



ARBITRATION AWARD

Case No: PSHS383-18/19

Commissioner: Allan Kayne

Date of award: 22 May 2019

In the matter between:

Solidarity obo Barry Mellor

(Applicant/ Union)

and

Department of Health- National

(Respondent)

DETAILS OF THE HEARING AND REPRESENTATION

1. The applicant referred a dispute to the Public Health Social Development Sectoral Bargaining Council (“the Council”) in terms of section 186(2)(a) of the Labour Relations Act 66 of 1995 (“the LRA”) in regard to alleged unfair conduct by the employer in relation to benefits. The arbitration took place over two days on 08 March 2019 and 16 April 2019 at the offices of the National Department of Health, situated at the corner of Andries and Struben Streets, Pretoria.
2. The applicant was represented by Mynie Kriek, an official from Solidarity trade union, while Theodorah Nemuramba, represented the respondent.
3. The proceedings were electronically recorded, and the record was filed with the Council’s administration.

4. The parties exchanged bundles of documents; the respondent's marked as 'R', and those of the applicant as 'A'.
5. This award is issued in terms of s138(7) of the LRA, which requires a commissioner to provide brief reasons for his/her outcome.

BACKGROUND

6. The applicant is employed by the respondent since 03 May 2011 and is based at the National Department of Health Forensic Chemistry Laboratory as a Forensic Analyst earning a monthly salary of R30,728.47 per month.

ISSUE/S TO BE DECIDED

7. I must determine whether the applicant was subjected to an unfair labour practice by the respondent and if so, to order the appropriate relief. The applicant claims that the respondent's failure to complete his 2016/2017 performance assessments as part of the Performance Management and Development System (PMDS) resulted in him not qualifying for his notch progression.
8. The applicant seeks to be awarded his notch increase or, alternatively, seeks compensation for the unfair labour practice.

SURVEY OF EVIDENCE AND ARGUMENT

9. The following constitutes a summarised version of the respective evidence of the parties and has not been captured verbatim. The fact that I have not captured all of it should not be misconstrued that I have not taken it into account. My findings are accordingly within the context of all of the evidence tendered.

APPLICANT'S EVIDENCE

Barry Mellor ("Mellor")

10. The applicant testified under oath that he was employed by the respondent as a Forensic Analyst reporting to Marga Kinnear ("Kinnear").

11. On 05 October 2015, Kinnear issued a written warning to Mellor for insubordination for failing to sign off his 2015/2016 performance assessment. Mellor appealed the warning and, in an email, dated 08 October 2015, cited his reasons for being unable to participate in the PMDS programme being related to threats put to him on 20 June 2014, in a meeting with Alida Grove (“Grove”), Kagiso Tholo (“Tholo”) and Kinnear at which time he was advised that PMDS would be used to get rid of him. Receiving no response, he followed up in a further email to Kinnear which he copied to Thathi Tau, the respondent’s Labour Relations Manager, without success.
12. The meeting of 20 June 2014 had as its origin, a complaint from the applicant to the Deputy Director-General, Dr Carter, pursuant to a situation where the applicant, among other employees, was directed to submit himself to the administration of a vaccination which he refused. Under the guise of a fact-finding meeting, Grove accused him of insubordination and advised him that the PMDS programme would be used to get rid of him. Although he submitted a grievance to the respondent, he received no response thereto as they misconstrued the content of the grievance to be about the administration of the vaccinations rather than the threat made to him at the meeting.
13. Accordingly, in 2015, Mellor advised that he could not participate in the PMDS programme without an impartial person conducting same and that his decision was as a result of the threat made against him, to which his line manager was party.
14. On 06 February 2017, he received a copy of a letter from the Head of Corporate Services, Ms Rennie (“Rennie”), addressed to Ms Netshidzivahani, dated 13 January 2017, requesting her intervention pertaining to 3 identified employees, including Mellor, who had not complied with PMDS legislative framework. Along with Netshidzivahani’s letter was one from Tholo requesting written explanations for his non-compliance within 5 days. He duly responded to all those involved (Rennie, Netshidzivahani, Tholo, Kinnear, Mosupi) on 10 February 2017 in which he refuted the allegations put to him in the correspondence, reexplaining the previous grievances and appeals which had not yet been attended to, and that Kinnear had told him directly, “You do not do PMDS” when he attempted to collect the PMDS documents. Although he included a proposal as to how he believed the dispute

could be resolved, he stated in his closing paragraph of the letter that, “I would appreciate it if the necessary unsigned Performance Agreement documents are made available for me to sign.”

