



ARBITRATION AWARD

Case No: **PSHS997-19/20**

Commissioner: **Maureen de Beer**

Date of award: **19 August 2020**

In the matter between:

PSA obo Cheryl Pegram

(Union/ Applicant)

and

Department of Health - Western Cape

(Respondent)

Details of Hearing and Representation

1. This matter was arbitrated on 17 February 2020 and on 11 August 2020 at the Western Cape College of Nursing in Athlone. The dispute concerned an alleged unfair labour practise in respect of benefits as contained in section 186(2)(a) of the Labour Relations Act 66 of 1995.
2. The applicant in this matter, Ms. Cheryl Pegram, was represented by a union representative of the Public Service Association of South Africa (PSA), Mr. Lee Van Rensburg. The respondent, Department of Health - Western Cape, was represented by Mr. Abraham Solomon.

3. The arbitration was previously adjourned/ or postponed to allow the respondent an opportunity to obtain a copy of a document which was relevant to its case. A ruling to that effect was issued on or about 17 February 2020.
4. The proceedings were digitally and manually recorded.

Background

5. The applicant was appointed as a senior administration officer at Grootte Schuur Hospital. She had approximately 30 years service and has been in her current position since late 2015. Her current salary is R321 555.00 per annum. In 2017 (at the time the dispute arisen) her salary was R281 418.00 per annum.
6. The applicant was assessed for period 1 April 2017 to 31 March 2018. At that time she was performing functions as an acting assistant director people strategy in addition to her appointed duties as a senior admin officer. She was assessed and scored by the pre-moderated committee at 121.66% (scoring fully effective: 3 points) She needed to score at least 130% and higher (being 4 points) to qualify for a performance bonus. Pegram was dissatisfied with the scoring and lodged a grievance on 2 January 2019 to her direct supervisor. She received an unsuccessful outcome on 15 February 2019. Her grievance was then escalated to Human Resources Management at Grootte Schuur Hospital. She was again unsuccessful and referred a dispute to the Public Service Commission (PSC). On 20 September 2019 there was a recommendation by the PSC that she needed to provide additional information to the pre-moderating committee. The pre-mod committee was not able to find sufficient evidence to increase her score and communicated the outcome to her on 19 November 2020.
7. The applicant referred a dispute to the Council on 30 November 2019. The dispute remained unresolved and was then referred to arbitration on 19 December 2019.
8. The applicant disputed her reviewed score and indicated that it was not a true reflection of the work she did during the period of assessment. At the time she not awarded a

pay progression (i.e. an increase based on performance) and performance bonus (bonus that she will get based on her performance). It was later agreed between the parties that she qualified for pay progression but not performance bonus. The applicant needed to sign documentation in order to receive the backdated pay progression, which she agreed to do. The dispute is thus only in respect of the non-payment of the performance bonus.

9. The applicant believed that she should at least have received a score of 165% and sought payment of the performance bonus. The respondent indicated that even if an employee scored in category of “significantly above” (being a score of 4) payment of a performance bonus was dependent on the budget. It also indicated that it will argue that according to the Public Service Regulations, a person’s performance must be reviewed on the position he/ she occupied immediately prior to the acting position. The applicant in her capacity as senior administration officer, failed to obtain the required scoring performance bonus.

Issue to be decided

10. I am required to decide whether the respondent’s failure to pay the applicant a performance bonus amounted to unfair labour practice. Should I determine that the respondent had committed an unfair labour practice, I must award appropriate relief in favour of the applicant.

Survey of evidence

11. The applicant testified that she performed functions as a senior administration officer (SAO). She was required to act as an acting assistant director (AD). One of the other SAO’s in her unit went on maternity leave and she had to run the unit. She performed the duties of the acting post for just over a year. She performed more tasks than her actual assigned duties. She was not paid or compensated by means of an acting allowance. Her performance assessment was done by her supervisor, Mr. Brierley. He continuously assessed her during the year as of 24 February 2017 to 31 March 2018. For her performance assessment period of 1 April 2017 to 31 March 2018 she was

scored 165%. She was satisfied with the score. She was subsequently informed that her points were reduced. She received a mark of 116% by the pre-moderating committee. She lodged grievances. On 20 September 2019 the PSC informed her that additional information was needed. She submitted the additional evidence on the same day to the acting senior director of labour relations, Mr. Van Rensburg. Her score was only increased to 121.66%. This was not sufficient for her to receive a performance bonus.

