



IN THE GENERAL PUBLIC SERVICE SECTORAL BARGAINING COUNCIL

Held in Bloemfontein

Panellist/s: David Fanapi

Case No.: GPBC563-2020

Date of Award: 08 November 2020

In the ARBITRATION between:

PSA obo N Nchejane and 2 Others

(Union / Applicant)

and

Office of the Chief Justice

(Respondent)

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DETAILS OF HEARING AND REPRESENTATION

- [1] This an arbitration award in terms Labour Relations Act, Act 66 of 1995 as amended (the LRA) and the General Public Service Sectoral Bargaining Council (the Council) policy that regulate the procedures of determining disputes referred to the Council (the Rules). This matter was heard on 15 and 22 September 2020 at 09:00. The arbitration hearing took place at the Respondent's premises.
- [2] The referring party is PSA on behalf of Ntsoaki Nchejane [Nchejane], Veruschka De Klerk [De Klerk] and Carine Naude [Naude] (the Applicants) represented by Nceba Baardman the Labour Relations Officer at PSA. The Office of the Chief Justice (the Respondent) was represented by Happy Mathebula the Labour Relations Officer.

ISSUE IN DISPUTE

- [3] The parties conducted a pre-arbitration meeting and agreed on the following issues in dispute:
- a) Whether the Supervisor had a meeting to discuss the final Performance Agreement (PA) with the Applicants.
 - b) Whether Naude and De Klerk submitted their PA's on the due date of 31 May 2018.
 - c) Whether Nchejane had valid reasons for not submitting on the due date of 31 May 2018.
 - d) Whether the Applicants qualify for pay progression in terms of the prescribed policies.
 - e) The Applicants seek a retrospective payment of pay progression from 01 July 2019 and the correction of their notches.

BACKGROUND TO THE DISPUTE

- [4] The Applicants were not awarded pay progression for the 2018/19 financial year. The Applicants were aggrieved by the developments surrounding their disqualification to be awarded pay progression, thus the referral of the dispute to conciliation on 10 July 2020, after all internal processes were followed. The matter was not resolved at conciliation and a certificate of non-resolution was issued and accordingly proceeded to arbitration. The Respondent is in the public sector.



SURVEY OF EVIDENCE & ARGUMENT

- [5] The parties submitted a joint bundle of documentary evidence; it was admitted as bundle "A"1-170. All three Applicants testified but called no additional witnesses. The Respondent called two witnesses namely: - Modiehi Luthuli (Luthuli) and Sonika Steyn (Steyn). The parties agreed and were directed to submit their closing statements in writing on the following dates: The Applicant on 25 September 2020, the Respondent on 30 September 2020 and the Applicant was supposed to reply on 02 October 2020. Both parties failed to comply with the deadlines and as a result their closing statements were not considered, except the Applicants' first submission because it was submitted in time.

The Applicants testified and argued as follows:

- [6] The Applicants are employed as Judges Secretaries on Level 7. They were not granted pay progression due to an alleged late submission of their PA's. It is the testimony of Naude and De Klerk that they submitted their PA's on 31 May 2018 after they only received them on the same date. They made changes to the PA's by deleting duties added which they did not agree with. These additional duties were not discussed with them. Steyn, their Supervisor threatened them with disciplinary action and made them to resubmit the PA's. Naude further testified that she mistakenly neglected to sign a second page in her PA's but initialled it which was an indication that it was not on purpose. It is the argument of the Applicants that their disqualification for pay progression due to an alleged late submission was unfair because there is another employee by name of Vorster who submitted late but was granted pay progression.
- [7] Nchejane testified that she approached Steyn with the intention of discussing her PA on the same day she received it, which was on 31 May 2018 due to observing additional duties she did not agree with. Steyn refused to discuss PA with her and instructed her to submit her concerns in writing, of which she complied. Steyn, however, threatened her with disciplinary action instead of responding to her concerns. The Applicant's representative argued that the Respondent had no right to require the Applicants to sign documents they did not agree with and/or without making the necessary amendments. The assertion by Luthuli that the Applicants were required by policy to sign and complain later was baseless because she could not refer me to any clause in the policy that provided for that requirement.

The Respondent's witnesses testified as follows:



[8] The Respondent's witnesses testified that the Applicants failed to submit their PA's by the deadline of 31 May 2018 as a result they forfeited their pay progression. It is the testimony of Steyn that Naude and De Klerk were disrespectful when they deleted certain information on the PA's hence the Disciplinary Action Intent letters issued to them. They were required to comply and complain later. The additional duties in the PA's were discussed with them. Nchejane submitted late without a valid reason but later change her view under cross-examination when the Applicant's representative referred her to the Nchejane's correspondence with her.

ANALYSIS OF EVIDENCE & ARGUMENTS

[9] At this stage I am required by the Rules of the Council to determine whether the Applicants were unfairly treated by the Respondent when they were disqualified to receive pay progression. I will be able to reach a decision after analysing the evidence and arguments submitted during the arbitration.

The relevant legal principles

[10] The LRA in section 186(2)(a) provides that an 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 benefits amongst others. One of the primary objects of the LRA is to give effect to and regulate the fundamental rights conferred by the Bill of Rights in section 23 of the Constitution of the Republic of South Africa 108 of 1996 as amended (the Constitution). The concept of unfair labour practice must be given content by the legislature, as per the purpose of the enactment of the LRA. Thereafter, left to gather meaning, in the first instance, from the decisions of the specialist tribunals, including the Labour Appeal Court and the Labour Court.

