

ARBITRATION AWARD

Case No: **PSHS477-18/19**

Commissioner: **Anna Maria Fourie**

Date of award: **1 May 2019**

In the matter between:

Keketso Naphtaly Kenny Ntlhare

(Union/ Applicant)

and

Department of Social Development- Free State

(Respondent)

DETAILS OF HEARING AND REPRESENTATION

- [1] The Applicant referred an alleged unfair labour practice dispute to the Bargaining Council for arbitration. The dispute was initially set down for arbitration in December 2018, but it was postponed due to the illness of the Respondent's representative. The arbitration was heard at the Civilia Building, Bloemfontein on 26 February 2019 and 17 April 2019 and the parties submitted written heads of argument on 25 April 2019.
- [2] Both parties were present and represented as indicated in the cover page of this award. The proceedings were conducted in English and I took notes by hand and recorded the proceedings electronically.

ISSUE TO BE DECIDED

- [3] The dispute related to an alleged unfair labour practice relating to demotion in terms of section 186(2)(a) of the Labour Relations Act, 66 of 1995 (“the LRA”). The Applicant sought compensation, should in his favour.
- [4] I thus need to determine whether the Respondent committed an unfair labour practice against the Applicant and if so, to order the appropriate relief. The onus was on the Applicant to show that an unfair labour practice was committed as the existence of an unfair labour practice was disputed by the Respondent.

BACKGROUND

- [5] It was the case of the Applicant that the Respondent committed an unfair labour practice against him by demoting him from the position of “Assistant Director: Labour Relations” to a position that did not appear on the structure of the Department, namely: “Assistant Director: Supply Chain Management Loss Control”.
- [6] It was further the case of the Applicant that he had been in this new office from 1 August 2018 without any instructions or work allocated to him until the Respondent reversed the decision on 7 February 2019, pending the arbitration date. The Applicant’s issue was that he was prejudiced in that, during the period that he had been in the demoted position, he could not be assessed in terms of the Performance Management and Development System of the Department which would have an impact on his progression in the long term. He earned R33 947.25 per month.
- [7] The Respondent’s position was that the Applicant had never been demoted, that the post to which he was moved indeed existed in the Respondent’s structure and that the Applicant was not prejudiced in any means as his salary and terms and conditions of employment had not changed. The Applicant had actually been transferred and he was consulted prior to his transfer.

SURVEY OF EVIDENCE AND ARGUMENT

[8] The Applicant testified and submitted a bundle of documents into evidence. The Respondent called one witness and also submitted a bundle of documents into evidence. After the Applicant closed his case, the Respondent sought an adjournment in order to ensure the presence of their witnesses at arbitration. This indulgence was granted to the Respondent during the sitting on 26 February 2019. After calling their first witness on 17 April 2019, the Respondent sought a further adjournment in order to secure the attendance of three more witnesses who were not available for reasons varying from having to appear in court on behalf of the HOD and attending the funeral of a former colleague. No substantiating evidence were provided for this request and the request was opposed by the Applicant and his representative, who indicated that they too would have wanted to attend to the funeral of the former colleague, but instead opted to comply with their responsibility to attend to the arbitration as set down. I refused the indulgence on the ground that no documents were submitted to prove that the witnesses were summoned to court and indeed attending to the funeral. The parties were granted time until 25 April 2019 to submit written heads of arguments. Both parties duly complied with this arrangement, although the Council only forwarded the arguments to me on 29 April 2019.

EVIDENCE FOR THE APPLICANT

Keketso Naphtaly Kenny Ntlhare testified as follows under oath:

[9.1] He was appointed as a Senior Labour Relations Officer in 2006 and became Assistant Manager Labour Relations on 1 December 2008. His academic background included:

- a Course completed at the Commissioner for Conciliation, Mediation and Arbitration covering substantive law, conciliation, jurisdictional rulings, managing dismissals and arbitration;
- a workshop relating to conciliation and arbitration;
- a certificate in labour relations;
- a Baccalaureus Legum degree from the University of North-West

- a Military law course at The School of Military Justice
- He was also admitted as an advocate of the High Court of South Africa.

