



ARBITRATION AWARD

Case No: PSHS959-17/18

Commissioner: Thando Ndlebe

Date of award: 20 May 2019

In the matter between:

NEHAWU obo MOTOKO K. & 5 OTHERS

APPLICANT

and

DEPARTMENT OF HEALTH- NORTH WEST

RESPONDENT

DETAILS OF HEARING AND REPRESENTATION

1. The matter was heard by me as an arbitration process on 4 July 2018, 10 September 2018, 8 October 2018, 29 April 2019 and 30 April 2019 in Mahikeng. The Applicants were present and were represented by Mr. V Mthombeni, an official of the National Education, Health and Allied Workers Union (NEHAWU), in the proceedings.

2 The Respondent was represented by Mr. T. Tau, its Director of Sector Labour Relations.

3 The parties submitted bundles of document and same were admitted as evidence and were marked Applicant's **Bundle "A"** and Respondent's **Bundle "B"** respectively. The parties agreed to submit written closing arguments to the Council by the 7 May 2019.

ISSUES TO BE DECIDED

4. I am required to determine whether or not the Respondent committed an unfair labour practice in terms of section 186(2) (a) of the Labour Relations Act 66 of 1995 (as amended) when it did not pay the Applicants performance bonuses for the 2014-2015 financial year. In the event I find in favour of the Applicants, that I order appropriate relief.

BACKGROUND TO THE DISPUTE

5. The dispute was referred to the Council by Nehawu on behalf of six employees of the Respondent, namely Mr. Kagiso Motoko, Ms. Kediheng Margaret Sehloke, Ms. Keneilwe Innocentia Moipolai, Ms. Banabotle Claudine Gayta, Ms. Desiree Dithipe and Ms. Madikata Daphney Tlhagale.

6. Mr. Motoko was employed by the Respondent on 1 March 2007, currently holds the position of Chief Personel Officer and is earning R294 276.00 per annum. Ms. Sehlobe was employed by the Respondent on 1 June 2007, currently holds the position of Personel Practitioner and is earning R240 519.00 per annum. Ms. Moipolai was appointed by the Respondent on 3 November 2010, currently holds the position of Personel Practitioner and is earning R236 970.00 per annum. Ms. Gayta was employed by the Respondent on 7 December 2005, currently holds the position of Personel Practitioner and earns R254 883.00 per annum. Ms. Dithipe was appointed by the Respondent on 19 September 2011, currently holds the position of Personel Practitioner and is earning R230 93-00 and Ms. Tlhagale was appointed by the Respondent on 1 October 2012, currently holds the position of Personel Officer and is earning R159 846.00 per annum.

7. The thrust of the case of the Applicants is that the Respondent did not comply with its own performance management and development (PMDS) policy when it failed to pay them their performance bonuses for the 2014-2015 financial year.

8. The relief sought by the Applicants was that the Council upholds the original scores that were determined by their Supervisors and order that their performance bonuses be paid by the Respondent for the period in question.

APPLICANTS' EVIDENCE AND ARGUMENT

Mr. Kagiso Motoko testified under oath as follows:

9. The document appearing at page 6 in Bundle "A" is a quarterly and annual assessment tool. He was assessed by his Supervisor and they agreed on certain scores. He signed the assessment tool with the agreed scores and it was then submitted to the Moderating Committee. He was reporting to Mr. Seja Moholo. He has been trained by the Respondent on the Performance Management and Development System. A Supervisor must assess the performance of his subordinates every three months and on an annual basis.

10. The Respondent did not enter into performance agreements with its employees during the period in dispute. There were no quarterly assessments that were conducted by the Respondent. The annual assessments were not informed by the performance agreements. He recognizes the rating calculator as found in page 18 of Bundle "B". The original score he obtained entitled him to receive a performance bonus but the Respondent did not pay him this benefit. The Respondent did not provide reasons as to why he did not receive his performance bonus. The Respondent changed his scores and did not provide reasons as to why it did so.

11. The Moderating Committee did not call his Supervisor to its meetings. He was not called by the Moderating Committee in his capacity of Supervisor of the other five (5) Applicants. The Respondent was supposed to call the Supervisors to its sessions. The Respondent disadvantages employees when it does not apply the Performance Management and Development Policy correctly. The Respondent did not explain why the ratings of the Applicants were downgraded by the Moderating Committee. There was no disagreement between him and his Supervisor in so far as his scores are concerned. In order to address the issue of the changing of scores the Applicants lodged a grievance with the Labour Relations Office of the Respondent. The Applicants then received a response from the Appeal Committee.

