

ARBITRATION AWARD

COMMISSIONER: MARINA TERBLANCHE

CASE NO: PSHS575-12/13

DATE OF AWARD: 7 AUGUST 2014

In the arbitration between:

NEHAWU obo T J MOTHALOSA

APPLICANT

and

DEPARTMENT OF HEALTH- FREE STATE

RESPONDENT

DETAILS OF HEARING AND REPRESENTATION:

- [1] An Arbitration hearing was scheduled for the 17th of July 2014 at the Botshabelo District Hospital. The Applicant was present and represented by Mr. S B Moloji, an Official from NEHAWU. The Respondent was absent from the proceedings and not represented. Parties agreed to submit written Heads of Argument only. Same was received on the 29th of July 2014 as agreed.

ISSUE TO BE DECIDED:

- [2] The Applicant has referred a dispute to the Bargaining Council relating to an alleged unfair labour practice in respect of the non-promotion of the Applicant to the position of Deputy Director : Administration & Support (salary level 11).

BACKGROUND TO THE ISSUE:

- [3] The Applicant is employed by the Respondent Department as an Assistant Director : Administration & Support at Botshabelo Hospital on salary level 9.
- [4] A Job Evaluation was requested and the Applicant's position was recommended to be graded on salary level 11. The Applicant was however not promoted to salary level 11 and seeks an order for the above promotion to be implemented.

SURVEY OF EVIDENCE AND ARGUMENT:

Documentary evidence:

- [5] The Applicant submitted a bundle of documents, marked Annexure "A";
- [6] The Respondent submitted a bundle of documents, marked Annexure "B".

SUBMISSIONS/ARGUMENT BY THE APPLICANT:

- [7] Mr. Mothalosa was employed by the Department of Health as an Assistant Director: Administration & Support at Botshabelo Hospital on salary level 9. See Annexure "A" page 21. Mr. Mothalosa submitted a request for Job Evaluation during November 2011 (see "A" pages 18 – 29) in terms of the Job Evaluation Implementation Strategy paragraph 6.6 (see "A" page 46) and the application was received by the Organisational Development and an analyst was appointed to handle the request (see "A" page 25).

- [8] The Job Evaluation was presented to the Departmental Job Evaluation committee where Mr. Mothalosa and a fellow colleague were invited and after successful presentation the request was then referred to the Provincial Job Evaluation Panel on the 1 November 2011 for ratification in terms of the Job Evaluation Implementation Strategy (see “A” pages 78 and 44 - 45).
- [9] Mr. Mothalosa was also invited with his colleague to attend the Provincial Job Evaluation Panel meeting during the deliberations on his request.
- [10] The outcome of the Job Evaluation was pronounced and the Assistant Manager post at salary level 9 held by Mr. Mothalosa was recommended to be graded to salary level 11. The Department decided not to implement the Job Evaluation outcome citing financial constraints (see “A” page 29).
- [11] The Department also conducted a Job Evaluation for level 8 post, for officials who were placed in smaller hospitals across the department and the outcome of the Job Evaluation was that the posts were graded to level 9 and the outcome of the Job Evaluation was implemented on the 01 January 2012, 01 May 2012 and 01 July 2012 (see “A” page 79).
- [12] The Department further conducted a Job Evaluation for an official, that was J van Wyk, who was appointed at Head Office Strategic Planning Unit and was on level 9, and the outcome of the Job Evaluation was that the post be graded at level 11 and that outcome was implemented on the 01 April 2013 (see “A” page 79).
- [13] The department has continually refused to implement the outcome of the Job Evaluation of Mr. Mothalosa post but the very plight of being in a financial situation has not deterred the implementation of other Job Evaluation outcomes of other categories.
- [14] Mr. Mothalosa’s Job Evaluation was never sent to the Executing Authority for final approval or determination in terms of the Job Evaluation Implementation Strategy paragraph 5.2 (see “A” page 40).
- [15] Mr. Mothalosa registered a grievance which was not resolved (see “A” page 17). Mr. Mothalosa then approached his union NEHAWU and declared a dispute with the bargaining council (see “A” pages 1 - 10, 16, 12, and 11).
- [16] The employer chose to implement the Job Evaluation of employees in certain categories notwithstanding the financial constraints cited in the 2012/2013 financial year, and not only at lower

levels but also at the level of Mr. Mothalosa and leaving him out of the process and or not implementing the outcome of his Job Evaluation.

