

ARBITRATION AWARD

Panelist/s: Kevin Perumal
Case No.: GPBC742.2019
Date of Award: 5 October 2020

In the ARBITRATION between:

T D MADLALA AND 30 OTHERS

(Union / Applicant)

and

DEPARTMENT OF TRANSPORT – KZN

(Respondent)

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DETAILS OF HEARING AND REPRESENTATION

1. The arbitration at all material times took place at the Department of Transport – KZN, Pietermaritzburg Offices and commenced on the 6 February 2020 and was completed on the 31 August 2020.
2. The applicants were represented by Mr. Sifiso Chili of Sifiso Chili & Associates whilst the Respondent was represented by Ashnee Lambert of Lambert INC.
3. The parties agreed that closing arguments will be submitted by the 14 September 2020 and the writer hereof will issue an award on or before the 30 September 2020. Subsequently this date was changed to the 5 October 2020.

ISSUE TO BE DECIDED

4. The pre-arbitration minute confirmed by the parties to the dispute determined that the arbitrator should consider the following issues:
 - 4.1 Whether or not an unfair labour practice was committed by the Respondent when it upgraded or promoted the employees within the Motor Transport Services, Technical Compliance Unit and in doing so excluded the Applicants;
 - 4.2 Whether or not the upgrade or promotion of employees within the Motor Transport Services, Technical Compliance Unit complied with the regulatory framework and requirements; and
 - 4.3 Whether or not employees and or personnel within the Motor Transport Services qualified to be classified as scarce skills as contended by the Respondent.

BACKGROUND TO THE ISSUE

5. A dispute was referred by the Applicant on the 11 April 2019 to the GPSSBC which concerned a dispute regarding a Collective Agreement-interpretation or application.
6. On the 8 November 2019, the GPSSBC set the matter down as a point in limine hearing for the 26 November 2019.
7. Following an application for condonation served by the applicants on the respondent, to which the respondent had opposed. On the 18 December 2019, a Ruling was made that the by the writer hereof confirming that the true nature of the dispute concerned an alleged unfair labour practice relating to promotion and granted condonation of the late referral of the dispute and accordingly requested the GPSSBC to set the matter down for arbitration.
8. On the 15 January 2020, the GPSSBC set the matter down for arbitration on the 6 and 7 February 2020.
9. On the 6th February 2020, it had become apparent to all parties that subsequent to condonation being granted that the certificate of outcome of the dispute as required by section 135 (5)(a) of the LRA, as amended needed to be completed. The parties agreed that the certificate of outcome of the dispute be dated the 18 December 2019 confirming that the dispute remained unresolved as at that date. The parties further agreed that the applicant would complete the request for arbitration in order to regularize the administrative processes of the GPSSBC.
10. The parties required further time to conduct the pre-arbitration conference as per Rule 20 For the Conduct of Proceedings before the General Public Service Sector Bargaining Council. In March 2020, the parties had

confirmed the pre-arbitration minute and agreed on the bundle of documents, agreed that the applicant will call two witnesses (applicant and 1 other), the respondent will call two witnesses.

POINT IN LIMINE APPLICATIONS

11. An application for condonation of the late referral of the dispute in terms of section 191 of the Labour Relations Act, 66 of 1995 (the "LRA"), read with the Rules of the GPSSBC was submitted by the applicant and opposed by the respondent. Accordingly, I concluded that in my view there seems to be ample evidence to suggest there is a possibility of success in resolving this dispute through arbitration and could not find any reason why condonation should not be granted. Our labour law is premised on fairness, and therefore it would not be in the interest of justice and fairness to deny the Applicants the opportunity to address their dissatisfaction with the Respondents conduct in failing to consider their application to be regraded to level 9. The application for condonation was granted.
12. An application for the recusal of the arbitrator was made by the Respondent on the basis that the Arbitrator is alleged to have "proffered his view that based on the documents, it is clear that the Respondent has acted unfairly towards the Applicants". Accordingly, I ruled that the Respondent has failed to demonstrate, on the facts, that it would not enjoy a fair hearing and is therefore dilatory and fruitless which has wasted all the parties' resources and time. Therefore, costs will follow the dismissal of this application.
13. A further application was made by the representative on behalf of the Respondent for the Respondents official employer representative who will also be called to testify in these proceedings to remain in the proceedings whilst other witnesses of the respondent testifies. The whole purpose of an exclusion order is that witnesses will not hear the witnesses' evidence before

giving their own evidence. If an exclusion order is made, you are not allowed to discuss any evidence with any other witnesses nor are they permitted to discuss their evidence with you. It is very important to not be present in a hearing room if an exclusion order has been made. If you are present when you are not supposed to be, some or all of your evidence may not be received. I ruled that should the respondent wish the witness to be present as the official rep of the department then her evidence must be presented to these proceedings in an affidavit before we continue with these proceedings or alternatively, the witness may be excused and bearing in mind procedural fairness the respondent will be granted the necessary time out to consult with their official representative who happens to be a witness. Accordingly, I ruled that the witness is to be excluded from the proceedings whilst other witnesses of the respondent presents their evidence.