He was thus suitably qualified for the post he had held at Labour Relations in the Department.

[9.2] His functions as Assistant Manager Labour Relations included training, investigations of disciplinary cases, handling of grievances and disputes and supervising Senior Labour Relations Officers. Proof of his utilisation in this regard is contained on pages 31 to 34 of the Applicant's bundle which shows that he was part of the provincial panel of presiding officers and that he had been requested to preside over disciplinary hearings in other provincial departments.

[9.3] On 22 July 2018, a Sunday, he received an sms from the Chief Director: Corporate Services, advocate Phahlo, instructing him to meet with him the next morning. He had been feeling ill, but attended. When he arrived, he found the Director: Legal Services, advocate Tsotetsi, also in the office. He was informed that he would be transferred to the post of Assistant Director: Loss Control at Supply Chain Management. He took note and then went to see a doctor. He was booked off and upon his return to work on 26 July 2018 he tried to engage with the head of department (HOD) about what he had been told. However, he struggled to get a hold of her and started to clear his desk bit by bit.

[9.4] On 27 July 2018, he went to the Supply Chain Unit to enquire regarding the issue. He also went to the Human Resources Unit dealing with the structure of the department. According to the copies of the approved organisation structure he received from Human Resources, as on page 40 of his bundle, the post he had held as Assistant Director Labour Relations was approved. However, the approved structure for the Sub-Directorate Supply Chain Management on page 41 of his bundle did not show the post he had been moved to, namely Assistant Director Supply Chain Management Loss Control. Only after he had declared his dispute, did the Respondent's representative provide him with a copy of an organisational

structure on which this post appeared, namely page 42 of his bundle. However, this document was not signed off by the MEC and thus, was not an approved structure.

[9.5] On 31 July 2018 Ms Moeti, Human Resources Official, handed him a copy of the letter of transfer on page 10 of his bundle. He did not feel well on 1 August 2018 and reported for duty on 2 August 2018, but could not get a hold of the Director: Supply Chain Management, Mr Thulo, until the 6th of August 2018 when the latter informed him that there was no post such as Assistant Director: Loss Control in his unit and he would have to engage with the Chief Director and revert to the Applicant. To date, Mr Thulo did not revert to him, which was why he had referred the dispute. He was not given a job description for the new post. He has never been given any instructions or functions to perform in the new post since he had occupied the new post. He also did not have any qualifications relevant to the post. Whereas he had two people under his supervision at Labour Relations, he did not have any subordinates in the new post. He felt redundant and demoted. He was not even informed whom he had to report to in the new post.

[9.6] The Respondent had a Performance Management and Development System in terms of which employees were assessed in conjunction with their direct supervisors for the purpose of amongst others, career progression and performance rewards. As he did not perform any functions in the new post, he would be prejudiced in that he could not be assessed for the entire period that he had been in the new post. In effect it meant that he could not be progressed to notch 11 as he had not been assessed in the financial year in question. This would also impact negatively on his salary and contribution to the Government Employee Pension Fund and Service Bonus. Prejudice was one of the elements of demotion. His transfer to the new position did not serve any purpose as he did not even possess the requisite qualifications to perform the job.

[10.1] Under cross-examination he submitted that he did not contact the HOD in writing as he wanted to meet her face to face. He also cleared his office as he had already been transferred by then. He was of the view that Phahlo and Tostetsi, being senior managers, were aware that the post he had been transferred to was not approved

and thus non-existent. It was put to him that Mr Masukela had been transferred from the post to which he had been transferred, as reflected on page 12 of the Respondent's bundle. He submitted that the post still did not appear on an approved structure. It was put to him that the Respondent would prove that the MEC could create a post within any directorate or sub-directorate which was the case with the post he had been transferred to. He submitted that the MEC could not just create unnecessary and unwanted posts, but had to consider finances and the regulating legislation. He was then referred to page 4 of the Respondent's bundle, a PERSAL system printout in terms of which it was proven that the post in fact existed and was approved by Treasury. He responded that the abbreviation, "PSSI" on the said document indicated that Mr Masukela had still been located as part of the sub-directorate Institution and Capacity Building and thus the document related to a different directorate. He submitted that this was an example of how people were unilaterally and illegally transferred within the department to non-existing positions, but still paid in terms of the PERSAL system.