12. The Supervisors must be consulted by the Moderating before scores are changed. A provisional rating is a score he agrees on with his Supervisor. The Moderating Committee

must not change employee scores without a consultative engagement with Supervisors of the affected employees. The scores of Ms. Ditheko and Ms. Sehlake who are his direct sub-ordinates were changed by the Moderating Committee without him being consulted. The Department of Public Service and Administration Guidelines provides that the Moderating Committee must provide a detailed report after the moderation process and the contents of pages 17 to 19 of Bundle “A” are not detailed minutes. The Moderating Committee took decisions on employees’ scores without following proper procedures and did not even taking minutes.

Under cross-examination, Mr. Motoko responded as follows:

13. He was not trained on the Performance Management and Development System (PMDS) Policy by the Respondent. He is however familiar with the PMDS Policy. He has been supervising staff from 2013 and since 2012 he has been assessed by his Supervisor. He could not tell which policy was implemented by the Respondent that led him to be a party to this dispute. He was not properly inducted by the Respondent on the PMDS Policy. The Respondent used policy NWPG13 which was amended or approved.

14. He does know the policy as found in pages 4 to 43 of Bundle “B”. He has never gone through the latter mentioned policy. The supervisor must be consulted before scores are lowered by the Moderating Committee. The discrepancies relating to the scoring do not relate to the failure to attach performance agreements. The performance assessment agreements that were reviewed by the Moderating Committee had discrepancies. All Government Departments have adopted the Performance Management Development System. The DPSA policy on performance policy is a national guideline

15. It is incorrect that when the Applicants referred the dispute before me they relied on NPG13. The Respondent did not ensure that quarterly performance reviews were conducted between supervisors and their sub-ordinates. He enquired from the Respondent as to why quarterly reviews were not done by the Respondent by engaging Mr. Sekgobo. He was not assessed by his Supervisor during the periods in questions on a quarterly basis. He reviewed the performance of his sub-ordinates. He was not properly assessed in the 2013-2014 and 2014-2015 and he suffered prejudice as a result thereof.

16. The Applicants referred the dispute to the Council because their Supervisors did not present before the Moderating Committee. Paragraph “J” as found in page 16 of Bundle “B” means that the Supervisor must report or present the annual assessment before the Moderating Committee. Present means that the Supervisors must orally present before the Moderating Committee and explain the assessment reports. A report means that the Supervisor must give an explanation. He does not agree that a written report amounts to reporting.

17. It is incorrect that Supervisors must not report before the Moderating Committee. The Moderating Committee never produced a report but only provided blank pages with numbers. A discrepancy is when a procedure has not been followed.

Ms. Thato Dithipe testified under oath as follows:

18. She started working for the Respondent in August 2012. She holds a National Senior Certificate and a Bachelor of Commerce in Human Resources Management. It was Mr. Motoko who assessed her performance and they finalized the performance agreement on 23 May 2015. The documents as found in pages 48 and 49 in Bundle “A-1” relate to the key performance areas she had to deliver on. It is clear that the Moderating Committee changed her scores of “4’s” to “3’s” with a red pen.

19. There was an agreement between herself and the Supervisor what the correct scores were. She was surprised when the Respondent did not pay her performance bonus during the rewards period. She then referred a grievance against the Respondent as a result of the non-payment of the bonus. The Respondent issued the Applicants with letters after payment to other employees was effected as found at page 58 in Bundle “A-1”. It was unfair for the Respondent’s Moderating Committee to change the scores. The Supervisor was supposed to be called by the Moderating Committee.

20. It can be seen at page 56 in Bundle “A-1” that she scored herself on the attributes a “4” and the Supervisor confirmed the score. The scores of “4’s” meant that it was possible that she qualified to receive a performance bonus. Mr. Motoko was not aware that the

scores were reduced as he only became aware of same when rewards were paid. The document appearing at page 61 in Bundle “A” is the PMDS document she signed with her Supervisor on 1 May 2016. The scores were again changed by the Moderating Committee from “4’s” to “3’s” as confirmed at pages 63 to 67 in Bundle “A-1”. She was not told by the Respondent why the scores were changed. The Respondent reduced her scores in the following years of assessment, namely 2013-2014 and 2014-2015. She was supposed to have received a performance bonus equivalent to approximately six percent of her annual salary for the 2013-2014 financial year. She would have received a performance bonus above nine percent of her annual salary for the 2014-2015 financial year.

