ARBITRATION AWARD

PHSDSBC
Public Health and Social Development Sectoral Bargaining Council

Commissioner: **Bhekinhlanhla Stanley Mthethwa**

Case No: **PSHS971-19/20**

Date of award: **9 March 2021**

In the matter between:

PAWUSA obo Cyril Bhekizenzo Mtambo (Union/ Applicant)

and

Department of Health - KwaZulu Natal (Respondent)

Details of hearing and representation:

1. The matter was scheduled for arbitration on 22 February 2021 at King Edward VIII Hospital in Durban. Mr. AS Mathonsi, a trade union official from PAWUSA represented Mr. Cyril Bhekizenzo Mtambo (hereinafter referred to as the Applicant) and Mr. MM Lembede who is a Deputy Director in Labour Relations represented the Department of Health- KwaZulu Natal (hereinafter referred to as the Respondent). The proceedings were digitally recorded.

2. Having presented their respective cases, parties agreed to submit heads of argument by 1 March 2021 and they did so.

Preliminary points:

3. There were no preliminary points raised.

Issues to be decided:

4. I have to decide whether or not the respondent committed "unfair act or omission… relating to the provisioning of the benefits to the applicant, as contemplated in section 186 (2) (a) of the Labour Relations Act 66 of 1995 ("the Act"), as amended. In the event it did, I have to determine the appropriate relief.

Background to the issue:

5. The applicant was aggrieved that during his work performance assessment for the period 2016/2017 financial year; his performance scores were reduced for no fair and valid reasons by his supervisor, Ms. Nozuzola Mtshali.

6. In the belief that the respondent's action amounted to unfair labour practice, the applicant referred the dispute to the Council for conciliation outside the prescribed timeframes. The matter was then set down before me for *in limine* hearing on 3 December 2020 and I issued condonation ruling on 8 December 2020 condoning the application. Thereafter the applicant submitted a request for the matter to be resolved through arbitration and the dispute was scheduled for arbitration as indicated above.

7. The applicant sought to be paid performance bonus in terms of Employee Performance Management and Development System (EPMDS) and be moved from his current notch (R184 359 pa) to the next notch (R187 116 pa) within the salary level 5.

Survey of evidence and arguments:

8. All the witnesses gave evidence under oath. The applicant, Mr. Cyril Bhekizenzo Mtambo testified in support of his case. The respondent led the evidence of Ms. Nokuzola Veronica Mtshali.

9. Mr. Mtambo testified that he was employed as a Supply Chain Clerk on 1 March 2005. During 2016/17 financial year he was working under the supervision of Ms. Mtshali. On 24 April 2017 he personally rated his work performance on the performance assessment form; thereafter, he handed over the assessment form to Ms. Mtshali to assess his work performance. It was common practice in the Finance Department that an employee shall rate herself/himself; thereafter a supervisor would rate an employee.

10. In this instance he had scored himself 3 points on the Key Result Areas (KRAs) and Generic Assessment Factors (GAFs). He later learnt from the Human Resource Officer that Ms. Mtshali had reduced his scores on KRAs; as a result, he was not paid the performance bonus. He was also not moved to the next notch within his salary level. Subsequently, this position was confirmed by Ms. Mtshali. He then asked Ms. Mtshali to provide him with the reasons for reducing his scores but she failed to do so. He did not know why other columns on the performance assessment form were not completed. In his view the performance assessment form did not reach the Intermediate Review Committee (IRC) and Moderating Committee (MC) before becoming final. It is so because both the IRC and MC did not make any comments on his performance assessment form for the period under consideration.

11. He had scored himself 3 points on GAFs and he did not obtain the same on KRAs and they agreed with scores with his supervisor. This is why he did not receive performance bonus. He had scored himself 3 points because Ms Sharon Van Wyk had informed them that they should score themselves 3 points.

12. There were tools that would be used to assess work performance of an employee. These tools had been applied prior to the assessments of his work performance. His work performance assessment had been conducted on 24 April 2017. On 22 June 2018 there was a grievance meeting to try and resolve his poor work performance for the financial year 2016/17. The action plan that was discussed on 22 June 2018 could have not assisted him to deal with the areas of concern.

13. On 21 July 2017 Ms. Mtshali addressed a letter to the Assistant Director for Support Services, Mr. S Naicker outlining incidents that she was relying upon in reducing his work performance assessment scores. However, he could not remember any of the incidents contained in the letter except a verbal warning issued against him. He could not remember why his supervisor issued him with a verbal warning.

14. In fact during the work performance assessment an employee should seat with her/his supervisor. However, in this instance they (him and Mtshali) assessed his work performance for the 2016/17 financial separately. Ms. Mtshali had informed them (departmental employees) that where the performance of an employee is lacking in certain aspects there would be an action plan to deal with the areas of concern.

15. Ms. Mtshali testified that she was employed as a Senior Finance Management Officer. It was her testimony that she scored the applicant at 2 points on the second KRAs (processing of payments) because his performance was not conforming to his job description. Mainly the suppliers were complaining about short payment on their invoices. The applicant was not completing his duties; as a result, she would instruct other subordinates to pull invoices to check the status

of the invoices on Debtors and Creditors. The applicant had been refusing to be assisted by other employees. After identifying these discrepancies she spoke to the applicant in February 2016. The applicant's performance did not change. However, during 2018/19 financial year the applicant got satisfactory work performance scores, simply because all other employees had a challenge with filing. They were then given the same work performance scores.