- [17] Communication was sent out that requested the submission of names and persal numbers of the officials performing Queue Marshalls functions at all Regional/ District Hospitals of the department following the Job Evaluation process. (See "A" pages 78 and 80). The above indicated inconsistency by the employer in implementing the Job Evaluation outcome of its employees.
- [18] The financial situation as mentioned by the employer did not deter it from continuing with Job Evaluation processes and implementation thereof, selectively, as it had done and sidelined qualifying officials like Mr. Mothalosa.
- [19] The employer failed to comply with clause 6.15.1 of the Job Evaluation Implementation Strategy which stipulated that:

"If a job evaluation as provided under the Public Service Regulations indicates that a job has been under graded (must be upgraded) the employer shall either

- a) within a reasonable period of time, endeavour to upgraded the position of an incumbent employee, or
- b) with the agreement of the affected employee, restructure her or his duties to reflect the grade determined by the job evaluation". See "A" page 50

- [20] It was clear from the evidence that the department had committed an unfair labour practice in not implementing the outcome of the Job Evaluation for Mr. Mothalosa post and thereby promoting him to level 11. See Minister of Safety and Security v Safety and Security Sectoral Bargaining Council and Others (P 186/08, P 184/08) [2010] ZALC 63; [2010] 9 BLLR 965 (LC) ; (2010) 31 ILJ 2680 (LC) (23 March 2010), also (Department of Justice v CCMA & others (2004) 25 ILJ 248 (LAC) and Public Servants Association obo its members v National Prosecuting Authority & another [2012] 8 BLLR 765 (LAC) pages 56 – 70 Annexure A

SUBMISSIONS/ARGUMENT ON BEHALF OF THE RESPONDENT:

- [21] There was as request for Job Evaluation for Manager: Administration, District Hospitals (Salary Level 9).
- [22] It was the contention of the applicant union that their member was due for upgrading to the relevant position, which was equivalent to his responsibilities.
- [23] On or around October 2008 the respondent experienced financial crisis in that some of core services had to be suspended and same was in contravention of Sec 27, Act 108 of 1996, South African Constitution.
- [24] On or around November 2008 circulars were issued to inform all Heads of offices about cost containment measures and that offices would have to reprioritize.
- [25] On the 14/11/2012 the Head: Health disapproved the Job Evaluation outcome in terms of the Public Service Regulations, chapter V C.5, which stipulated that the executing authority may increase the salary of a post to a higher range pending certain conditions such as the financial status of the Department. ("B" Page 46-47)
- [26] It was important to explain the procedure the Department followed to implement a request of a job evaluation:
- ♣ Firstly, when an application for job evaluation was submitted, the department needed to evaluate the weight of a post to determine the salary level according to the functions attached to such post. At this point in time only the post was evaluated, and NOT the incumbent of the post. The MEC: Health had the delegated power to approve same.

 - ♣ Secondly, after the weight of the job was determined and approved by the MEC: Health, it should be established whether the incumbent of the post was on the correct salary level. The Head: Health had the delegated power to approve the upgrading of the incumbent into the job-evaluated post without following the normal recruitment procedure.

[27] Public Service Regulation, 2001, chapter C.5 stipulated the following:

“An executing authority **may** increase the salary of a **post** to a higher salary range in order to accord with the job weight, if –

- a) the job weight as measured by the job evaluation system indicates that the post was graded incorrectly; and
- b) the department’s budget and the medium-term expenditure framework provide sufficient funds.”

[28] The upgrading of the posts was not approved on condition that the departmental budget should be considered. The Head: Health had the authority to consider the application for upgrading of the post considering the Department of Health’s financial status, irrespective of the financial status of an institution.

[29] In terms of the above-mentioned Regulation, the Head: Health was not obliged to approve the upgrading of the post, as it was stipulated that: “An executing authority may increase the salary of a post...”

[30] Taking the above into consideration, the Department of Health was not obliged to implement the upgrading of the post as the evaluation was not approved considering the cost implications to the department.

[31] It was clear that the Department “may increase the salary of a post to a higher salary” depending on the “department’s budget and the medium-term expenditure framework provided there is sufficient funds”, where after “she or he may continue to employ the incumbent employee in the higher graded post without advertising the post” in terms of the above-mentioned Public Service Regulation.

[32] The Department therefore still had the right not to upgrade the post, even though the post was job evaluated. In this instance, the Department did not approve the implementation of the benchmark as they took the financial constrains of the Department into consideration, a factor which was totally in line with the Public Service Regulation.(“B” Page 46-47)

[33] Take note of **Health Human Resource Management Circular No. 09 of 2012: Cost containment measures** . Due to the Department of Health's financial situation, no posts were filled, which included the filling of posts due to Job Evaluation. The Department of Health was therefore not obliged to upgrade a post, or to upgrade the incumbent employees.