12. It was her evidence that she could not perform all her SAO duties for the purposes of the performance evaluations (to receive a mark higher than 100%) but she performed all her required duties. In addition to that she also performed the duties of the acting assistant director (AD), as well as supervisory functions. She was required to focus on the AD duties because that was what her manager expected of her. She had to fulfill two roles. She testified that there were previous cases where people performed on a higher level or performed additional functions to their own duties. Their office will then investigate such reported cases and they will compensate the employees by way of the SPMS (Staff Performance Management System). During cross-examination Pegram indicated that she did not have the relevant documentation to make comparisons to her case. She was able to mention two names being CA Weder and L Majosi, who were previously compensated by means of the SPMS. It was her further evidence that throughout the year her performance scores were high and at the end of the review period she scored 165%. She thus had an expectation that she will receive a bonus. She believed that the pre-moderated committee was not fully aware of the functions she performed. She felt that her performance assessment should have been referred to the moderating committee and should not have remained with pre-moderating committee. She was of the opinion that her additional tasks should have been taken into account. She expected to be remunerated according to the SPMS but no one called her in order to explain her situation.

13. In cross-examination she confirmed that the pre-moderated committee has the right to change the scores should they need to. She however felt that they acted unfairly when they lowered her score. According to Pegram the pre-moderating committee only looked at the management of staff and disciplinary functions (KPA4), which was

increased. They failed to consider the other KPA's (key performance areas) the additional evidence she handed in acting as a AD. The pre-mod committee did not take all her evidence into account. It was pointed out to Pegram that the KPA's in her quarterly assessments were different to that on which she was assessed on by the pre-mod committee and that it appeared that the committee looked at her outputs as a AD. Pegram indicated that she was unsatisfied with the score of 3 which she was awarded. The fact that she performed the AD functions at 100%, should have increased her mark. Pegram further indicated that her acting position was continuously renewed. She acknowledged that no agreement for the performance assessment of the acting assistant director post was signed but she signed performance agreement of a SOA with AD functions as this was added by her manager, Mr. Brierly. She was of the opinion that the pre-mod committee was supposed to score her as a SAO, doing the functions of a AD, which they failed to do. The particular performance agreement of the SAO, which contained the functions of a AD was submitted to the committee. She claimed that she did over and above what was expected of her but she was not considered for a performance bonus. She was instructed to perform the functions of the acting director and could not perform at a level 5 as a SOA. The outcome she required was to receive the performance bonus and maintain her rating of 165%. The specific year's Bell Curve was needed to specify what the bonus was that was allocated for that specific year. Subsequent to the arbitration and as agreed to between the parties the respondent submitted a copy of Circular H29/2018, which reflected that for performance cycle 1 April 2017 to 31 March 2018 once off cash bonuses will be awarded to employees on salary level 1 – 8. Employees who scored between 130% and 149%, will receive 3% of their salary notch; and those who scored 150% - 167%, will receive 6% bonus. The cash bonus was subject to the forced distribution curve (FDC) from the highest percentage. The highest percentage was not contained in the documents submitted by the respondent.