16. On 29 September 2016 she had a meeting with the applicant to assist him to deal with his performance issues and his failure to complete his duties. In that meeting the applicant apologised and stated that he had family crisis. On 14 February 2017 she issued the applicant with a verbal warning for late coming, failing to complete his tasks and disappearing from his work station. In February 2017 the applicant had refused to do filling. On 23 February 2017, 121 orders were given to the applicant but he did not do them. She spoke to the applicant and assisted him in that regard. They also agreed on the Performance Improvement Plan on 24 April 2017 with the applicant. He had conducted counselling sessions with the applicant and also issued him with a verbal warning. On 21 July 2017 he wrote an explanatory note to the Assistant Director for Support Services about the reasons that led to the applicant being scored at 2 points on three KRAs (processing payments, reconciliation of monthly suppliers' statements and filing).

17. It was not true that she assessed the applicant's work performance in his absence. She sat down with the applicant during his work performance assessment on 24 April 2017. The applicant's work performance assessment was thereafter forwarded to the IRC and MC. The applicant attended MC meeting and he was represented.

18. In his Heads of Argument Mr. Mathonsi contended that it could be true that the applicant was under performing during the period under consideration but there is no evidence that the respondent took steps to address the applicant's performance issues. The mere fact that the applicant's work performance was

not considered by the IRC and MC should be declared unlawful and procedurally unfair. Accordingly, the applicant should be paid performance bonus and be moved to the next notch.

19. On the other hand, Mr. Lembede contended that during the applicant's work performance assessment on 24 April 2017 the supervisor had found the applicant's work performance unsatisfactory on processing payments on MEDVAS System. The applicant was also found to be under performing on reconciling monthly suppliers' statements. He was also found to be under performing on checking and filing documentation. Both the applicant and the supervisor agreed on the work performance scores and signed the same. Furthermore, during cross-examination the applicant conceded that his work performance was poor. It was for these reasons that the respondent believes that it did not commit any unfair labour practice as outlined in section 186 (2) (a) of the Act. As such, this application should be dismissed.

Analysis of evidence and arguments:

20. An employee who alleges that she/he is the victim of an unfair labour practice bears the onus of proving the claim on a balance of probabilities. The employee must not only prove the existence of the unfair labour practice but she/he must also prove the underlying facts she/he is relying on and that the conduct of the employer is unfair **(*see Grogan Dismissal, Discrimination and Unfair Labour Practices (August 2005) Juta page 43***).

21. The point of departure in this case must be found in the definition of unfair labour practice in the Act. Section 186 (2) (a) of the Act sets out the meaning of unfair labour practice as follows: "Unfair labour practice' means 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."

22. On a proper conspectus of the evidence and argument before me, the applicant appears to be basing his case for alleging that unfair labour practice was committed on three pillars; namely that: the respondent breached the policy that regulates work performance assessment (EPMDS), the respondent failed to take steps to address his performance issues in terms of EPMDS and that his work performance was not considered by the IRC and MC as required.

23. These allegations were vehemently denied by the respondent and throughout its testimony Ms. Mtshali maintained that when she assessed the applicant's work performance on 24 April 2017 they were seating together in a meeting. They discussed the applicant's work performance and agreed that the applicant's work performance was lacking on three KRAs as a result she scored the applicant at 2 points. She further stated that they agreed on a Performance Improvement Plan on 24 April 2017. The last but not least she stated that the applicant's work performance was considered by the IRC and MC and the applicant was represented in the MC meeting.

24. Ms. Mtshali's testimony was supported by documentary evidence in the form of contemporaneous notes made by her for all the incidents where she recorded the applicant's performance issues, records of the meetings, applicant's performance agreement and his work performance assessment. Notably, the applicant did not challenge the veracity of any of these documents. Let alone challenging Ms. Mtshali's evidence on key result areas that relate to his performance issues. According to the applicant he could only remember being issued with a verbal warning but he could not remember why it was issued.

25. It is important and worth noting that under cross-examination he conceded that they both agreed with Ms. Mtshali that his work performance was lacking on three KRAs. Despite that he insisted that he should have obtained 3 points on KRAs. It is for these reasons that where the applicant's version contradicts Ms. Mtshali's version; I accept Ms. Mtshali's version. In my view the respondent adopted an objective approach conforming to EPMDS in assessing the applicant's work performance for the period under consideration. This is why he was found lacking on three KRAs.

26. Clearly, the applicant has failed to lead any evidence to show why the respondent's conduct amounted to unfair labour practice as defined on section 186 (2)(a) of the Act. Accordingly, I do not find anything unfair in the conduct of the respondent. Unfairness implies failure to meet an objective standard and may also be taken to include arbitrary, capricious or inconsistent conduct, whether negligent or intended.

27. It is trite that the onus rests on employees who allege that they have been victims of unfair labour practices to prove their case on a balance of probabilities. For the reasons set out above, I find on a balance of probabilities that the applicant has failed to discharge that onus.

28. Accordingly, I am persuaded that the respondent did not commit unfair labour practice within the meaning of section 186 (2) (a) of the Act and the applicant is found to have poorly performed on three KRAs (processing payments, reconciliation of monthly suppliers' statements and filing) during 2016/17 financial year. As such, the applicant is not entitled to be paid performance bonus and be moved from his current notch to the next notch.

29. In the circumstances I make the following award:

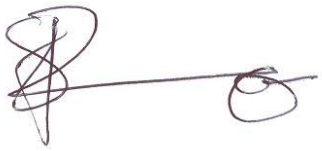
Award:

30. I find that the respondent's failure to pay the applicant performance bonus during 2016/17 financial year did not constitute an unfair labour practice.

31. The applicant is not entitled to any relief.

32. This file should be closed.

33. No order for costs is made.



Bhekinhlanhla Stanley Mthethwa