[34] **Resolution No. 3 of 1999 clause 4.3 (page 7)** must be read in conjunction with the above-mentioned Public Service Regulation:

"If a job evaluation as provided under the Public Service Regulations indicates that a job has been under-graded, the employer shall either:

- a) within a reasonable period of time, endeavour to upgrade the position of an incumbent employee,
or
- b) with the agreement of the affected employee, restructure her or his duties to reflect the grade determined by the job evaluation."

[35] The issue in dispute was not whether the Department would endeavour to upgrade the position of the applicants, but that the process must be allowed to unfold, in which the process was done and the Head: Health pronounced himself on the matter.

[36] The upgrading of post on the implicated incumbent was not an entitlement or automatic, and was subjected to conditions such as the availability of finances. It was therefore reasonable that the Department may delay or even decline the implementation of the job evaluations due to financial difficulties as per above-mentioned Public Service Regulation. **PSCBC Arbitration case No. 125-07/08 between PSA obo J. Fox and others vs the Department of Health, Department of Public Service and Administration.**

[37] The merits of the above-mentioned case and the case of the applicants, were the same, i.e. paragraph 2.1 and 2.2 which read as follows:

♣ “The question to be determined was whether or not, on proper construction of PSCBC Resolution 3 of 1999 (Collective Agreement) the applicants are effectively **entitled to be promoted**;

♣ “In the event of the afore-going question being decided in the affirmative, it was requested by the union to direct the respondents to give effect to clause 4.3 of the collective Agreement by upgrading the union members’ positions and paying them on higher or upgraded levels retrospectively.”

♣ Paragraph B.(o) of the above-mentioned case:

“The key words were “to endeavour” and not “shall upgrade.””

♣ Paragraph B (p) of the above-mentioned case:

“The word “endeavour” was defined by the Concise Oxford English Dictionary to mean:

“try hard to do or achieve something”, to do one’s utmost”, “an earnest and industrious effort”.”

♣ paragraph 6.1 + 6.2:

- In the premises the Collective Agreement in question did not automatically and without further ado entitle union members to upgrading or promotion;
- Clause 4.3(a) of the Collective Agreement in question, on proper construction, in fact entitled the affected incumbent union members to require the First Respondent to make a genuine and honest attempt at upgrading their posts within a reasonable period of time after the job evaluation had revealed that their posts were under-graded.

- [38] Based on all said above, it was clear that the Department of Health did not approve the implementation of the job evaluation, however same was disapproved due to financial constraints.
- [39] The respondent further and fore mostly argued that the fact that the applicant was never upgraded or absorbed into the post after the evaluation, could not be termed as unfair labour practice against or towards the applicant for **upgrading was not a dispute or right, but of interest in that the applicant wished to create a fresh right same must be negotiated for it was not an existing right and based on that the council lacked jurisdiction.** The dispute arose out of a Job Evaluation which was conducted and thus, the council lacked jurisdiction in as far as the content was concerned, it was also argued in a well-known case of *Swissborough Diamond Mines (Pty) Ltd v Government of the RSA 1999 2 SA 279 (T) at 324H-I* where the following was stated: "In *Heckroodt NO v Gamiet 1959 4 SA 244 (T) at 246A-C* and *Van Rensburg v Van Rensburg en Andere 1963 1 SA 505 (A) at 509E-510B*, it was held that a party in motion proceedings may advance legal argument in support of the relief or defense claimed by it even where such arguments are not specifically mentioned in the papers, provided they arise from the facts alleged. As was held in *Cabinet for the Territory of South West Africa v Chikane and Another 1989 1 SA 349 (A) at 360G*, the principle is clear but its application is not without difficulty."
- [40] The dispute referred was truly an interest dispute concerning payment of the higher salary because the job performed by the applicant was allegedly intrinsically/inherently higher than the salary he received.
- [41] The Commissioner was required to first decide whether this was the dispute of right or interest and same sentiments were shared in the *Northern Cape Provincial Administration v Humbidge No and others (1999) 7 BLLR 648 LC*.

In drawing a distinction between rights and interests disputes *Rycroft and Jordan in A Guide to SA Labour Law (1992) on page 169 say:*

“ Broadly speaking, disputes of right concern the infringement, application or interpretation of existing rights embodied in a contract of employment, collective agreement or statute, while disputes of interest (economic disputes) concern the creation of fresh rights, such as higher wages, modification of existing Collective agreements etc. Collective bargaining, mediation and, as a last resort , peaceful industrial action, are generally regarded as the most appropriate avenues for the settlement of conflicts of interests while adjudication is normally regarded as an appropriate method of resolving disputes of rights. ”

[42] In Mahango v MEC department of Roads and Transport, Limpopo Province and other(41054/2007)(2009) the court said under these circumstances, the dispute between the parties is a labour dispute as intended by the provisions of the LRA. The dispute resorts under the exclusive jurisdiction of the Labour Court and for the reasons that were given the application was dismissed with costs and in the matter between Polokwane Local Municipality v south African Local government bargaining Council and others (JR 1843/05)(2008) ZALC, were the court share the same sentiments in the decision mentioned supra.