14. The second witness for the applicant was Errol Nole Brierley. During the period 2017/2018 he was the head of human resources (HR) at Groote Schuur Hospital. Ms. Pegram was one of his supervisors (being a senior administration officer at level 8). He further confirmed that she was acting in the position of assistant director for period 1 April 2017 to 31 March 2018. According to the employment policy Pegram had to be

assessed at salary level 8 (as a SAO). He assessed her for the full year. In respect of her fourth quarter assessment he confirmed that he scored her 165% as SAO. He indicated that he scored her a 5 (for obtaining more than 150%) based on the fact that the unit manages very complex HR issues and the fact that she performed her functions as SAO and AD (assistant director); and collectively her performance was exceptional. In August 2017 he described her performance as outstanding; she acted without compensation; her progress was excellent and consistent. In October 2017 he also described her performance as outstanding. He recalled being called to represent Pegram in respect of her assessment during in August 2018 by the chairperson of the pre-mod committee. He was not able to go because he was diagnosed with cancer at that time. He was of the opinion that the committee should have considered that he scored her 100% as SOA and as 100% as AD. This was the basis for his scoring of 165%. If he had the opportunity, he would have motivated to the committee that Pegram performed full time as an AD and that she also had to ensure that compliance were adhered to. She performed exceptionally as a SAO. The committee members did not work as closely to Pegram as he did. He indicated that he consistently throughout the year scored her performance as outstanding. The score of 165% was thus correct. According to him the committee failed to consider the synopsis and evidence provided that she performed at a high level. The quarterly assessments showed that she performed at a high level. Brierley was referred to clause 71(8) of the Public Service Regulations. The particular section indicated that an employee at a higher level shall be assessed at the level of his or her post that he or she occupied at the time immediately prior to the acting position. It is stipulated further that regardless of whether or not the employee was remunerated for so acting, the performance incentives shall be calculated at a lower level. According to Brierley the performance management system is an output driven system which is unfair. In cross-examination Brierley was also referred to the minutes of pre-mod committee. He indicated that no consideration was given to the additional evidence he provided the committee. The evidence he provided to the committee was for the whole period and not only April 2017 to July 2017, as indicated in the report of the pre-mod committee. He was also of the opinion that the formal moderating committee should have intervened. In conclusion of his evidence Brierley the purpose of a merit award is to recognise the

consistent outstanding performance of an individual, which was how Pegram performed.

15. None of the respondent's witnesses arrived and its case was closed.

16. In closing arguments, it was argued on behalf of the applicant that she performed in her SAO tasks more than 100%, taking into account her other functions. Her supervisor scored her at 165%. The committee failed to take this into account. Her acting periods was renewed 3 times in a period of 1 year, thus she performed excellent in that position. It was submitted that I must find that the conduct of the respondent was unfair; that the applicant must retain her mark of 165%; further should she qualify within the bell-curve, she must be rewarded the performance bonus. The respondent argued that the performance assessment of the applicant was done in accordance with the Public Service Regulations in respect of the post she occupied as SAO. This was not unfair. The respondent believed that the evidence submitted by the applicant was taken into account by pre-mod committee. The committee had the right to change her score. The policy states, if nothing was submitted a score of 3 must be awarded. The respondent indicated that it never acted unfairly and requested that the applicant's case be dismissed.

Analysis of evidence and arguments

17. Unfair conduct of an employer relating to the provision of benefits, is included in section 186 of the LRA as a of form unfair labour practice. The definition or category of this matter being a benefit dispute was not disputed. In *Apollo Tyres South Africa (Pty) Ltd v CCMA and Others (DA1/11) [2013] ZALAC 3*, the court held that the definition of a benefit as contemplated in section 186(2)(a) of the LRA was not confined to rights arising out of a contractual agreement or by operation of law but included rights judicially created as well as advantages or privileges. The applicant's claim to payment of a performance bonus aroused from part 5 the Public Service Regulations, 2016, being the respondent's performance management. The issue in question thus relates to the entitlement of the applicant for a performance bonus for the period 1 April 2017 to 31 March 2018.