[10.2] He submitted that he did not follow up after his meeting with Thulo as he had not requested to be transferred. He submitted that when he looked at the key responsibilities of the Assistant Director Loss Control at Supply Chain Management, he was not qualified to perform the duties. He conceded that the duties of the post were set out on pages 44 and 45 of his bundle of documents. He submitted that he did not make the Respondent aware that his transfer was not in the public interest as he assumed that they knew it. He submitted that by 1 April 2018 he had a job description and performance plan at Labour Relations. He submitted that since he was transferred to a non-existing post, there would be no one to assess him.

[11.1] Under re-examination he explained that he was not informed of what functions Mr. Masukela had performed and he was not oriented in his new post.

EVIDENCE AND ARGUMENT FOR THE RESPONDENT

Application to submit a new bundle.

[12.1] Mr. Mahlaba applied to introduce a new bundle, as he had eliminated some pages from his original bundle and added two new pages.

[12.2] Mr. Mokhachane objected to the introduction of the new bundle as the Applicant had closed his case already and could not accept new evidence at this stage of the proceedings.

[12.3] In reply, Mr. Mahlaba submitted that he asked at the previous sitting to add to his bundle.

Ruling on application to introduce a new bundle

[13] Having considered the submissions of both parties and having perused my notes of the previous sitting of the arbitration, I found no indication that the Respondent mentioned that they would apply to introduce a new bundle when the arbitration re-convened. A proper application could have been brought prior to the re-convening of the arbitration. It would not be fair to introduce a new bundle at this stage of the arbitration as the Applicant had already closed his case and would not have an opportunity to present evidence in response to the bundle. The application of the Respondent to introduce a new bundle at this stage of the arbitration was denied.

Liza Rossouw, Deputy Director PMDS, testified under oath on behalf of the Respondent as follows:

[14.1] With reference to the Applicant's assertion that he would be prejudiced due to the Department's failure to assess him for the period that he had been in the other post, she explained that officials of the Department were assessed twice per year. The assessment and supporting documentation would be submitted to their division and then the Chief Directorate would conduct a primary moderation process. During this process the rates of all officials would be checked as well as whether the Chief

Directorate falls within the limits of paying cash bonuses and notch progressions. A final moderation process follows where after she would write a submission to the Head of Department (HOD) to sign. Once this was approved, the end-of-cycle report would be used to implement the new notches and or the cash bonuses. If the Applicant was assessed and found to be fully effective, he would be moved up one notch to an amount of R413 475.00 per annum. Should there be a cash bonus, the moderating committee would calculate the percentage.

[14.2] A performance agreement for the entire cycle of assessment, namely 1 April to 31 March, must be submitted to their division before 31 May and they then have until 30 June to capture the performance agreements on the PERSAL system. Although the Applicant had been at Loss Control for seven months and had not performed the functions he did before at Labour Relations, he would not be prejudiced as the policy provides that if an official, for reasons beyond his control was unable to perform his functions, the official may not be prejudiced in terms of performance assessment. Such an official could not be assessed below “fully effective”. Thus, meaning the Applicant would have to be rated at fully effective for the period he had been at Loss Control. She advised the Applicant’s supervisor to formally assess the Applicant for the period 1 April to 30 June at Labour Relations. Whoever had been responsible for the Applicant at Loss Control had to assess him from July to February as fully effective. Assessment was compulsory, even when an official could not perform due to reasons beyond his control.

[15.1] Under cross-examination, she confirmed that the Applicant had to be assessed as “fully effective” for the period of seven months he had been inactive. She had not yet received any assessment of the Applicant for the said period, but the Respondent had until 31 May to submit the assessment. She agreed that the Applicant could not perform for a period of seven months due to the Respondent’s decision to transfer him to Loss Control from Labour Relations. She explained that, if the Applicant had no supervisor at Loss Control, someone would have to take control, even if it was his supervisor at Labour Relations, Mr Mahlaba.