15. He recalled that, in quarter one of the 2016/2017 financial year, having taken legal advice regarding his situation, he had reported to Kinnear’s office to collect his PMDS document, when the analysts were notified to do so, but was told by her to return to his container as he did not do PMDS and he was not issued with the documentation.

16. Mellor submitted a grievance to the respondent on 28 February 2017 pertaining to its “failure to promote with regards to notch progression” in which the issues pertaining to his participation in the PMDS programme were once again addressed, among other issues. The relief he sought entailed the backdated implementation of the notch increases. He received no response to this grievance.

17. Mellor presented his PMDS documentation which he received from Kinnear in February 2017, after the Rennie correspondence. He was instructed to complete and sign the performance agreements (and not the assessments). However, he noted all his previous unaddressed concerns thereon and supplemented the document with an addendum elaborating in this regard. The performance agreement was dated and signed by both Mellor and Kinnear on 13 February 2017, while the addendum was dated 14 February 2017. Although Kinnear instructed him not to complete the assessments, he rated his performance in respect of each of the first three quarters of the 2016/2017 financial year and included these assessments with the performance agreement and addendum. Additional comments were subsequently appended to the first two quarters’ assessments, dated 06 June 2017, indicating that Mellor only received the PMDS documentation in February 2017, and that he had attempted to submit his 2013/2014 second quarter assessment but that his line manager refused acceptance thereof. Quarter 3’s assessment was similarly dated 06 June 2017 while quarter 4’s indicated that it was completed on 03 May 2017. The assessments were supported by 29 additional pages to support various self-ratings being higher than 3. Comparing the applicant’s performance assessments records to those of the respondent, he noted the difference to each to be the additional comments made by Grove, dated

01 June 2018, on each assessment stating that there was no performance agreement in place for him.

18. Mellor related how he was visited, on 20 April 2017, by two representatives of the respondent regarding his performance agreement and assessment. He advised them that he had received the documentation only in February 2017, and they advised him to write to his line manager requesting a date for the assessment discussion. He addressed this to Kinnear in a letter that same day which she refused to accept initially, signing for it eventually the following day.
19. In response to an email from Kinnear, dated 09 May 2017, in which she requested his quarter 4 assessment documentation, Mellor responded, on 13 June 2017, reminding her that she had refused to issue him with the PMDS documentation and that she had subsequently instructed him only to complete quarter 4's assessment.
20. Further email correspondence, dated November 2017, entails discussions between Mellor and Kinnear in regard to his quarter 4 assessment for 2016/2017 and also setting up his 2017/2018 quarter 1 assessment discussion with her. The email trail reflects an escalation to Tholo in which she clarifies that the 2016/2017 processes had been completed without Mellor's assessments for the first 3 quarters as he only signed his performance contract in February 2017. She further admonished him for not having signed the 2017/2018 performance agreement by that stage. In response, Mellor further escalated the matter to the attention of Grove, Mamabolo, Nkumane, Mahlanya and Netshidzivhani on 20 November 2017 outlining his dispute once again, based on the latest correspondence.
21. On 28 February 2018, Solidarity Legal Services addressed correspondence to the respondent (via Kinnear, Tholo, Grove and Netshidzivhani) in regard to the respondent's failure to respond to his previous communication and in which they request an explanation as to why his 2016/2017 PMDS was not finalised, how the respondent's failure to notch progress him would be addressed and when the quarter 3 assessment of the 2017/2018 financial year would be concluded. Grove advised on 06 March 2018 that she would revert within a week but by 22 March 2018, there had still been no response. On 14 June 2018, Solidarity

addressed a further query to the respondent to which no response was received and, on 10 July 2017, the dispute was referred to the Council.