18. An applicant has the onus to establish the existence of an unfair labour practice. The applicant is required to show that the respondent acted capriciously, for insubstantial reasons; or on the basis of any wrong principle in a biased manner.
19. The applicant was unhappy with the fact that the duties she performed in her appointed position was not considered in conjunction with the duties she fulfilled in an acting role. It was argued by the respondent that the applicant was not entitled to receive the bonus since she scored too low. It was further indicated by the respondent the Public Service Regulations, 2016, requires an employee to be assessed at the level of her appointed post and not the acting position. The applicant agreed with this. It is noted that in regulation 72(11) it is indicated that if an employee, who is not a member of a SMS (senior management service), is appointed to act in a SMS post for a period longer than three months, he or she must amend his or her performance roles and responsibilities. In such instance the performance agreement and workplan shall be developed and managed in terms of the departmental performance management system for non-SMS employees. The latter thus confirms that the additional duties must be taken into account irrespective of the employee being assessed in his/ her normal/ or appointed position. In respect of the evidence submitted the performance agreement of the applicant was so amended by Mr. Brierly, although it was not a performance agreement of an AD but an SAO. Pegram performed for longer than three months in the acting assistant director roll. Her supervisor was more than satisfied with her performance. She was required to fulfil two roles. She was thus not able to perform exceptionally in one role (being her appointed role). Based on the evidence of Brierley taking into account that she performed 100% in both roles respectively, collectively her performance was exceptional and the applicant was thus of the opinion that she was deserving of the score of 165%.
20. In *Eskom Holdings Ltd v NUM obo Kyaya [2017] 8 BLLR 797 (LC)* it was alleged that the employer committed unfair labour practice in not promoting employees pursuant to regarding of their positions. The managers of the applicants made a presentation that the employees involved in the dispute should be graded and moved to a higher level. Such recommendations required approval by the job grading committee and

general manager of the division. They were never moved to a higher grade and referred an unfair promotion dispute to the CCMA. In terms of the employer's job evaluation policy grading is done by a job evaluation committee. An individual manager could not effect the grading but the general manager of the particular division made the final decision to approve the grading. The employees argued that they had an expectation to be promoted. The court found that there was no evidence to suggest that the grading was improperly arrived at; wrong or in breach of company policy. The employees wanted the commissioner to change their grading. The court held that a commissioner cannot do a grading exercise *de novo*. A commissioner must assess what the employer did and then decide on the actions of the employer and its policies, whether such conduct was fair. The court had to determine whether employees were entitled to be upgraded. In *Ncane v Lyster NO and Others (DA27/5) [2017] ZALC1* it was determined that the discretion of an arbitrator to interfere with an employer's substantive decision to promote a certain person is limited and an arbitrator may only interfere where the decision is irrational, grossly unreasonable or mala fide. Although the latter two cases dealt with promotion disputes, the exact same considerations can be applied when determining whether the respondent's conduct amounted to unfair labour practice.

21. As indicated above the duty rests on the applicant to prove that the conduct of the respondent amounted to unfair labour practice. The applicant indicated that she did not have any issues with the manner in which the process was conducted. She felt that it was unfair that the additional duties of the acting role she performed were not taken into account. During cross-examination the applicant admitted that her performance agreement was amended to contain the acting post's functions. It was also put to her that it thus appeared that the functions she complained of not being taken into account were taken into account. Although the latter was not submitted into evidence by the respondent, it was the duty of the applicant to show that such evidence/ or information was not provided. The applicant failed to submit such evidence. The basis of her evidence to maintain a score of 165% was based on the assessment of her manager, Mr. Brierly. The applicant however contended that the pre-moderating committee has the right to change or amend scores. Mr. Brierly does not make the final decision.

22. The applicant also made a comparison of her case in relation to two other employees who were paid via the SPMS. I cannot find that the applicant sufficiently submitted evidence of a proper *like for like* comparison to that of her case. There is no indication that circumstances of other two employees compared to the current case. The applicant thus failed to establish an inconsistency case.

23. It was the duty of the respondent to determine whether the applicant qualified for a performance bonus or not; and in doing so must act fairly. The applicant failed to show that the respondent acted capriciously, for insubstantial reasons; or on the basis of any wrong principle in a biased manner. I do not have the jurisdiction to change her score. She further failed to show that she was entitled to a score of 165% based on unfair conduct by the moderating committee. It was thus not proven by the applicant that what the respondent did overall, in respect of her assessment and scoring, was unfair.

Award

24. The applicant failed to show that the respondent had committed an unfair labour practice.

25. The applicant's claim is dismissed.



Commissioner Maureen de Beer

