



ARBITRATION AWARD

Panellist : Selolong Mosoma
Case No.: GPBC220/2020
Date of Award: 23 August 2020

In the ARBITRATION between:

PSA obo E Bingwa

(Union / Applicant)

and

Department of Sport, Arts and Culture

(Respondent)

Union/Applicant's representative: Francois Clark

Union/Applicant's address: PSA

Telephone: 0662887395

Telefax: Fclark@ncpg.gov.za

Respondent's representative: Fabian Borman.

Respondent's address: Department of Sports, Arts and Culture

Telephone: 066 476 3630

Telefax: Fabianborman@ncpg.gov.za

ARBITRATION AWARD

DETAILS OF HEARING AND REPRESENTATION:

- 1.This is the arbitration award in the arbitration between PSA obo Ms. E Bingwa, the applicant, and Department of Sports, Arts and Culture Northern Cape Provincial Government.
- 2.The arbitration was held under the auspices of the General Public Services Sector Bargaining Council in terms of section 186 (2) (a) of Labour Relations Act as amended.
- 3.The dispute is in relations to an alleged unfair labour practice relating to benefits in terms of section 186 (2) (a) of Labour Relations Act 66 of 1995 as amended.
- 4.The arbitration hearing took place on the 31 August 2020 in Kimberley.
- 5.The applicant was represented and was represented by an official of her union, Mr. F Clark.
- 6.The respondent was represented by Mr. Fabian Borman, Legal Services Manager.
- 7.The proceedings were conducted virtually.

ISSUE(S) TO BE DECIDED:

- 8.I have to decide whether the respondent committed an unfair labour act or omission involving
unfair conduct relating to benefits as contemplated by section 186 (2) (a) of Labour Relations Act as amended.
- 9.Whether the conduct of the respondent amounts to unfair labour practice by reducing the applicant's final performance assessment score from 145, 33 to 114,00 which then disadvantaged the applicant from receiving performance bonus.

10. In the event that I find in the affirmative, I have to decide the appropriate relief the applicant would be entitled to.

BACKGROUND TO THE MATTER:

11. The respondent is a public sector Department of Sports, Arts and Culture based in Kimberley, Northern Cape Province. The applicant is currently employed by the respondent as Personal Assistant to Director Cultural Affairs.

12. Turning to the incident that led to the current dispute of the applicant, it is common cause that during 2017/2018 financial year performance cycle the applicant was assessed and given the final score of 145,33. The score which was also endorsed by the intermediate committee before her booklet was submitted to moderation committee.

13. According to the applicant, she performed sufficiently above expectation during the final performance assessment cycle of 2017/2018 financial year.

14. The applicant further indicated that she qualified for 12% performance bonus in terms of the Northern Cape Provincial Administration Policy on Employee Performance Management and Development System, dated April 2016.

15. According to the applicant, she did not receive the said 12% performance bonus as expected, upon enquiry the applicant was informed that she did not qualify to receive performance bonus.

16. Applicant was aggrieved after she learned that the Departmental Moderation Committee has reduced her final score from 145,33 to 114,00. She then lodged an appeal which was not resolved to her satisfaction and received outcome thereof on or around February 2020.

17. In light of the above, the applicant referred an unfair labour practice dispute to the General Public Service Sectoral Bargaining Council (the Council).

18. On the other hand, the respondent maintains that the applicant did not qualify for 12% performance bonus in terms of the Guide and the Northern Cape Provincial Administration Policy on Employee Performance Management and Development System. The applicant received a final score of 114,00% which was significantly below the required score for one to receive 12% performance bonus. The respondent sought as remedy, that the matter be dismissed.

SURVEY OF EVIDENCE AND ARGUMENT:

19. As it is only required that an award with brief reasons be issued, the following is a summary of relevant evidence and arguments heard and considered in deciding this matter. The applicant testified in her own case. The respondent did not call any witnesses except for written closing arguments. The applicant's evidence can be summarized as follows.

APPLICANT'S SUBMISSION

20. Ms. Bingwa testified that she is currently employed by the respondent as Personal Assistant to Director Cultural Affairs (SL7) and has been employed by the respondent since 10 April 2014.

21. The applicant intimated that she was assessed for 2017/2018 financial year and received a final score of 145,33 which was significantly above expectation. She further indicated that her final score was validated or confirmed by the Intermediate Review Committee.

22. She further intimated that in terms of the Northern Cape Provincial Administration Policy on EMPDS an employee whose performance is significantly above expectation is legible to receive 12% performance bonus.