[15.2] She explained that the organisation structure had to be approved by the MEC and according to her knowledge, a structure not approved by the MEC could not be accepted. She agreed that, according to the approved structure as depicted on page 41 of bundle A, there was no provision for an Assistant Director: Loss Control. She agreed that the Applicant had been transferred to a post that did not appear on the structure. The structure on page 42 of bundle A in which the post do appear, was not signed by the MEC and there was no departmental stamp on the document. She could not say where the document came from.

ANALYSIS OF EVIDENCE AND ARGUMENT

[16] I need to determine whether the transfer of the Applicant happened following a consultation with him and whether his transfer effectively constituted a demotion, thereby prejudicing him and constituting an unfair labour practice against him.

Did the transfer constitute a demotion?

[17] The testimony of the Applicant was that he had been notified of his transfer from a position that he had been fully utilised in to a post which he did not possess the qualifications for and for which he was never given a job description or any instructions to perform. He further testified that his attempts to discuss the situation with the relevant managers were unsuccessful due to various reasons. There was no indication in his testimony that he had been consulted about the transfer or that he had been in agreement with the transfer. He merely complied with an instruction and all his attempts to obtain clarity were in vain. He also indicated that the post to which he was transferred did not even exist in terms of the approved organisation structure of the Respondent. The Respondent's attempts to rebut his evidence in this regard were unsuccessful. Reference was made to one Mr. Masukela who would have occupied the same post before the Applicant, but the documentation referred to nowhere confirmed that Mr. Masukela had actually been in the said post. Furthermore, the Respondent failed to present the evidence that their representative indicated would be presented to prove that the post in question did in fact exist.

[18] It was clear from the Applicant's testimony that he had been placed in a position where he could not perform any duties, as he was not qualified for the post and no guidance or instruction had been given to him for the period of seven months he had been in the post. It was the Applicant's concern that he would be prejudiced as a result of this during his performance assessment. On the evidence presented to me, it seems very probable that the Applicant had felt uncertain about his position and that he was demoted. He had been taken from a post which he had the relevant qualifications and experience for and where he had performed a range of relevant duties, to a post where he sat waiting on instructions that were not forthcoming.

[19] In the matter of *Nxele v Chief Deputy Commissioner, Corporate Services, Department of Correctional Services and others* (2008) 29 ILJ 2708 (LAC) the Court considered whether the decision to transfer the employee temporarily to Pollsmoor constituted a demotion. It was held that the status, prestige and responsibilities of the position were relevant to the determination of whether or not a transfer constituted a demotion. In the light of the detailed and uncontested evidence of the employee in regard to the status, prestige and responsibilities of his position in Cape Town, the Court had no hesitation in concluding that that position was of higher status and prestige and held greater responsibilities than the position he was to occupy at Pollsmoor. The employee's transfer to Pollsmoor therefore constituted a demotion. Since the employee did not consent to the demotion, it was unlawful in terms of the common law and unfair in terms of the LRA.

[20] The Applicant testified in detail about his qualifications and experience as well as his responsibilities in the post he had been transferred from. This evidence of his was not contested. The Applicant's testimony that he had felt redundant and demoted in the post he had been transferred to was also not contested. It seems that his situation was similar to the one described in the matter of *Nxele*. His responsibilities were not less in the new post, they were non-existent. Furthermore, he no longer supervised anyone and he did not even know who would supervise him. Such a situation would very probably be intolerable for any reasonable employee to endure.