22. On 02 August 2018, Grove responded to Solidarity's 28 February 2018 correspondence advising that Mellor, having only signed his 2016/2017 performance contract in February 2017, could only be assessed for the last 6 weeks of that financial year and that his failure to comply with the Departmental Circular R1 of 2016 and sign his performance contract by 13 May 2016 contributed to the issue. Supporting this assertion, Grove emailed copies of the delivery reports dated 26 June 2016, 12 July 2016 and, 10 April 2017 reflecting that Mellor had received the email communication from Kinnear pertaining to the PMDS process. The delivery reports reflected that Mellor had received and read the emails. Specifically, the email of 26 June 2016 called on Kinnear's direct reports to collect their PMDS documents and job descriptions from her. Although Mellor reported to her to collect them, she refused to issue them to him. He further supplied an email from Kinnear to her reports, dated 06 February 2018 regarding their quarter 3 assessments, confirming his appointment for later that month.

23. Mellor explained that any employee whose performance was rated to be satisfactory, or numerically a number three, would qualify for a notch increase which was implemented prior to the annual salary increase percentage and, as a result of him not being fully assessed for the 2016/2017 financial year, he had not received the notch increase for the period in question.

24. He noted that Kinnear's written correspondence to Netshidzivhani, requesting assistance regarding *inter alia* Mellor's reluctance to sign his performance agreement, was dated 01 August 2016. Further records included in the respondent's bundle included minutes of a performance moderation committee meeting held between 12 and 15 June 2017 which reflected that feedback was supplied that Mellor had been unwilling to hand in his PMDS documentation, had only signed his performance agreement in February 2017 and had not submitted his quarter 4 assessment. The June 2018 performance moderation meeting minutes reflected that the committee concluded that Mellor's non-compliance meant that the PMDS was thus considered invalid.

Cross-examination

25. During cross-examination, Mellor testified that he only signed his performance agreement for the 2016/2017 financial year on 13 February 2017 but that it should have already been completed during quarter 1 which would have run from April to June 2016. He had, however, attempted to collect the documentation from Kinnear at the time but she had told him that he did not participate in the PMDS programme in front of the other analysts and he returned to his container, embarrassed. He explained that he took up the matter with his legal representative and trade union and that he had attempted to address it in the form of the grievances and correspondence submitted to the respondent. Although the performance agreement ought to have been signed during the first quarter, he had signed it on 13 February 2017, being the day Kinnear eventually issued it to him which he believed was in response to his correspondence to Rennie, and not based on the threat to him that his remuneration would be suspended in its absence. He failed to understand why the respondent was unable to assess his performance through the first 3 quarters once he submitted the agreement as it was commonplace to backdate documents.
26. Mellor disputed that it was his refusal to collect his PMDS documentation from Kinnear that prompted her to draft a letter requesting assistance. He denied ever seeing her letter. However, had he been copied into that correspondence, he would have ensured that the performance agreement she sought was delivered to her immediately as he had been willing to do so since the first quarter.
27. He confirmed having received Kinnear's email correspondence reminding the analysts about the PMDS process, particularly her email of 12 July 2016 but was reluctant to respond to it as she had been very clear that he did not participate in the PMDS programme. He accordingly escalated his dispute, seeing no value in responding to another email from her.
28. Mellor submitted that Kinnear had a history fabricating issues presenting email correspondence between him and her, dated 23 October 2017, in which he accused her of blatantly dishonesty pertaining to various other situations regarding leave, operational matters and her sabotage of him in respect of PMDS.

