employer.
- [12] The Applicant argued that valid reasons should be given without wasting the employee's resources who believes that he shall be recognised out of his excellent performance instead of being met by grievances. The Respondent contends that evaluation comes after the quarterly reports have been assessed by a Committee and it therefore does not oblige the employer to pay incentive bonus.
- [13] In closing the Applicant's case, Mr. Mahlangu argued that the Respondent's Representative could not justify the follows:
- [13.1] That Clause 9.5.2.5 of the Provincial PMDS Policy provides that the Moderating Committee cannot withdraw a nomination in respect of cash bonus without written reasons per individual case.
- [13.2] That the Moderating Body's only powers it has is to review the Employee's assessment scores and ensure consistency and fairness but not to disqualify or withdraw a nomination without written reasons.
- [13.3] That the Respondent's Representative, Mr. Mlambo confirmed that the Applicant, Mr. Makhubela met the minimum requirements in respect of the average performance evaluation outcome or score 79% which fall under Category B of the cash bonus.

- [13.4] That the supervisors responsible for the recommendations in respect of nominations of those who meet the minimum requirements for incentive cash bonus and Mr. Makhubela was one of those who were nominated accordingly.
- [14] Mr. Mahlangu argued that it was unfair to implement the incentive cash bonus selectively based on personality than on individual performance aligned to one's performance contract. It is his belief and conviction that the Respondent did not comply with the provisions of the PMDS Policy which led to omissions in respect of payment of cash bonuses.
- [15] Mr. Mahlangu submitted that the Applicant prays that the commissioner rules in his favour and order the Respondent to pay Mr. Makhubela the incentive cash bonus for the 2009/10 financial year under Category B.

The Respondent's case and argument:

- [16] The Respondent's *witness* Mr. Willie Mlambo testified that he is the PMDS Coordinator and he assists the Moderating Committee and also assists in the payment of rewards. He has been doing this job since January 2008, i.e. he has 6 years experience.
- [17] Mr. Mlambo testified that the Moderating Committees are called the Management Committees at facility level. The Committees are appointed by the District Manager or in this case, the District Chief Director at facility level. The Committees' role is to look at the files of candidates being considered for incentive bonus.
- [18] Mr. Mlambo further testified that when they do the 4th assessment, if an employee obtains a score of 71% or above, the manager will recommend the employee for incentive bonus and followed with the nominations to the Moderating Committee and for pay progression; the employee must reach an average of 49% or above to qualify for pay progression automatically. The manager or direct supervisor must always nominate an employee because the score on its own will not suffice.
- [19] Mr. Mlambo testified that if the employee's outputs exceeded the agreed performance measures with evidence, the respective employee will then be recommended for the rewards and the employee will be withdrawn from the nominations if the opposite happens. The supervisor will be informed with reasons why the employee is withdrawn and those selected for consideration will be recommended to the District Management Committee.
- [20] Mr. Mlambo further testified that the Moderating Committee is satisfied with the performance of the employee which is above the set performance measurements during the second level of assessment. The Moderating Committee will not be violating the PMDS Policy if there is no evidence to support a score of 71% or above and the employee is not awarded the incentive bonus but gets pay progression.
- [21] During cross-examination by Mr. Mahlangu, the witness Mr. Mlambo confirmed that it is the responsibility of line manager to assess and rates the employee's daily performance accordingly. Mr. Mlambo admitted that the same line manager or direct supervisor submits the name of the employee who is nominated to the Moderating Committee. He further confirmed that only highly rated employees are nominated and submitted to the Moderating Committee.
- [22] Mr. Mlambo testified during cross-examination that the power to acknowledge or disregard scores of highly rated employees in terms of Clause 9.5.2.1.4 read with 9.5.2.1.6 of the PMDS Policy. Mr. Mlambo admitted that in terms of Clause 9.5.2.1.4, the Moderating Committee rechecks if all the 4 Quarters including the Contract of the current year have been submitted.