[43] Lastly, the Respondent referred to an arbitration award, **PSHS 193-09/10** in the matter between *Hospersa obo Strydom & others v Department of Health* where with similar facts the Commissioner argued that failure by the Respondent to promote the applicants, do not constitute an unfair labour practice and the matter was dismissed.

ANALYSIS OF EVIDENCE AND ARGUMENT:

[44] The Applicant dealt with the merits of the case in its written Heads of Argument and the Respondent replied, and although done later in its written Heads of Argument, the Respondent indicated that it was relying on a *point in limine* pertaining to the jurisdiction of the Council.

[45] Various case law was cited by both parties and I took same into consideration. Since jurisdiction is the primary issue in dispute, I focused on this first and fore mostly.

[46] In terms of the case law cited by the Respondent in respect of the jurisdiction of the Council, I concur with the Respondent's argument as far as the case law is concerned.

[47] There are conflicting versions on whether an employee needs to establish either a contractual right or a legal right before a finding may be made that an unfair labour practice occurred. In **Protekon (Pty) Ltd v CCMA & others [2005] 7 BLLR 703 (LC)** the Court held as follows :

"The essence of the court's reasoning was that the unfair labour practice jurisdiction may not be used as a substitute for collective bargaining, to create new employment rights or to further collective bargaining."

[48] In the **Protekon case** the Labour Court found that it was never the intention nor the effect of the case of **HOSPERSA & another v Northern Cape Provincial Administration (2000) 21 ILJ 1066 (LAC)** to limit the enquiry in determining unfair labour practice disputes, only to question whether the employee was contractually entitled to the remedy sought.

[49] In the case of **SA Post Office Ltd v CCMA & others (2012) 33 ILJ 2970 (LC)** the Court found that it was bound to follow the said three LAC judgments and specifically relied upon the following dictum in **G4S Security Services v NASGAWU & others (unreported LAC case No DA3/08 dated 26 November 2009)** in which the LAC interpreted the judgment of Moegoeng AJA in HOSPERSA :

"My understanding of what Moegoeng AJA is inter alia saying is that, in order for the respondent to bring a successful claim under item 2(1)(b) of Schedule 7, they would have to show that they have a right ex contractu or ex lege. It is only then that having established the right, the Commissioner would have jurisdiction to entertain the dispute as a dispute of right."

[50] In **Minister of Labour v Mathibeli and Others (2013) 34 ILJ 1548 (LC) (23 October 2012)** the Labour Court held that *"the Public Service Regulations contain conditions that are a precursor to the population*

of a re-graded post. By the mere re-grading of a post therefore, the incumbent of that post does not acquire a right to be promoted to the newly created status level of the post. A dispute arising between the employer and the employees, in its work place, would accordingly not be one of right but one of interest, for which the employees might be entitled to strike.”

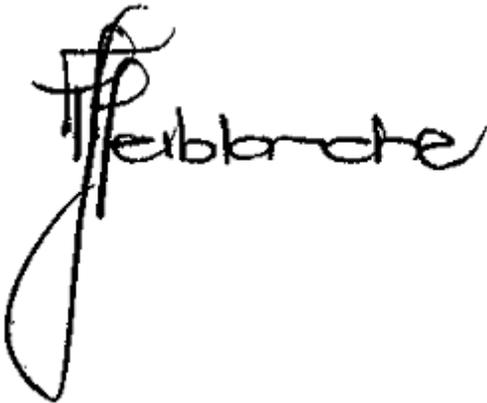
[51] In my view and in my understanding of the merits of this case before me, I find that no right exists for the Applicant to be promoted to salary level 11. I took into consideration the Applicant's reply to the Respondent's Heads of Argument, but have no legal basis to find that the Applicant enjoys a right to the said promotion.

[52] I therefore find that the Council indeed lacks jurisdiction to Arbitrate this dispute as it pertains to an interest and not a right.

AWARD:

- [1] I find that the Public Health & Social Development Sectoral Bargaining Council lacks jurisdiction to Arbitrate and therefore, determine the Applicant's dispute as an unfair labour practice dispute, as it is a dispute of interest and not a dispute of right.
- [2] I herewith dismiss the case of the Applicant.
- [3] No order as to costs is made.

SIGNED AT BLOEMFONTEIN ON THIS 7th DAY OF AUGUST 2014

A handwritten signature in black ink, appearing to read 'Terblanche', with a large, stylized initial 'T' on the left side.

MARINA TERBLANCHE
PHSDSBC PANELIST