[11] An unfair conduct implies a failure to meet an objective standard and may be taken to include uninformed, erratic, or inconsistent conduct, whether negligent or intended. In **NEHAWU v University of Cape Town & others** (2003) ILJ 95 (CC) it was held that the focus of s 23(1) is, broadly speaking, the relationship between the worker and the employer and the continuation of that relationship on terms that are fair to both. In giving content to that right it is important to bear in mind the tension between the interests of the workers and the interests of the employers which is inherent in labour relations. Care must therefore be taken to



accommodate, where possible, these interests so as to arrive at the balance required by the concept of fair labour practices. It is in this context that the LRA must be construed.

[12] It is true and trite that in disputes of this nature the referring party bears the onus to prove that an employer has acted unfairly. However, a plain denial from an opposing party without corroborated evidence is not allowed. The Respondent's witness, Steyn, claims that the additional duties in relation to the PA's were discussed with the Applicants. She, however, failed to call one of the secretaries or someone else who was present in the meetings when the additional duties were allegedly discussed. Not to mention her performance during cross-examination, was not impressive. She was vague and confrontational towards the Applicants' representative when he wanted an explanation about why she expected the Applicants to sign and complain later, whereas, her email on A131 dated 30 May 2018 indicated that they should print and sign if they were satisfied. Now, I cannot comprehend her insistence that Nchejane was required to sign and complain later, when her own instruction on the above email indicates the opposite and she failed to refer to any authority that provided for her insinuation. She was further argumentative when it was put to her that Nchejane would have signed the PA if she did not refuse to engage.

[13] In light of the above it is my finding that Steyn's testimony cannot be found to be reliable because it is clear that she was biased, and she was trying to protect/defend her failure to properly manage her subordinates. Therefore, Nchejane had a valid reason for failing to submit her PA on 31 May 2018 because Steyn unreasonably refused to engage with her and explain the presence of additional duties. It is absurd to have expected her to attach her signature to a document she did not agree with. The fact that Nchejane signed her PA after an engagement with Steyn's line manager it is an indication that her failure to submit by 31 May 2018 was not deliberate and undermining of authority as Steyn tried her utmost best to make me believe that it was the case.

[14] Luthuli was also not a very reliable witness because she could not refer me to any policy that required the Applicants to comply and complain later when the latter's representative wanted to know why his members were expected to sign when they were not happy with some of the contents of the PA's. I agree with the Applicants it would not have been possible to complain after they have attached their signature. The fact that Steyn refused to engage Nchejane when she approached her leaves much to be desired as to her



management style. Considering the above, it is probable that the Respondent acted unfairly towards the Applicants because it refused to engage with them when they wanted clarifications, in the case of Nchejane.

[15] In the case of Naude not signing the additional page it appears not to be deliberate, but an error because she initialled the page in question which is an indication of oversight. Steyn should have alerted Naude about the fact that she did not sign because the former signed on the same page next to where Naude was supposed to sign. So, she failed in her duties as a Supervisor, period. The Applicants consistently testified and argued throughout the arbitration that the additional duties were never discussed with them. Steyn only promised to hold a discussion. While on the other hand she claimed to have held the discussion. It is probable that the additional duties discussion was never held. The reason for the finding is because the Respondent yet again failed to call an additional witness and/or submit evidence that corroborated Steyn's version, not forgetting the fact that she was not a reliable witness as already found above.

[16] Therefore, having considered the above, it is probable that the discussion never happened. Naude and De Klerk were further consistent in their testimony that they submitted their PA's on 31 May 2018. This version was supported by Steyn during cross-examination when she admitted to that fact, and indicated that Naude's PA lacked one signature, and/or it was not properly signed. I have already made a finding regarding the missing signature and will not repeat it. Steyn was not sure what happened to De Klerk's PA but confirmed that it was submitted. Finally, it is my finding that both De Klerk and Naude submitted their PA in time. Steyn should have referred their PA's to the moderating committee or engaged them instead of instructing them to resubmit. It is further my finding that the Applicants qualified for pay progression because were it not for the negligence, failure to properly manage, proper guidance of subordinates and issue the PA's in time to allow adequate time for discussions, by the Respondent's functionary, Steyn, the Applicants would have submitted their PA's in time, especially in the case of Nchejane and in compliance with the policy.

REMEDY

[17] Section 193 of the LRA gives arbitrators certain powers to determine unfair labour practice disputes, including making any determination that is reasonable. However, all determinations should be rational and justifiable as per the decision in **Shoprite Checkers (Pty) Ltd v Ramdaw NO & others** (2001) 22 ILJ 1603 (LAC). It is my finding



that the Respondent should be ordered to award the Applicants pay progression retrospectively from 01 July 2019 and pay them the outstanding pay progression.

AWARD

[18] In the circumstances I make the following order:

- a) That the Office of the Chief Justice, the Respondent, committed an unfair labour practice against Ntsoaki Nchejane, Veruschka De Klerk and Carine Naude, the Applicants.
- b) That the Respondent is ordered to award the Applicants' pay progression with retrospective effect from 01 July 2019.
- c) That the Respondent must pay the Applicants the outstanding pay progression by no later than 15 December 2020 in the same manner it pays their salaries.



David Fanapi

(GPSSBC) Arbitrator