ARBITRATION AWARD

PHSDSBC
PUBLIC HEALTH AND SOCIAL DEVELOPMENT SECTORAL BARGAINING COUNCIL

Case No: **PSHS364-18/19**
Commissioner: **Arne Sjolund**
Date of award: **25 March 2019**

In the matter between:

PSA OBO KAGISO IGNATIUS OSEILE APPLICANT

and

DEPARTMENT OF HEALTH- NORTH WEST RESPONDENT

DETAILS OF HEARING AND REPRESENTATION

1. This matter was set down for an arbitration hearing by the PHSDSBC and heard on 19 October 2018 and 14 March 2019. The hearing took place at the Dr Ruth Segomotsi Health District Offices, in Vryburg.

2. Mr. Kagiso Ignatius Oseile (hereinafter referred to as "the applicant") represented himself and was assisted by Ms. Graaff, an official from PSA. Department of Health- North West (hereinafter referred to as "the respondent") was represented by Mr. Sekgoro ("Sekgoro").

3. Prior to the commencement of the matter on 19 October 2018 the respondent made an application for postponement which was opposed by

the applicant. The respondent submitted that the person dealing with this matter was summons to a meeting with the most senior person in the department. The applicant submitted that the issue in dispute related to benefits and that I should make a decision whether to postpone, or not as long as they did not have to pay the cost of the postponement. After considering the submissions made by the parties, postponement was refused. In the matter of *Masstores (Pty) Ltd t/a Builders Warehouse v CCMA & others* [2006] 6 BLLR 577 (LC) Cele JL held that as follows:

"however, once the applicant had lodged an application for the proceedings to be postponed it behove of the Commissioner to have acted in compliance with the duties of a Commissioner. He had then to listen to the merits and demerits of the application from both parties; he had to apply his mind to the issues at hand and had to consider among others; whether it was in the interest of justice and fairness that the postponement be granted or refused, what prejudice was likely to be suffered by either party should the postponement be granted or refused, whether such prejudice could be cured by an appropriate order, and/or whether the application was bona fide or a mere tactical maneuver. The caveat to the application of these general principles is that, as held in the LC matter, Carephone Pty Ltd v Marcus NO & others [1998] 11 BLLR 1093 (LAC), the statutory requirements for the functioning of the CCMA 'are less congenial to the granting of postponements than is the case in a court of law."

In this regard, Froneman DJP stated:

"*there are at least three reasons why the approach to applications for postponements in arbitration proceedings under the auspices of the Commission under the LRA is not necessarily on a par with that in courts of law. The first is that arbitration proceedings must be structured to deal with a dispute fairly and quickly. Secondly, it must be done with "the minimum of legal formalities*", *and thirdly, the possibility of making costs orders to counter prejudice in good faith postponement applications is severely restricted*".

4. Another important principle emerging from *Carephone* is that, in line with the fact that the grant of a postponement is an indulgence and involves the exercise of a discretion on the part of a Commissioner, the refusal of a postponement is reviewable only if the discretion was not judicially exercised. In considering whether or not to grant postponement I noted that this matter related to the issue of benefits, where it is unlikely that the respondent only had one official to deal with provisions the issue at hand. I also noted that Sekgoro was present and could not find any reason why he could not proceed with the respondent's case. It should be noted that parties should not assume that a postponement will be granted and should come prepared to proceed should the postponement be refused. The principles set out above have been applied by the courts fairly and consistently over many years. Postponement is an area which highlights the tension between expeditious dispute resolution and a fair hearing. In the matter of *National Airlines (Pty) Ltd v Mudau & others* [2003] 3 BLLR 279 (LC) the Court found that postponement was fairly refused on the grounds that witnesses were not available where the employer ought to have anticipated in advance of the arbitration that a witness would be required to give evidence on its behalf. In considering my decision not to postpone the matter I also considered that the respondent did not comply with the rules of the PHSDSBC. Postponements will generally only be granted where there is compliance with part five of clause 23 of PHSDSBC Resolution 2 of 2015. I also considered the fact that the respondent's representative opted to attend another meeting rather than deal with this issue that was set down well in advance.

5. Several documents were submitted into evidence and utilized during the arbitration hearing.

6. The hearing was conducted in English and digitally recorded.

7. The matter was finalized on 14 March 2019 whereafter the parties agreed to submit their closing arguments in writing by 21 March 2018.

ISSUE TO BE DECIDED

8. This matter is brought in terms of section 186(2)(a) of the Labour Relations Act 66 of 1995, as amended (LRA) and relates to the issue of benefits.

9. The applicant's dispute emanates from the fact that his supervisor nominated him to receive a performance bonus during the 2016-2017 financial year, but he failed to get any performance bonus.