SURVEY OF EVIDENCE AND ARGUMENT

Applicants Submission

- 14 The applicants first witness was one TD Madlala who was employed in the Public Transport Enforcement Unit within the department of Transport as a Principle Provincial Inspector. He commenced work with the respondent in 2002. Although, their work functions were different to the Technical Compliance Unit, they had shared common work functions and responsibilities when it came to rendering roadworthy inspection services in respect of bus companies, and inspection/ verification of buses contracted to the department. His employment as a Traffic Officer is confirmed via the National Road Traffic Act and as inspector via the National Land Transport Act. The PTEU unit was a specialised unit established to deal with public transport and freight which found its appointment in terms of section 86 of the National Land Transport Act, 05 of 2009.

- 15 He argued that the Technical Compliance Officers would join them in road blocks and perform the inspection functions. They had no authority to stop vehicles. The job functions of these Technical Compliance Officers related mainly to that of vehicle inspections to ensure compliance with road traffic legislation, ensure compliance by the general motor industry, ensure compliance of testing stations in terms of legislation and codes of conduct/ practices to perform administrative and clerical functions, conduct audits and to represent the department at meetings and court/ hearings. They do not perform Traffic Officer functions.
- 16 Their grievance started when one day at a roadblock, they were visited by the Technical Compliance Officers in full uniform, previously they did not wear uniform, with the Rank of Chief Provincial Inspector, which was above their rank. This concerned them and they started to enquire how did this come about? They discovered that these officers were promoted. The incident occurred at the Marion Hill Toll Plaza. The Rank of Principle Provincial Inspector was at level 8 and that of Chief Provincial Inspector was at level 9. These officers were previously at the same level as them at level 8. In terms of the decorum that goes with ranks, an officer who is a chief is superior therefore one would have to take instruction from him if your rank is lower. When we questioned them, the Technical Compliance Officers stated that they were promoted. It was difficult to understand how they became Chief Provincial Inspectors when the main functions of traffic duties were not being performed by these inspectors.
- 17 He further confirmed that the Technical Compliance Officers whose only requirement for the appointment was that they be appointed as Traffic Officer as per section 3 of the Road Traffic Act, whilst the law enforcement unit (Principle Provincial Inspector) required appointment as traffic officer in terms of Section 3 of the Road Traffic Act, Peace Officer in terms of the Criminal Procedure Act and Inspector in terms of the National Land Transport Act.

- 18 On the 5 March 2009, they lodged a grievance with the respondent alleging that the respondent had committed an unfair labour practice with regard to the upgrading of the post of Technical Compliance Officers and that the respondent had unfairly discriminated against them. They requested the respondent to have their posts upgraded to the same level as that of the Technical Compliance Officers, i.e. from salary level 8 to 9. After lodging the grievance and subsequent to the respondent having conducted an investigation into the matter, the Technical Compliance Officers were stripped of their uniforms, but retained their level salary at level 9.
- 19 On the 6 September 2017, they were advised formally in writing of the outcome of their grievance by the MEC Mr. TM Kaunda, Member of the Executive Authority Transport, Community Safety and Liaison, that the job evaluation benchmark process of Provincial Inspectors that was conducted in July 2009, prohibits any department to conduct any evaluation of Provincial Inspectors. The MEC cannot evaluate jobs that have been evaluated by the Minister in terms of the Public Service Regulations. The MEC regarded the matter as being resolved and that they were advised to lodge a dispute with the GPSSBC or refer the matter to the Public Service Commission.
20. When they lodged their grievance, the department appointed a certain Ms. Blunt to conduct an investigation into the matter. Her investigation revealed the following:
- 20.1" *In 2008 4 employees lodged a grievance as a result of the staff members in the Technical Compliance Component of the Motor Transport Services having been upgraded one salary level.*
- 20.2 *Another 72 employees lodged a grievance in February 2009.*
- 20.3 *The Technical Compliance Officers posts were evaluated in May 2003.*

20.4 A request was made to upgrade one level 10 post and nine level 8 posts by one level on the 10 January 2007. The HOD approved the request on the 1 February 2007. The level 10 post and level 8 posts six post were filled with the incumbents and subsequently upgraded. The vacant level 8 posts were upgraded and advertised. The advert was withdrawn and no short listing took place.

20.5 The request to upgrade these posts was based on the motivation that the Motor Transport Services was not able to recruit and retain staff. These posts were not re-evaluated as the Directorate utilized the scarce skills mandate in order to upgrade these positions. Furthermore, she was informed that the Directorate had previously advertised these posts numerous times and had not been able to attract suitable candidates. The statistics obtained from Personnel doesn't provide sufficient evidence of a recruitment problem. After further discussion with the Directorate it became evident that the motivation was based more on a retention mechanism. The statistics also did not highlight this fact".

20.6 "She recommended that if this division is the same position as the technical Compliance Division whereby they also not able to retain suitable candidates for their positions, the decision should also use the same mandate utilized by the Motor Transport Services to motivate for the upgrading of their posts in order to recruit and retain suitable staff".