23. The applicant stated that despite the above-mentioned, the Departmental Moderation Committee reduced her score from 145,33 to 114,00, which was not in line with the Northern Cape Provincial Administration -Policy on Employee Performance Management and Development System (EMPDS)

24. Applicant further testified that the Departmental Moderation committee acted outside its powers by reducing her final score as individual employee.
25. She testified that the above is informed by paragraph 8.2 on page 78 of bundle "A1" of applicant's bundle which outlines the roles and responsibilities of Departmental Moderation Committee. Paragraph 8.2 reads as follows "The Departmental Moderation Committee shall not assess each individual case for the purpose of evaluating ratings but should develop an overall view of the results of the process.
26. She further testified on both different roles and responsibilities of Intermediate Review Committee and Departmental Moderation Committees as outlined on page 95 of applicant's bundle.
27. The applicant testified that she did not receive the 12% performance bonus as expected, upon enquiry she learned through her supervisor that the Departmental Moderation Committee has reduced her score from 145,33 to 114,00. She further testified that the reduction of her score disadvantaged her from receiving 12% performance bonus.
28. She intimated that she was aggrieved by the decision of the Departmental Moderation Committee and lodged an appeal challenging decision of Departmental Moderation Committee for reducing her final score without notifying or consulting her. The applicant on her appeal she further challenged Departmental Moderation Committee powers in relations to lowering individual employee's scores.
29. The applicant further testified that she received the outcome of the appeal form the Appeal's Committee which indicated that the applicant's motivation for extra work was insufficient.
30. Under Cross-examination, the applicant maintained that the Departmental moderation Committee did not have powers to lower or reduce her, but only intermediate Review Committee had those powers.

RESPONDENT'S SUBMISSION

31. The respondent representative indicated that they were not going to call any witness because their sole witness who happens to be applicant's immediate supervisor was in isolation.
32. The respondent representative intimated that the respondent is going to rely on the very same bundle of documents submitted by the applicant.
33. The respondent representative further pointed out that the respondent did not commit any unfair labour practice by not giving the applicant 12% performance bonus.
34. He further indicated that the Departmental Moderation Committee did not consider individual case but the entire directorate.
35. The respondent representative further referred to paragraph 8.3 of page 79 bundle 'A' which defines guidelines in respect of normal distribution curve of performance category.
36. He further indicated that the Departmental Moderation Committee took into account distribution curve and applicant fell outside 25%.

CLOSING ARGUMENTS

37. Both parties submitted written closing arguments which were submitted on the 07 September 2020.

ANALYSIS OF EVIDENCE AND ARGUMENT:

38. I have carefully considered all evidence presented by parties, however, section 138 (7) of Labour Relations Act requires brief reasons for my award, I have only considered evidence that I regard as necessary to substantiate and arrive at my findings and determination of this dispute.

39. It must be determined if the respondent committed an unfair labour practice by reducing the applicant's final performance assessment score from 145,33 to 114,00 which then disadvantaged the applicant from receiving performance bonus.
40. Section 186 (2) (a) Labour Relations Act 66 of 1995 as amended (LRA) defines unfair labour practice as "any unfair act or omission that arises between an employee and an employer involving any unfair conduct by the employer relating to the promotion, demotion, probation or training of an employee or relating to the provision of benefits to an employee.
41. Section 23 of the Constitution provides that everyone has the right to fair labour practice.
42. The onus to proof the existence of conduct complained about of unfair labour practice within the meaning of section 186 (2) (a) of LRA rests with the employee, see *City of Cape Town v SA Municipal Workers Union obo Sylvester and Others (2013) 34 ILJ 1156 (LC)*. The employee must therefore be able to lay the evidentiary foundation to substantiate his or her claim of unfair labour practice.
43. It is common cause that the applicant received a final score of 145.33% which entitles her 12% bonus payout and the Departmental Moderation Committee lowered that score to 114,00 due to insufficient motivation for extra work.
44. The respondent policy on Employee Performance Management and Development System dated April 2016 is reflected on page 62-91 bundle A.
45. Paragraph 8.1. and 8.2 on page 78 of Bundle 'A' deals with roles and responsibilities of both Intermediate Review Committee and Departmental Moderation Committee.
46. It was argued on behalf of the applicant that the Department moderation Committee did not have powers to lower the applicant final assessment score which was validated by the Intermediate Review Committee.