[21] In the matter of *SAPS v Salukazana and others* (2010) 31 ILJ 2465 (LC) the employee was notified by a letter headed 'lateral transfer' that he had been permanently transferred to a new position. The effect of the transfer was that although he remained on level 13 and his salary and benefits were not changed, his status had been diminished. In the past he reported to the area Commissioner, in his new position he was expected to report to a person below the area Commissioner. The Court found that demotion can manifest itself in many ways. It can arise through a reduction in salary, a change to terms and conditions of employment and a transfer. In fact, a demotion and a transfer have common attributes – there is a movement in both a demotion and a transfer. If the movement leads to a reduction in status, it is a demotion. Thus, if a transfer leads to a change in terms and conditions of employment which amounts to demotion, an employee is entitled to bring a claim relating to an unfair labour practice.

[22] It was not in dispute that the Applicant's remuneration and post level remained unchanged when he was transferred. However, based on his uncontested testimony, I concluded that he had certainly been diminished in status as a result of the transfer. I further concluded that the transfer indeed constituted a demotion.

Would the Applicant be prejudiced?

[23] It was not in dispute that the decision to transfer the Applicant had been reversed and that the Applicant had effectively been reinstated in his position at Labour Relations from 11 February 2019. The Applicant's concern however, was that he would be prejudiced in terms of the Respondents' PDMS system and that he would not be progressing in terms of income notch since he was not assessed during the seven-month period he had been at Loss Control. This concern of the Applicant is understandable as he might be prejudiced in terms of income and benefits in the long run.

[24] The Respondent's witness, Mrs Rossouw' testimony was clear that the Applicant should not be prejudiced as a result due to the Respondent's policy that an official who could not perform during a performance cycle due to circumstances beyond his

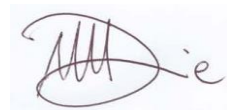
control, had to be assessed as fully effective, thus qualifying for a progression. Mrs Rossouw seemed to be a reliable witness and there was no apparent reason to doubt the credibility of her evidence.

[25] The issue of concern that remained however, was whether the Applicant had in fact been assessed for the period he had been at Loss Control as he had to be in terms of the policy. Mrs Rossouw had no information in that regard, save for saying that someone had to take responsibility for that. The Respondent presented no evidence to indicate that anyone did in fact take responsibility to ensure that the Applicant would be assessed for the period that he had been at Loss Control. It thus follows that, although theoretically in terms of the policy the Applicant should not be prejudiced, there is a very real possibility that he would be prejudiced if he was not assessed in time for the current performance cycle. Although the period for submission of assessment documentation had not expired yet, as per the testimony of Mrs Rossouw, there was no indication of any action taken in this regard by the Respondent. It would thus appear that the Applicant's concerns in this regard are justified.

[26] As for the fact that the Applicant's transfer constituted a demotion, I concluded that he was prejudiced in that he had felt demoted and redundant. The Applicant's prayer to be compensated thus seems to be justified. There was no evidence before me to suggest that the Respondent followed a fair process in coming to the decision to demote the Applicant. Furthermore, no evidence was presented to me that provided any explanation or rationalisation for the Respondent's decision to demote the Applicant. There seemed to have been no reason whatsoever for the decision. It is thus my conclusion that the Respondent indeed committed an unfair labour practice against the Applicant. In light of the above, I make the following award:

AWARD

- [27] The Respondent, Department of Social Development- Free State, committed an unfair labour practice towards the Applicant, Keketso Naphtaly Kenny Ntlhare, by demoting him for no apparent reason and without following a fair process.
- [28] The Respondent must compensate the Applicant in the amount of **R101 841.75 (one hundred and one thousand eight hundred and forty-one rand seventy-five cent)**, being the equivalent of three months' salary and calculated as R33 947.25 per month x 3 = R101 841.75. The Respondent must pay the Applicant this amount of compensation by no later than 31 May 2019.
- [29] The Respondent is further ordered to ensure that Mr. TI Mahlaba, the Applicant's supervisor at Labour Relations, submit the necessary assessment forms and supporting documentation of the Applicant for the period from 1 August 2018 to 10 February 2019 that he had been at Loss Control, to the office of Mrs EC Rossouw, by no later than 15 May 2019 so as to ensure that the Applicant will not be prejudiced in terms of the Respondent's PDMS.
- [30] I make no order of costs.



Signature:

Commissioner: Anna Maria Fourie