29. He conceded that it would not have been possible to complete the quarter 4 performance assessment during February 2017 as that quarter had not yet completed and that Kinnear's instruction to him not to assess quarters 1 through 3 was based on him not being contracted during that period. He further conceded that theoretically, it would not have been permissible to complete the first 3 quarters' assessments during the fourth quarter; however, even the current period saw assessments for the first 3 quarters being conducted outside the allotted time. Having sought legal advice, he performed the self-assessments for these quarters on 06 June 2017, following his submission of quarter 4's assessment to Kinnear on 03 May 2017. She subsequently only signed it on 18 May 2018, more than 380 days later. He denied that quarter 4's assessment was not finalised on 03 May 2017 because he failed to submit a portfolio of evidence but rather that Kinnear often sat on documents for extended periods of time and, had she requested supporting documentation from him, he would have provided it to her almost immediately. He further denied that it had not been finalised that day because of his insistence to finalise the first 3 quarters' assessments.
30. Mellor denied that he forfeited his right to pay progression solely on the basis of his failure to submit his performance contract to the respondent timeously in terms of regulation 72 of the Public Service Regulations, 2016 but rather that Kinnear denied him the documents he needed in order to comply.
31. He remained resolute that he and his representatives had been seeking feedback from the respondent as to how it planned to deal with the first 3 quarters of the 2016/2017 cycle and that he was prevented from doing so because the initial PMDS documentation was not issued to him.
32. He claimed not to have been aware that he was entitled to declare a dispute pertaining to his appeal not being attended to and to refer it to the Council. He described the ball as being in their court and that he expected them to revert in accordance with their procedures.
33. Mellor disputed that the changes effected to key performance areas of the analysts were done so correctly. He referred to paragraph 6.5 of the Department of Public Service and Administration's Employee Performance Management and

Development System guide which required that changes were subject to consultation and sign off by both the employer and employee, which was not the case. He was aware of another of the 12 forensic analysts who also disagreed in this regard and maintained that it was not his intention to determine the nature of the duties to perform, but rather to exercise his right to ensure that changes to the weightings were procedurally implemented; in the revised format, which he claimed he was never consulted, the new weightings were not in his interest.

34. He indicated that he was aware that pay progression was not an automatic entitlement and that his performance assessment was still subject to moderation by the committee. However, he was confident that, based on the results he achieved in quarter 4's assessment, he would still have qualified for it.

RESPONDENT'S EVIDENCE

Marga Kinnear ("Kinnear")

35. Kinnear testified under oath that she was employed by the respondent as its Assistant Director in the toxicology section of the Forensic Chemistry Laboratory and that she was the direct supervisor to the applicant.

36. She confirmed that Mellor was not awarded his notch increase in respect of the 2016/2017 financial year as he failed to participate in the PMDS programme and did not collect his PMDS documentation and job description from her. Ordinarily, in quarter 4 of the financial year, new performance agreements were concluded with the first performance assessment taking place in or after the first quarter of the new year. Signed performance agreements, once returned by employees, were routinely sent to the respondent's Head Office. As a result of Mellor not signing his performance agreement, she had escalated the matter to Netshidzivhani via Grove, evidenced by her letter, dated 01 August 2016. She doubted that Mellor would have eventually signed his performance agreement without Netshidzivhani's intervention.

37. As the responsibility for PMDS rested with the employees, she reminded her analysts, via email, each quarter and referred to her email of 26 June 2016 (with its associated recipient report) and her reminder of 12 July 2016 (with its

associated recipient report); both reports indicating that Mellor had received and read the emails.

38. After Mellor received the correspondence from Rennie, Kinnear provided him with his performance agreement, and he signed it. As he only signed his performance contract in February 2017, she was advised that he was not contracted for the first 3 quarters and that only quarter 4's assessment could be completed. Although Mellor signed his quarter 4 assessment on 03 May 2017, she only signed it on 18 May 2018, explaining that as he had been rated higher than a 3, supporting documentation to motivate the rating was required which entailed a substantial amount of communication going back and forth and that she was still waiting for his documentation by June 2017.
39. Kinnear confirmed that Mellor had indeed had previous issues related to PMDS but denied that she had turned him away as he usually did not come to collect the documentation from her in quarters 1, 2 and 3.
40. She denied Mellor's assertions in his email, dated 13 June 2017, that she had told him in February 2017 not to complete the PMDS assessment and maintained that, as a manager, she would never have sent him away. She denied his claims, in the same email, that she had told him that he did not participate in the PMDS programme and further denied that she had stated that it was not her problem how his final overall rating was going to be determined using only one quarter's assessment.
41. Kinnear confirmed receiving the applicant's letter, dated 20 April 2017, on 21 April 2017 but denied that she had refused to accept the letter from Mellor and that they had subsequently assessed quarter 4 in May 2017. It made sense to her that, as he was not contracted for the first 3 quarters in terms of his performance agreement, he could not be assessed for the uncontracted period.
42. At the moderation committee meeting in June 2017, she advised that Mellor's PMDS had not been completed and handed in on time. At the moderation committee meeting in June 2018, his PMDS was presented to the committee and the issue of the missing first 3 quarters was noted and, according to the minutes of the meeting, was declared invalid as a result.