21. She works closely with her Supervisor at all times. The Supervisor is always aware of her performance. It was not fair for the Chairperson of the Moderating Committee to state that her performance was normal as he never worked with her. The Supervisor was not involved in the alteration of her performance scores.

Under cross-examination, Ms. Thiye responded as follows:

22. She lodged a grievance against the Respondent because her performance scores were changed without her knowledge. The applicable policy that was in place at the time her performance is the one found in Folder 3 in Bundle “A-1”. The policy as referred to in page 2 of Bundle “A-3” was not in place during the 2013-2014 and 2014-2015 financial years. The Respondent issued the document found in Bundle “A-3” after the employees were disgruntled and there was a strike because Supervisors were not called by the Moderating Committee. She is not aware that the Respondent has a new PMDS policy. The new PMDS policy applies to all employees of the Respondent.

23. She was trained by the Respondent on the PMDS policy when she was appointed. She has a limited understanding on the functions of the Moderating Committee. The Moderating Committee looks at assessment reports of employees who appear to be punished by Supervisors. The Committee also looks at sub-ordinates who are correctly assessed and it cannot fulfil its functions without the involvement of Supervisors as its members would not know the employees’ day to day functions. The Committee must ensure that it complies with the PMDS policy.

24. It was incorrect for the Moderating Committee to reduce her performance scores. The Supervisor was not involved when the scores were reduced by the Moderating Committee. The Moderating Committee considered her assessment hence she received a letter. The Moderating Committee has no right to reduce performance scores when proper submissions have not provided by sub-ordinates and Supervisors. The Committee must call the Supervisor before reducing scores.

25. The Administrator understands that Supervisors must be called by the Committee before scores are reduced. The Supervisor was supposed to be involved in the moderating process. Page 6 in the blue folder in Bundle "A-1" means that the Supervisor must present orally before the Committee after having submitted a written report. The Committee did not provide the Applicants with minutes of their meetings.

RESPONDENT'S EVIDENCE AND ARGUMENTS

Mr. Eric Segoro testified under oath as follows:

26. He is appointed by the Respondent as a Deputy Director responsible for Performance Management and Development Systems. He ensures that employees are assessed and that moderation takes place. He also co-ordinates transformation and change management. He co-ordinates the meetings of the Moderating Committee. He ensures that employees are trained on performance management. He also ensures that incentive payments are processed for deserving employees.

27. The PMDS policy which was in place when the Applicants lodged the dispute was NWPG13 and as found in Bundle "A-1" or at pages 4 to 43 in Bundle "B". The Committee can lower and increase performance scores as provided in pages 15, 25 and 26 in Bundle "B". A work plan is a tool that an employee signs with his or her Supervisor. It is provided at page 26 in Bundle "B" that the Committee will make reference to key performance areas as outlined in the work plan and the performance agreement.

28. It is the Supervisor who conveys the final assessment results to all employees as provided in paragraph 9.8 at page 16 of Bundle “B”. The Human Resources Department will inform Supervisors once the assessments have been moderated and they receive personalized letters. The PMDS policy that was in place at the time the Applicants referred the dispute did not require Supervisors to be consulted by the Committee when scores were lowered. The Supervisors were not informed by the Respondent when the scores were lowered by the Committee in the past. In the 2018-2019 performance period the Respondent will ensure that it accounts to Supervisors when scores are lowered. The Respondent was prompted to take the latter mentioned position as a result of many grievances that were filled by staff.

29. The Respondent’s PMDS policy is evolving. In the new format of the PMDS policy there is a form that must be filled by the Supervisor and that must be given to the employee at the first level of moderation. The Respondent’s new policy is different from the old one. Bundle “A-3” is a notice that was issued to managers relating to the finalization of the 2017-2018 PMDS and is signed by the Administrator of the Respondent, namely Ms. Jeanette Hunter. Paragraph 4.5 in page 2 of Bundle “A-3” means that before a reduction happens, an assessment must first be referred back to the staff member and the Supervisor. The new proviso was not applicable during the 2014-2015 performance year.

