



ARBITRATION AWARD

Case No: PSHS692-18/19

Commissioner: Allan Kayne

Date of award: 11 February 2019

In the matter between:

Public Servants Association (PSA) obo Mzimkhulu Mcuba (Applicant/Union)

and

National Department of Health

(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 an unfair labour practice related to benefits. The arbitration took place on 28 November 2018 and 28 January 2019 at the offices of the National Department of Health, 242 Struben Street, Pretoria Central.
2. The applicant was represented by Archie Sigudla of the Public Servants Association (PSA), and Thathi Tau 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 that of the applicant as "A".
5. This award is issued in terms of section 138(7) of the LRA, which requires a commissioner to provide brief reasons for his/her outcome.

BACKGROUND

6. The applicant was initially employed by the respondent as the Deputy Director: Dentistry, with effect from 03 December 2001.
7. In May 2011, the parties settled a dispute in regard to the interpretation and application of the PHSDSBC's Resolution 3 of 2009 in which the respondent confirmed that the applicant fell within the ambit of the resolution and that it would implement same, retrospectively to 01 July 2009, by not later than 15 June 2011.

ISSUE/S TO BE DECIDED

8. I am required to determine whether the failure by the respondent to grade progress the applicant, with effect from 01 July 2017, constitutes an unfair labour practice and, if so, to order the appropriate relief.
9. The applicant seeks to be grade progressed with effect from 01 July 2017.

SURVEY OF EVIDENCE AND ARGUMENT

10. 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

Dr Mzimkhulu Mcuba

11. The applicant testified under oath that he commenced employment on 03 December 2001 as Deputy Director: Dentistry. This position required that he be registered as a Dentist with the Health Professions Council of South Africa. He was

advised that he was excluded from the PHSDSBC's Resolution 3 of 2009 and accordingly referred a dispute to the Council which was successfully resolved on 10 May 2011 in terms of a settlement agreement, the terms of which provided that he qualified to fall within the ambit of the resolution, and that it would be implemented retrospectively for him.

12. He received all outstanding amounts due to him, in respect of backdated remuneration, in July 2011 and he was translated to be Manager: Dental Services, grade 1, notch 2 with effect from 01 July 2010.

13. According to Mcuba, paragraph 2.3.6.2 of the PHSDSBC's Resolution 1 of 2010 reads as follows:

“Employees who occupied OSD posts of Manager Medical/Dental Services on 31 March 2010 are translated to the new (amalgamated) post/job level of Manager Medical/Dental Services, in accordance with Annexure B(1) of this agreement, and retain their original entry date to the post they occupied as at 01 July 2009.”

14. Mcuba presented correspondence from the respondent to him, dated 20 June 2011, confirming his appointment as Manager: Dental Services with effect from 01 July 2009 at an annual salary of R537,855, with a further progression, effective 01 April 2010 (in terms of PHSDSBC Resolution 1 of 2010) to Manager: Dental Services Grade 1, with another salary progression, with effect from 01 July 2010 (as a cost of living adjustment) to R691,296 per annum.

15. According to Resolution 3 of 2009, an eligible employee who satisfies the respondent's performance requirements of at least 60%, would be entitled to progress to the next notch. In the position occupied by the applicant, it would take 8 years to progress. Accordingly, he ought to have been moved to grade 2, notch 1 with effect from 01 July 2017.

16. In a letter from the respondent addressed to him, dated 13 November 2017, his satisfactory performance is noted, and he is awarded a 1.5% pay progression, with effect from 01 July 2017, bringing his remuneration package to R1,168,350 per annum. Aggrieved that he had not been grade progressed to grade 2, notch 1, he submitted a grievance to the respondent, which it has not resolved to his satisfaction.

17. Under cross-examination, Mcuba confirmed that he was only aware of the performance requirement, in addition to the 8 years, in order to be grade progressed. He agreed that, where an individual's performance was not satisfactory, he would qualify for neither notch nor grade progression. Only once approved by the Director-General, would those who are eligible be progressed.
18. The applicant did not agree with the respondent that, despite attaining his 8 years of service on 30 June 2017, grade progression was not immediate and took effect only at the commencement of the following performance cycle; in this case with effect from 01 April 2018. He maintained that notch progression took place on 01 July of each year and that, in terms of the PHSDSBC's Resolution 3 of 2009, once an employee reaches the last notch, he would move to the first notch of the next grade.
19. Mcuba disagreed that with this methodology as employees who attained their 8 years' service in the months of January, February or March, and whose performance was at least satisfactory, would qualify for grade progression in April of that same year, at the same time as employees who similarly qualified during the period April to December of the previous year.

RESPONDENT'S EVIDENCE

Mthoko Majola

20. Majola testified under oath that he worked in the respondent's Performance Management Unit and that he was aware of Mcuba's grievance.
21. He confirmed, based on the respondent's records, that the applicant's in-service record reflected that he was translated to OSD with effect from 01 July 2010 and that he was unaware of the May 2011 settlement agreement.
22. Referring to the letter addressed to the applicant on 20 June 2011 (page R30-R31), he confirmed that applicant was translated with effect from 01 July 2009, although it was processed only in 2011 and that, accordingly, he would attain his 8 years' service on 30 June 2017. As a non-senior management employee, he would therefore only qualify for the grade progression on 01 July 2018 (senior management employees would, however, qualify with effect from 01 April 2018, in

accordance with a determination issued by the Department of Public Service and Administration). The delay was necessary as a performance assessment of at least satisfactory, for the performance cycle which ended on 31 March 2018, would need to be processed.