43. She refuted Mellor's claim that she was not a truthful person and that, as a manager, one needed to be open-minded. Dishonesty would ultimately catch up.

Cross-examination

44. Kinnear explained that she understood PMDS to entail a contract of what performance was required of an employee and what was to be assessed. While the job description indicated how the work needed to be performed, the performance agreement detailed the norms required, and the assessment process was performed at the end of each quarter.

45. Although she had seen Mellor's claims that the PMDS would be used against him, she believed it not to be that easy if an employee was performing and being rated 3, 4 or 5. As to why she had not responded to any of Mellor's emails, she believed it to be an option to remain quiet in the interest of stopping a disagreement. She was unaware of him lodging a grievance as well as his other correspondence.

46. Kinnear was unable to recall if she had responded to the applicant's emails of 08 October 2015 and 19 October 2015 sent to her in regard to his appeal against the written warning issued to him noting, however, that this email contained a reference to the June 2014 meeting allegations made by Mellor against her, Grove and Tholo. She reiterated that sometimes remaining silent was just better. However, she denied, ever threatening the applicant at the June 2014 meeting.

47. Referring to Mellor's email of 13 June 2017, she could not recall if she had told him that he did not do PMDS. However, she denied that she chased him away as it was not something that she would do. She could not recall if she had responded to this email but recalled that discussions had ensued about how to deal with the first 3 quarters versus the last one and that she had spoken to Tholo who was to discuss with Grove in order to provide feedback to Mellor. Various emails followed in this regard to ascertaining what the decision of the moderation committee was.

48. Kinnear refuted Mellor's claim that there had been no updates provided to him regarding his query pertaining to the first 3 quarters, which prompted him to seek assistance from his trade union.

49. She reiterated that Mellor never collected his PMDS from her as he was still awaiting feedback about his previous grievance but noted that the performance

agreements and assessment documentation were generic, and he could have obtained them from any of the other analysts. She believed that he had indicated in an email to her that he did not want to participate in the PMDS programme but that that correspondence was not available.

Alida Grove (“Grove”)

50. Grove testified under oath that she was the respondent’s Director of Forensic Pathology, responsible for the Forensic Chemistry Laboratories and that she chaired the PMDS moderation committee. She recalled that, at the June 2017 meeting, they had been advised the Mellor had not wished to hand in his PMDS documentation, and he was instructed to do so by Employee Relations, and he signed his agreement only in February 2017. Although he had completed his quarter 4 assessment, he had not submitted it to Kinnear. The matter was accordingly referred to the PMDS team for assistance.

51. She confirmed that, based on communication received from Tholo and Kinnear in regard to Mellor’s unwillingness to sign his performance agreement, she had escalated it to the Chief Director for intervention and that it was based on Rennie’s letter to Mellor that he eventually signed it on 13 February 2017.

52. During the June 2018 meetings of the moderation committee, the focus was on the 2017/2018 PMDS, although previous outstanding issues were also discussed which included Mellor’s 2016/2017 PMDS. On the basis of the facts before the committee per the previous year’s minutes and the instruction from the Employee Relations and PMDS teams to moderate only the 2016/2017’s quarter 4 assessment, the committee proceeded to do so. However, as the performance agreement was only signed in February 2017, it did not comply with the PMDS Policy, and PSA regulations and the PMDS was therefore declared invalid.

53. Grove submitted that Mellor had never complained to her regarding a refusal by Kinnear to issue him with the PMDS documentation but noted that she received so many emails from the laboratory people that she did not get to all of them. She confirmed that no formal grievance in this regard was lodged.

54. Although Grove recalled a meeting pertaining to the applicant one Friday afternoon a number of years back, she could not recall precisely what was discussed; even the year and content could not be recalled, but she did note that Mellor always seemed to have some issue of concern.

55. She denied that there had been a unilateral change to the key performance areas of the analysts by management but rather that, annually, prior to the sign off of the performance agreements, all laboratory heads participated in input and discussion sessions to review the norms, make amendments, finalise them before distributing, and implementing the new agreements. The applicant's duties, as an analyst, were always to analyse blood toxicology, blood alcohol and food in order to produce reports according to quality procedures.