10. I am therefore tasked to determine whether the respondent committed an unfair labour practice relating to benefits when not approving a performance bonus for the applicant. The applicant bears the onus of proof in this matter.

BACKGROUND TO THE ISSUE

11. The applicant is employed as a Senior Employment Relations Practitioner by the respondent and has worked for the respondent since 09 September 2004.

12. It is common cause that the applicant's supervisor motivated that he gets a performance bonus for the financial year 2016-2017, but he failed to get a performance bonus. It is further common cause that the applicant failed to score above the required 5 to be eligible for a performance bonus and even if he was not moderated downwards, he would have still not been eligible to receive a performance bonus. The respondent submitted that a performance bonus is not an entitlement and that it is given on the discretion of the respondent.

SURVEY OF EVIDENCE AND ARGUMENT

13. 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:

14. The applicant testified that he agreed with his supervisor that his score was 4 whereafter the moderating committee reduced his score to 3. The applicant testified that the moderating committee consisting out of only two people made a mistake when his score was reduced from 4 to 3. He further testified that his assessment was not properly presented and that his supervisor should have presented his report as per the policy but that someone else had presented the report. The applicant refered to the bundle of documents and testified that he did additional duties over and above that was expected from him and therefore he should have received a performance bonus.

15. Mr. Maibi, Deputy Director in the employ of the respondent testified on behalf of the applicant after a subpoena was obtained. He testified that he agreed with the applicant on his performance appraisal after it was sent back to the applicant a couple of times. He testified that he was the applicant's Supervisor and that it was not necessary that he present the applicant's performance appraisal to the moderating committee. Once the performance appraisal was agreed upon, the applicant signed and that no further additions could be made.

16. Mr. Mojaki, Deputy Director Finance, in the employ of the respondent testified on behalf of the applicant after a subpoena was obtained. He testified that the moderating committee can either agree or disagree on the scores as per the performance appraisal. He testified that three people were present during the moderating committee meeting but at some point, one of the members were excused. Mojake testified that the supervisor must present the performance appraisal, should such supervisor be available.

Respondent's case:

17. Mr. Sekgoro, Deputy Director in the employ of the respondent testified that he was responsible for performance management and that he knew the policies of the respondent. When directed to the bundle of documents he testified that the applicant's supervisor should have presented his

performance appraisal, should he had been available. Sekgoro later testified that the meaning of the policy meant that an employee's Supervisor must present the performance appraisal to the moderating committee.

ANALYSIS OF EVIDENCE AND HEADS OF ARGUMENT

18. It is the applicant's case that he was entitled to a performance bonus for the financial year 2016-2017. It is the respondent's case that the applicant was not entitled to a performance bonus.

19. In essence; it is the applicant's case that the respondent committed an unfair labour practice relating to benefits in terms of section 186(2)(a) of the LRA. The LRA states that 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. Unfair labour practice means any unfair act or omission that arises between an employer and an employee involving s186(2)(a) of the LRA, i.e. "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". Unfair labour practice disputes of rights, rather than interest, a dispute over benefits must amount to a dispute of right to be classified as such. It is trite law that disputes of right arise *ex contractu and ex lege*.

20. 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. It is common cause that the applicant failed to meet the required score of 5 in order to be eligible for a performance bonus. Even if he was not moderated downwards, he would still have not been eligible for a performance bonus. It is not disputed that the applicant did work over and above that was expected from him, this was included in his performance appraisal.

21. In terms of establishing whether an unfair labour practice regarding benefits has been committed, I am guided by the Labour Appeal Court matter 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). In this matter the Court held that only disputes of right about already existing benefits can be heard by the CCMA, or a Bargaining Council. 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.

22. I am further guided by the Labour Court in the matter *of Protekon (Pty) Ltd v CCMA and others* [2005] 7 BLLR 703 (LC). In this matter he Court found that there are at least two instances in which an employer's conduct in relation to benefits may be subject to scrutiny; "where the employer is bound by contractual obligations in this regard; and where the employer enjoys discretion in terms of the contract to confer a benefit".

23. I am further guided by the Labour Court matter in *IMATU obo Verster v Umhlathuse Municipality & other* [2011] 9 BLLR 882 (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*.

24. In terms of *Apollo Tyres*, 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 section 186 (2)(a) of the LRA.

25. 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.

26. In considering the above analysis and the application of law, the applicant failed to dispose of the onus to prove on a balance of probabilities that the respondent acted unfairly in the exercise of its discretion not to award a performance bonus to him. Accordingly, I order as follows:

AWARD

27. The applicant failed to dispose of the onus to prove, on the balance of probabilities that the respondent committed an unfair labour practice relating to benefits, in terms of section 186 (2)(a) of the LRA.

28. The matter is dismissed.

Arne Sjolund