23. He confirmed that, the 2017/2018 performance management results had, to date, not been finalised and that that would necessitate backdating any progression to 01 July 2018 for those affected, which included the applicant.

24. Referring to the applicant's performance feedback letter, in respect of the 2016/2017 cycle in which his performance was assessed as fully effective, dated 13 November 2017, he explained the letter's contents that the applicant did not qualify for pay progression, as he was already on the last notch of his salary level. He added that the applicant would, however, still have qualified for the annual cost of living adjustment.

25. During cross-examination, Majola confirmed that the applicant was not considered to be a senior management employee and, accordingly, only qualified for grade progression only on 01 July 2018, if his performance was assessed to be at least satisfactory in respect of the performance cycle, ending on 31 March 2018 (i.e. the 2017/2018 cycle).

26. He confirmed that the applicant attained his 8 years of service on 30 June 2017 but, in terms of the resolution, was required to complete his performance management cycle successfully and, accordingly, would only qualify to progress to the next grade on 01 July 2018.

ANALYSIS OF EVIDENCE AND ARGUMENT

27. Section 185(b) of the LRA prescribes that every employee has the right not be to be subjected to an unfair labour practice and section 186(2)(a) defines an unfair labour practice as, *inter alia*, “any unfair act or omission that arises between an employer and an employee involving unfair conduct by the employer relating to the promotion, demotion, probation (excluding disputes about dismissals for a reason relating to probation) or training of an employee or relating to the provision of benefits to an employee”.

28. It is common cause that, in terms of the agreement entered into between the applicant and respondent on 10 May 2011, the applicant qualified to fall within the ambit of Resolution 3 of 2009 and, based on the documentation to hand, was retrospectively translated to grade 1, notch 2, with effect from 01 July 2010 and that it can be inferred that his service from 01 July 2009 to 30 June 2010, would have been at grade 1, notch 1.
29. The Department of Public Service and Administration (DPSA)'s Circular 4 of 2009, at paragraph 8.4.1 provides for the payment of a non-pensionable allowance as a once-off gratuity to eligible employees, in service as at 30 June 2009, as a result of the non-implementation of the Occupational Specific Dispensation (OSD) and covers the period 01 July 2008 to 30 June 2009, coinciding with the translation date of the applicant on 01 July 2009.
30. The applicant would, therefore, in terms of the OSD, attain 8 years of service on 30 June 2017. It was undisputed that this date would occur during a performance management cycle; in this case, the cycle running from 01 April 2017 to 31 March 2018. Performance could therefore only be assessed following the conclusion of the cycle.
31. The PHSDSBC's Resolution 3 of 2009, at paragraphs 1.1 and 1.2, defines grade progression as *"the salary movement from one salary grade (scale) to the first salary notch of the next higher salary grade (scale) attached to a post"*, while pay progression is defined as *"the salary movement from one salary notch to the next higher salary notch attached to the same salary grade (scale)"*.
32. In its objectives, in paragraph 2 of the resolution, it seeks to provide for pay progression *"within the limits of the relevant grades based on performance"*, and similarly, for grade progression *"where applicable, based on performance"* (my emphasis).
33. The resolution is clear that both pay progression and grade progression are inextricably linked to the individual performance of the employee, the assessments of which are only concluded following the end of the performance management cycle, which takes place on 31 March of each year.

34. Paragraph 4.1.6.3 provides that *“The actual pay progression will be awarded with effect from 1 July in the year in which the professional has complied with the prescribed requirements for such pay progression”* and paragraph 4.1.10.2 prescribes that *“Progression to the next salary grade (scale) attached to the post, provided that the candidates meet all the requirements to progress to the relevant higher grades as indicated in Annexures A1, A2 and A3.”*
35. Although disputed by the applicant, the requirements for pay progression, in accordance with paragraph 4.1.6.3 are 3-fold:
- 35.1. The employee must firstly attain the service requirements, in this case, 8 years;
 - 35.2. The employee must receive an assessment of at least satisfactory for the performance management cycle under review (in this case, the applicant’s performance assessment pertaining to the year in which he attained his 8 years of service) ended on 31 March 2018; and
 - 35.3. The Director-General must approve the performance assessments.
36. Paragraph 4.1.6.3 further provides that such pay progression will be effective from 1 July in the year that the employee complied with the specific requirements.
37. The applicant, therefore, subject to a satisfactory performance assessment for the performance cycle ending 31 March 2018, only qualified to be grade progressed to grade 2, notch 1 with effect from 01 July 2018, and not with effect from 01 July 2017.
38. I, therefore, find that the applicant has failed to discharge the onus in proving that the conduct of the respondent was unfair and that he was subjected to an unfair labour practice.

AWARD

39. The respondent's failure to grade progress the applicant with effect from 01 July 2017 does not constitute an unfair labour practice as he is only entitled to grade progression, subject to meeting the necessary requirements, with effect from 01 July 2018.

40. The matter is accordingly dismissed.

41. There is no order as to costs.

A handwritten signature in black ink, appearing to read "Allan Kayne". The signature is written in a cursive style with a large initial "A" and "K".

Allan Kayne