Cross-examination

56. Grove confirmed that, during the moderation committee meeting of 2017, which took place between 12 and 15 June 2017, Kinnear had advised the committee that Mellor had not submitted his quarter 4 assessment of 2016/2017. According to an email trail, Kinnear asked Mellor for his quarter 4 assessment on 09 May 2017 and then again on 22 May 2017 with Mellor's next email, in that chain being sent to her on 04 August 2017, the content of which changed to the 2017/2018 PMDS.

57. Although Grove confirmed being copied into Mellor's email of 24 May 2018 in which he made specific reference to the meeting in June 2014 when she had told him that PMDS would be used to get rid of him, she was not aware of this being said and called on Mellor to the proof thereof through the recordings he claimed to have made. She had not responded to that particular email as it was neither directed to her, nor did she respond to such matters by email.

58. Grove advanced no comment regarding Mellor's assertions that he had, on numerous occasions, addressed the dispute, in writing. However, in re-examination, she submitted that there had been no grievance, emails or disputes directed to her in this regard.

Mthoko Majola ("Majola")

59. Majola testified under oath that he was a Deputy Director in the respondent's Performance Management and Development Systems Department and that his

role was to guide the respondent to comply with the prescripts of the Department of Public Service and Administration and government.

60. He testified that performance agreements were to be signed by 31 April of each year (sic) and that, in terms of the legislative framework, they were required to monitor the performance of employee through quarterly reviews during the financial year. He referred to the Public Service Regulations which required that a performance agreement be concluded within 2 months of the commencement of the cycle, or within 3 months of a new employee's start date. Regulation 72(7) provided that no employee shall qualify for performance rewards, including pay progression, if he/she has not signed a performance agreement within the prescribed timeframe. It was not possible to enter into a performance agreement at the end of the cycle, as Mellor had done on 13 February 2017, as the agreement formed the basis on which the assessments were to be conducted. In his view, the applicant ought to have been disciplined for non-compliance in respect of the quarterly reviews. He recalled the advice sought from the Director regarding retrospective reviews relating to Mellor's first 3 quarters was that they could not be performed.

Cross-examination

61. During cross-examination Majola confirmed that while the financial year ran from 01 April to 31 March of the following year, the quarters were split as follows:

- 61.1. Quarter 1 – 01 April to 30 June;
- 61.2. Quarter 2 – 01 July to 30 September;
- 61.3. Quarter 3 – 01 October to 31 December; and
- 61.4. Quarter 4 – 01 January (following year) to 31 March.

62. While it was put to him, with reference to Mellor's email to Kinnear requesting his 2017/2018 performance agreement, dated 04 August 2017, that performance agreements were usually finalised outside of the prescribed 2-month timeframe, Majola noted that he would not be able to comment in that regard. He noted that assessments were to be conducted within 1 month after the end of the quarter.

63. Referring to Mellor's subsequent email to Tholo, dated 16 November 2017, in which he confirmed that he had only received the correct PMDS and job description

documentation the day before, Majola noted that it remained both the employee and the manager's responsibility to see the process through, and that it was not correct to do so out of time. Where managers failed to comply, this ought to have been escalated to the PMDS Department.

64. He noted that his department had received no complaints from Mellor in regard to the 2016/2017 timeframes and that the only dispute he was aware of related to the late signing of his performance agreement in February 2017.

ANALYSIS OF EVIDENCE AND ARGUMENT

65. Section 186(2)(a) of the 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.

66. In the well-known judgment 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.*” In the matter to hand, the applicant correctly asserts that the benefit in question relates to the pay progression increase awarded to employees in terms of the respondent’s performance management system which, in itself, is governed by the Public Service Regulations (“the PSR”), which commenced on 01 August 2016 in terms of Government Notice R877 in Government Gazette 40167, dated 29 July 2016.

67. In *Charlies v the South African Social Security Agency & Others* (2014) ZALCJHB 172 (LC), the Labour Court, with reference to *Apollo (supra)*, held that jurisdiction vests in that instance, in the CCMA, to hear the applicant’s claim, and that the focal point of such an arbitration would be limited to whether or not the employer’s decision not to award the employee the benefit claimed, was fair or not.