30. The role of his office is to make sure that there is alignment in the moderation forms. The office conducts spot checks on the forms and it will then send it back to the respective staff for correction. The process will then involve the Supervisor to check compliance. The Applicants were not unfairly treated by the Respondent. It was the moderation process resulted in the reduction of the performance scores.

Under cross-examination, Mr. Segoro responded as follows:

31. The starting point of the PMDS policy is to identify the objectives of the Respondent. The Respondent’s employees assist the employer to achieve the objectives by implementing operational plans. The operational plans are followed by performance agreements which in turn must involve workplace plans. The performance appraisal process will end up with the Moderating Committee. A report will go to Committee for

review. A computation will be done and there will be a proposal for payment to the Head of Department and the Member of the Executive Council.

32. The role he had in the 2014-2015 assessment period was that of co-ordinator and chairperson. He chaired the Committee for the occupational levels 9 to 11. The Respondent was required to inform those employees who would not receive the performance bonus. The letter that was issued to the Supervisor was sufficient. The Respondent complied with the PMDS policy in so far as the Applicants are concerned. Performance review is the responsibility of the employee and the Supervisor. The Committee looks at two documents, namely the annual assessment report and the performance agreement.

33. The process of lowering scores by the Committee involves it assessing whether the outputs have been achieved and then to make a determination. The old policy did not say that the Moderating Committee must call or consult Supervisors. The Committee can change performance scores. The old policy provided that the Supervisor can provide a written report or make an oral representation. He did not sit in the Committee that did not call Mr. Motoko. The Respondent's Committee can decide to accept written reports and same is viewed as sufficient information. The change of performance scores from "4's" to "3's" amounted to alterations.

34. The reduction of performance scores does amount to a discrepancy as found at pages 22 and 23 in Bundle "B". A Supervisor plays an important role in the management of performance. The Respondent responded to the Applicant's request by providing a copy of the Committee's minutes. The DPSA guidelines as appearing in page 22 in the green folder in Bundle "A-1" do not apply to the Respondent. The trade unions were involved in the processes relating to the Appeals Committee. He was not involved in the Appeals Committee processes.

ANALYSIS OF EVIDENCE AND ARGUMENT

35. In terms of **section 138(7) of the LRA**, I am required to issue an award with brief reasons, and what follows hereunder is a summary of the evidence and arguments that I regard as necessary to substantiate my findings and determination of the dispute. In my analysis I have considered all the evidence and closing arguments that have been presented to me by both parties.
36. The case of the Applicants is that the Respondent committed an unfair conduct when the Moderating Committee lowered their performance scores or ratings for the periods in question. Mr. Motoko submitted that the Moderating Committee did not involve him when the performance scores of his subordinates were altered. Moreover, the Respondent did not involve his immediate Supervisor when his assessment was moderated by the Moderating Committee. Ms. Dithipe further testified that the Moderating Committee did not have a right to alter her performance scores without involving her immediate Supervisor.
37. Mr. Segoro testified for the Respondent to the effect that in terms of the old PMDS policy it was not a requirement for it to involve Supervisors during the moderation process. He further submitted that the Respondent has since reviewed its PMDS policy as confirmed by the contents of the document found in Bundle “A-3”. According to the Mr. Segoro, the Respondent has since decided to ensure that the moderating process is more transparent and that Supervisors properly account to the Moderating Committee before it alters performance ratings.
38. It is worth mentioning that Bundle “A-3” was introduced into the record of the proceedings by the Applicants. Bundle “A-3” at page 1 in its subject line provides for the “finalization of performance moderation or processing of performance incentives 2017/2018” and it states at paragraph 4.2 at page 2 that “in instances where the Committee identifies deviations or discrepancies that will lead to reduction of agreed scores, the Committee must first refer the assessment report back to the staff member and supervisor who assessed the initial assessment report in order to provide additional motivation and or portfolio of evidence on KPAs

or GAFs identified by the Committee with insufficient motivation to support the allocated scores”.The latter mentioned document is dated the 21 February 2019 and signed by the Respondent’s Administrator, namely Ms. Jeanette Hunter.