47. It was also argued on behalf of the applicant that the Appeal's Committee failed to take into consideration and address grounds for appeal raised by the applicant as outlined on page 56 of the applicant's bundle.
48. It was further argued on behalf of the applicant that the Appeals Committee re-assessed the applicant whereas she has already been Intermediate Review Committee.
49. Lastly it was argued on behalf of the supplicant that there was no good cause shown or justification why the Departmental Moderation Committee lowered the applicant's final assessment score.
50. Evidence on behalf of the respondent was that the applicant failed to prove that the reduction of her score mounts to unfair labour practice in terms of section 186 (2(a) of the Labour Relations Act as amended.
51. It was argued on behalf of the respondent that the Departmental Moderation committee did not act unfairly, nor did it omit to act when it considered the scores of all the employees including the applicant.
52. It was further respondent's argument that the Departmental Moderation Committee did not single out the applicant as an individual case and assessed her individually.
53. It was also the respondent's argument that the Departmental Moderation committee has to make tough decision with regards to adherence of 25% distribution curve limit.
54. Having considered both applicants and respondent arguments it is very clear that the crux of this matter is centered on the lowering of applicant's score by the respondent.
55. It is applicant's argument that the Departmental Moderation Committee did not have powers to lower her score and consider re-assess her as an individual employee.

While on the other hand it is respondent's argument that the Departmental Moderation committee did not exceed its powers by doing so.

56. The applicant's bundle on page 78 outlines the roles and responsibilities of both Intermediate Review Committee and Departmental Moderation committee.

57. It is very clear that each committee had its own distinctive roles and responsibilities,

58. It was argued on behalf of the applicant that the Departmental Moderation Committee deviated from its role and responsibilities by lowering the applicant's score. It was also argued that if the score of the applicant was to be lowered that was the responsibility of the Intermediate Review Committee not the Departmental moderation committee.

59. This version of the applicant is supported by the distinctive roles and responsibilities of both Intermediate Review Committee and Departmental moderation committee as set out on page 78 of the applicant's bundle.

60. On page 78 paragraph 8.1.1 bullet 5 and 6 indicates that the IRC may recommend and communicate to the supervisor changes in ratings, including lowering of such ratings. Under bullet 6 it says any recommendations on the lowering of rating score must be referred back to the supervisor to try and reach consensus on the change.

61. No evidence was led by or presented before me by the respondent that before the lowering of the applicant's score was lowered there was consensus reached on the change.

62. The EMPDS is very explicit when coming to the on page 78 of the applicant's bundle when coming to the lowering of scores.

63. It was argued on behalf of the respondent that the Departmental Moderation committee has to make tough decision with regards to adherence of 25% distribution curve limit.

64. Even though there was no evidence led or presented before me during the proceedings with regards to the 25% distribution curve limit. This version of the respondent confirms that indeed the Departmental Moderation Committee lowered the applicant's score to adhere to 25% distribution curve. It further supported the applicant's version that the Departmental moderation committee has exceeded its powers by lowering the applicant's score.

65. Again, if the reason for lowering the applicant's score was based on the 25% distribution. Curve, it is contracting the appeal's committee's outcome which indicated that the motivation. Of the applicant for extra work is insufficient.

66. The reason of the appeal's committee outcome then also confirms that the applicant was excluded from receiving 12% performance bonus based on insufficient motivation for extra work not based 25% distribution curve limit ad alluded to be the respondent.

67. In light of the above, I am convinced that the applicant was entitled to receive 12% performance bonus during 2017/2018 performance.

68. Having considered the arguments and documents I am convinced that the applicant demonstrated that the respondent committed unfair labour practice and she is entitled to relief sought.

69. In the premises, I find that the applicant demonstrated that the respondent committed unfair labour practice y lowering applicant score from 145,33 to 114,00.

AWARD:

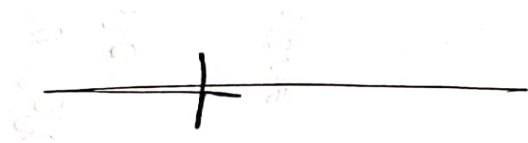
70. The respondent, Department of Sport, Arts and culture Northern Cape Provincial Government, is ordered to pay the applicant 12% performance bonus based on applicant's notch as of 31 March 2018.

71. The amount due to the applicant is R 27,193,22 (twenty-seven thousand one hundred and ninety-three rands and twenty-two cents)

72. The amount in the preceding paragraph must be paid no later than the 15 October 2020.

73. Payment of the amount referred to in paragraph 72 must be made to the bank account of the applicant known by the respondent.

Thus, signed and dated at Kimberley on the 21 day of September 2020.

A handwritten signature in black ink, consisting of a horizontal line with a vertical stroke intersecting it, followed by a short horizontal tail.

Name: Selolong Mosoma

SECTOR: GPSSBC