68. In unfair labour practice disputes pertaining to benefits, the onus of proof lies with the employee party firstly to establish the nature of and entitlement to the benefit

in question, and subsequently to show that the conduct of the employer, relating to the provision of that benefit, was unfair.

69. Regulation 72(1) of the PSR requires existing public service employees to enter into a performance agreement within 2 months of the commencement of the financial year; in other words, by no later than 31 May of each year. Sub-regulation (4) goes on to provide that “[i]f both the employee and his or her supervisor do not sign the performance agreement or an agreement of similar nature due to a dispute relating to the content of the agreement, a person shall be appointed within one month after the expiry of the period stipulated in sub-regulation (1), to consider the dispute.” According to sub-regulation (5), such a person is required, within one month of his/her appointment to consider the dispute and recommend a performance agreement or an agreement of a similar nature to be signed, while sub-regulation (6) requires the signing of such an agreement within two weeks of receipt thereof, failing which the agreement shall be deemed to have been signed from the date of the recommendation. Regulation 72(7) prescribes that “No employee shall qualify for performance rewards as contemplated in regulation 73(1), including pay progression, if he or she has not signed a performance agreement or an agreement of similar nature within the period contemplated in sub-regulation (1)”.

70. It is clear that the purpose of these regulations and sub-regulations are to hold the employees of the public service to account in respect of their key performance areas, mutually agreed between the employee and management, and to make provision for situations where such agreement is not timeously established. They further provide a mechanism for a third party to assist in resolving the impasse and to recommend a performance agreement to be signed which, if not, is deemed to have been agreed to by the employer and employee. Taking into account the timeframes prescribed in the regulations, a person appointed to consider such a dispute must be appointed within one month of the expiry of the two-month period for existing employees referred as per sub-regulation (1), and his/her recommendation must be furnished within a month from his/her date of appointment. At the very least, this implies that the recommendation can only ever be made outside of the period referred to in sub-regulation (1) and accordingly,

read in conjunction with regulation 72(7), the employee shall not qualify for any performance rewards, including pay progression. On the facts before me, it is evident that Mellor's performance contract was only concluded in the 11th month of the 2016/2017 financial year and failed to comply with the PSR requirements thereby disqualifying him from being eligible for performance rewards, one of which included pay progression.

71. On the applicant's own version, he had previously made it known that, as a result of Grove's threats to utilise PMDS to get rid of him, he feared participating in the programme and had refused to participate since 2015 but that he had subsequently been advised by his representatives that he should not refuse. Mellor submitted that, Kinnear refused to issue him with the performance agreement, on the basis that he did not participate in the programme but that she ultimately did so following Rennie's letter to him in February 2017, her instruction to him being that he should only complete the performance agreement portion of the pack and not the assessments. His focus of attention, at this point, turned to how the employer would assess his overall performance for the financial year if he were disallowed from submitting self-assessments for the first 3 quarters.

72. On the one hand, Mellor's version is that he was repeatedly turned away, by Kinnear, when attempting to collect any of the PMDS documentation from her, while, on the other hand, Kinnear denied that she had ever done so claiming that he had never come to collect them from her. Faced with two mutually opposing versions, I am required to consider which is the most probable. Kinnear's testimony left me unconvinced that she had not repeatedly turned Mellor away, her reasoning being vague that, as a manager, she would not have done so. Although she denied doing so, this appears to be the first time she has actually denied this as she previously, repeatedly ignored these allegations, put to her in writing by Mellor, on the basis that sometimes remaining silent was an option. I can only conclude that, faced with an employee who exercised his rights, and who may have been perceived to have been somewhat difficult, she contributed to perpetuating this acrimonious relationship by denying him access to generic documentation pertaining to his role, that was not proprietary and to which he was entitled, whether or not he wished to participate in the PMDS programme. She had absolutely

nothing to lose in ensuring that he was provided with the PMDS documentation even if it meant simply forwarding it on to him.