39. It was the testimony of Mr. Segoro that the PMDS policy is evolving and that the developments as contained in Bundle “A-3” came into being as a result of the grievances on PMDS by employees. Ms. Dithipe also confirmed the Respondent’s version in this regard when she stated that employees were not happy with the old PMDS policy to such an extent that there was a strike. Mr. Segoro and Ms. Dithipe testified that the old PMDS policy was not applicable when the Applicants referred their dispute with the Council.

40. I find that PMDS policy NWPG13 was applicable for the periods of assessment in question when the Applicants referred the dispute and not the amendment to the policy as found in Bundle “A-3”. The old policy provided that Supervisors could present or report to the Moderating Committee, but it did not provide specifics on the process to be followed when it reduced scores. It is my humble view that in the event the performance scores agreed between a sub-ordinate and a Supervisor are final, then there would have no need to have performance assessments scores to be moderated. The fact that there is moderation, same can be viewed to mean that the scores can be altered by the Moderation Committee.

41. It cannot be correct that when employees are assessed by their Supervisors, they are then automatically “guaranteed to receive a performance bonus payment”. In the event that all the Respondent’s employees are “guaranteed a performance bonus payment”, then there will be no need to moderate the performance scores. In the matter of ***IMATU obo Verster v Umhlathuze Municipality and Others (2011) 9 BLLR 882 (LC)*** the Court held that “a performance bonus or a merit award is a discretionary bonus which an employee cannot claim as a right as such a benefit is a not a right that the employee is automatically entitled to *ex contractu*”. It is therefore my finding that in view of the fact that the old PMDS policy was applicable for the performance period in question; there was no unfairness that was suffered by the Applicants.

42. In their closing arguments the Applicants submitted that “the purpose of moderation is to ensure that managers or supervisors evaluate their staff in terms of NWPG13 not to change score a primary function and require supervisors to present or report on annual assessment reports and during this matter the Applicants proved that the opposite transpired during moderation, supervisors duties were overlooked and the moderation committee acted ultra vires. The fashion upon which the PMDS policy is not complied within the Department makes it hard to determine which employees need development and those who are qualifying for possible promotion”.

43. The Applicants further argued that “Mr. Motoko is the supervisor to Thato Dithipe and the lowering of Thato Dithipe’s score by the Moderating Committee he was neither requested nor instructed to submit a report to the Moderating Committee or to come before the Moderating Committee to present his supervisee”. In as much as I respect the Applicants arguments in this regard, there is nowhere in policy NWPG13 where the Respondent is expected to consult and engage Supervisors before performance scores are changed by the Moderating Committee.

44. The Respondent in its closing arguments submitted that “where there is no provision for a specific act to be done, the Respondent will not have the jurisdiction or authority to implement provisions that are out of policy. The policy that was in place has since been amended and is now applicable across all the public service departments in the province. Supervisors will now be presenting their subordinates in line with the current policy and further that in the event of the agreed performance rating is lowered by the Moderating Committee, the affected employee will be informed through the Supervisor to motivate the reduced key performance areas. This means that the employee will be given an opportunity to add on the motivation before the Moderating Committee makes the final decision”. I therefore find that the Respondent has recently amended its amended its PMDS policy but at the time the dispute was referred to the Council by the Applicants the Respondent did not have a consultative regime in place with sub-ordinates and Supervisors in so far as performance moderation was concerned.

45. In the event the Applicants qualified for the incentive bonus, the Respondent would have had an obligation to pay same to them. This principle was confirmed in the matter of

PSA & Another v DG-Office of the State President Case No. JR2219/11 (delivered 5 March 2015) where the Judge held that “ it is clear that in terms of the PMDS, which as indicated earlier is based in the provisions of the Act, the DG has a duty to pay the bonuses to those who after the performance assessment qualified. It is to be noted that the **duty to pay the bonuses to those who qualified has its source in legislation, regulations and policy**”. The Respondent has failed to provide me with compelling evidence and arguments for me to decide in their favour. It became clear during the proceedings that the Respondent has since amended its PMDS policy but same was not applicable during the performance period in question.

AWARD

46. The Respondent’s conduct did not constitute an unfair labour practice against the Applicants.

47. The Applicants referral is hereby dismissed.

48. I make no order as to costs.



THANDO NDLEBE