- [23] Mr. Mlambo conceded that since the Applicant obtained a score of 79% he met the minimum requirements and the supervisor would submit it to the Moderating Committee his nomination. Mr. Mlambo was unable to comment on the PMDS Policy, Clause 9.5.2.5 on page 11 that says: ...Moderating Bodies may not withdraw a nomination for any individual without written reasons for individual case.
- [24] In closing the Respondent's case, Mr. Mnisi presented the following arguments:
- [24.1] It has been made clear that the score on its own does not qualify an Employee for incentive bonus but does qualify the Employee for pay progression. The PMDS Policy does not mandate the Employer to pay an Employee the incentives he has been scored 71% or above, but rather for further consideration.
- [24.2] It is true that an Employee gets nominated in order to be considered but he is not nominated in order to be paid incentive cash bonus. Once an Employee is nominated, he will still go through the Provincial Moderating Committee for consideration. The outcome of the Moderating Committee will determine whether that Employee will be paid incentives or not.
- [24.3] The entire PMDS Policy is characterised by the word "may" rather than "must". These two words distinguish whether an Employer may pay or must pay. The Applicant was not unfairly prejudiced and therefore his application should not be considered.

Analysis of submissions and the application of law:

- [25] An employer is guilty of an unfair labour practice if it commits any form of unfair conduct relating to the provision of benefits to an employee [s186(2)(a) of the LRA]. Unfair disputes of right rather than interest, a dispute over benefits must amount to a dispute of right to be classified as such. Disputes of right arise *ex contractu* and *ex lege*.
- [26] The question that arises from the above analysis and application of law is whether the Respondent acted unfairly in exercised its discretion. "Unfair" implies a failure to meet an objective standard and may be taken to include arbitrary, capricious or inconsistent conduct, whether negligent or intended. According to Mr. Mlambo, the Moderating Committee will not be violating the PMDS Policy if there is no evidence to support a score of 71% or above and the employee is not awarded the incentive bonus but gets pay progression.
- [27] "Unfair labour practice" means any unfair act or omission that arises between an employer and an employee involving s186(2)(a) of the LRA – unfair conduct by the employer relating to the promotion, demotion, probation (excluding disputes about dismissals for a reason relating to probation) or training of an employee or relating to the provision of benefits to an employee.
- [28] I am guided by the Labour Appeal Court in **Hospersa & Another v Northern Cape Provincial Administration (2000) 21 ILJ 1066 (LAC)** and **Gauteng Provinsiale Administrasie v Scheepers & Others [2000] 7 BLLR 756 (LAC)**, the court held that only disputes of right about already existing benefits can be heard by the CCMA. As a general rule, the term 'benefits' in the definition of unfair labour practice only includes benefits '*ex contractu* and *ex lege*' – benefits that already exist in terms of a contract or law.

- [29] I am further guided by the Labour Court in **Protekon (Pty) Ltd v CCMA and others [2005] 7 BLLR 703 (LC)**, the court found that there are at least two instances in which an employer's conduct in relation to benefits may be subject to scrutiny:
- [29.1] Where the employer is bound by contractual obligations in this regard; and
- [29.2] Where the employer enjoys discretion in terms of the contract to confer a benefit.
- [30] I am further guided by the Labour Court in **IMATU obo Verster v Umhlathuse Municipality & other (2011) 9 BLLR 882 (LC); (2013) 9 BLLR 934-940 9 (LC)** which followed the **Pretokon** case, where the court held that the performance bonus or merit award is a discretionary bonus which an employee cannot claim as a right as it does not constitute a benefit to which an Employee is entitled to *ex contractu*.
- [31] In terms of **Apollo Tyres SA v CCMA & others (2013) 5 BLLR 434 (LAC)**, rights judicially created as well as advantage or privileges employees have been offered or granted based on policy or practice subject to the Employer's discretion constitute benefits as contemplated by s186(2)(a) of the LRA.
- [32] Disputes of right are those in which the parties claim a legal entitlement to the relief sought and disputes of interest are those that parties claim an advantage to which they have no legal right. Both Employers and Employees are entitled to bargain for a better deal in disputes of interest which is the case in this particular dispute.
- [33] In the light of the above facts, analysis and the application of law, the Applicant did not successfully discharge its onus to prove on a balance of probabilities that the Respondent acted unfairly in the exercise of its discretion not to award performance incentives to the Applicant. I deem it necessary to make the following award:

Award:

- [34] The Applicant failed to prove that the Respondent's conduct constituted an unfair labour practice.
- [35] It follows therefore that this application of unfair labour practice dispute is dismissed and there is no order as to costs.

Signed and dated at Johannesburg on this the 5th day of August 2014.

Panellist:



Chris Sizili MBILENI.