73. Notwithstanding the aforementioned, Mellor himself bears some responsibility in this regard. Having been denied access to the documentation, he failed to formally address Kinnear's refusal/s, at the time, apart from referring to the situation in subsequent correspondence. It is also common cause that the PMDS performance agreements and assessments pertaining to analysts were not unique to each individual and were not tailor-made, and I am of the view that Mellor could simply have bypassed trying to collect it from Kinnear, copied one of his colleagues' and proceeded to complete and submit his performance agreement to her, thus ensuring an indelible record of his compliance with the PSR regulations.

74. On the respondent's version, the foundation of the applicant's non-participation in the respondent's PMDS programme dated back to June 2014 when he claims to have been threatened that PMDS would be utilised to terminate his services. The applicant was very clear in his evidence as to what transpired on 20 June 2014 (which meeting was supposed to resolve a prior grievance relating to the vaccination issue), and he reduced his complaints, serious in nature, to writing on several occasions. Not once in the lead up to this arbitration does it appear, from the evidence, that his allegations put to the respondent were denied or that any attempt was made to deal with them. Kinnear once again adopted the approach of choosing not to respond to communication of this nature while Grove testified that the correspondence in which these allegations were made, was not specifically addressed to her, that she was merely copied into them and thus, did not warrant a response. The oral evidence, pertaining to the Friday meeting of 20 June 2014, presented during the arbitration by Kinnear and Grove was equally unconvincing, and I believe intentionally vague with both of them finding it difficult to recall what had been said at that meeting. On the other hand, the applicant's version was cogent and clear and was supported by his repeated reminders to the respondent of what had taken place, none of which was ever formally dealt with or denied by it.

75. The matter to hand effectively turns on the question as to whether or not the employer's conduct, relating to the provision of a benefit, in this case, pay

progression, was unfair. Reference was made several times by the respondent's witnesses to the provisions of the PSR pertaining to the performance agreement conclusion process and how disputes ought to be dealt with. However, it is abundantly clear that, despite these regulations, the respondent, who expected the applicant to comply with the PSR, failed to do so itself. While Majola was emphatic about compliance in terms of timeframes prescribed in the PSR, he was unable to explain why Mellor's email to Kinnear, dated 04 August 2017, indicated that his performance agreement for the 2017/2018 financial year had, at that stage, still not been issued to him. His subsequent email correspondence to Tholo, dated 16 November 2017, indicates that he had "finally received the correct PMDS and Job description for the 2017/2018 cycle from Marga Kinnear only on the 15th of November 2017." (sic)

76. The respondent's conduct in dealing with the applicant pertaining to the PMDS programme and its consequent benefit to the applicant simply amounts to an attempt to use the PMDS system against him punitively, whilst simultaneously dismally failing to meet its obligations to adequately address his legitimate concerns over an extended period of time. Although the applicant himself failed to conclude his performance agreement within the prescribed period in terms of the PSR, his reasons for doing so are as a direct consequence of the respondent's conduct and he has succeeded in discharging the onus of proving that he was subject to the unfair conduct of his employer relating to the provision of a benefit.

77. In the circumstances, I am not of the view that it would be appropriate to order the respondent to implement the notch increase in respect of the 2016/2017 financial year as he bears some responsibility in failing to conclude his performance agreement timeously, the main requirement needed to qualify for a notch increase.

78. Section 193(4) of the LRA provides that an arbitrator may determine an unfair labour practice dispute on terms that he/she deems reasonable, which may include *inter alia*, compensation. Section 194(4) of the LRA requires that such a compensation award be just and equitable in the circumstances, but not more than the equivalent of 12 months compensation.

79. Accordingly, compensation in the form of a *solatium* would be appropriate in the circumstances to address the wrong suffered by the applicant and to deter recidivism. An amount equivalent to one month's compensation, amounting to R30,728.47, would, therefore, be just and equitable.

AWARD

80. Accordingly, the applicant, Barry Mellor, was subjected to an unfair labour practice by the respondent, Department of Health- National, as contemplated in section 186(2)(a) of the LRA.

81. The respondent, Department of Health- National, is ordered to pay the applicant the amount of R30,728.47 by no later than 30 June 2019.

A handwritten signature in black ink, appearing to read 'Allan Kayne', with a small dot at the end.

Allan Kayne