21. With regard to the submission to the HOD made by the Motor Transport Service on the upgrade of the Technical Compliance Officers from level 8 to 9, and the recommendation of Ms. Blunt for them to use the same mandate to be upgraded, he was not sure if there was a submission made on their behalf, hence they grieved the matter with no success. It was later discovered that the applicant's submission for the upgrade had gone missing.

22. On the 29 July 2009, the Department of Public Service and Administration issued a circular to all provincial departments that employ Provincial Traffic Inspectors which advised departments that employees that are currently on salary range 8 should remain in posts on salary range 8 if high level supervisory and first level management functions (Principle Provincial Inspector), whilst, Employees currently on salary range 9 should be absorbed onto posts on salary range 10 if management functions within the inspectorate are performed (Chief Provincial Inspector)
23. At paragraph 5.4 of the circular, the following is stated: "It is important to note that the translation of employees to the higher graded posts should be considered based on their competencies to perform the work attached to the posts. Departments should also ensure during this process that the requirements of Chapter 1, Part V.C.6. of the Public Service Regulations are adhered to. Employees who retain their existing salaries on personnel basis, i.e. those employees where post are upgraded but who do not qualify for absorption in the upgraded posts. Will not qualify for pay progression while on personal salaries."
24. The employee testified that it was not proper for the Technical Compliance Officers to be upgraded initially from salary level 8 to 9 and subsequent to the benchmarking exercise moved to salary level 10 as the critical component of the benchmarking exercise was the performance of management functions which was critically missing
25. The employee denied that the Technical Compliance Officers were regarded as a scarce skill and that he supported the view expressed by Ms. Blunt that there was no proof offered by the respondent that there was a challenge with the recruitment and retention of the Technical Compliance Officer posts.

26. He demanded redress and that the respondent should upgrade them as well.
27. Under cross-examination, the employee stated that they were not seeking relief against the Technical Compliance Officers but rather seeking an upgrade of their posts to level 10. He disagreed with the respondent's view that the Technical Compliance Officers were much sought out in the private sector as they had obtained a specialised skill and an examiners certificate to undertake vehicle inspections. He was unable to comment on what legislated mandate empowered the HOD to make the final decision with regard to the upgrade.
28. He further testified undercrosss examination that he had seen the Technical Compliance Officers for the first time at the road block in Marion Hill Toll Plaza. He disagreed with the respondent when the respondent stated that the motivation was based on scarce and critical skills, and motivation to retain and attract given the out flux and influx in the private sector of compliance officers.
29. Under re-examination he stated that the requirement for an examiners certificate as per the advert stated that "successful applicants will be required to successfully complete an A Grade Vehicle Examiners Corse" therefore, it was not a pre-requisite for the job. The motivation to upgrade the Technical Compliance Officers to level 9 was done in accordance with the regulations according to the respondent, however, he was of the view that it was not legal to do so.
30. He further affirmed that the respondent made a submission to the HOD on the 9 October 2009, for the PTEU upgrade and was awaiting the outcome thereof.

31. The second witness called to testify was Mr. S Ngcobo, the head of the unit in charge of Organisational Development, former Management Advisory Services. He was employed by the respondent for the past 7 years. His overall experience in the public sector amounted to around 22 years. He testified that all jobs within the public sector must be evaluated as per the provisions of the Public Service Regulations. Previously the respondent had its own policy but recently the Provincial Office of the respondent had provided for the use of one policy. The process followed is that management will determine whether the job had changed either positively or negatively and submit the same to the Organisational Development Unit for assessment. If there is a change in the job description by at least 20 % then the job is submitted for evaluation.
32. The job would be submitted to a job screening committee and thereafter to an evaluation panel appointed by the MEC. Their recommendation is submitted to the executing authority or delegated official to make the final decision. The decision is submitted to HR for implementation and the incumbent and supervisor is advised. The system that was previously used was the Equate Job Evaluation System but they were now using the web Enabled Evaluation System.
33. When asked about the motivation submitted by the Motor Transport Services on behalf of the Technical Compliance Officers for the upgrade. He said that he would have requested the HOD to undertake the evaluation of the jobs requested for the upgrade. He confirmed that no evaluation of these jobs were done at the time the motivation was submitted. He was of the opinion that the upgrade was illegal.
34. Under cross-examination, the respondent put to the witness that the job had acquired new and specialised skills and that became inherent in the job content, his view was that would be quiet challenging assuming this was the reason for the upgrade, however the posts were not evaluated as per the policy. He further disagreed with the arguments advanced by the

respondent that the motivation was also to retain staff. He reaffirmed that the decision to upgrade was unlawful. He was aware that the applicants were not seeking relief against the Technical Compliance Officers. The respondent asked if he was aware of the relief sought by the applicants and he stated yes, however "one cannot correct a wrong with a wrong" was his words.

35. Under re-examination he stated that the dual process of evaluation and determining the job worth must be followed in this matter.
36. The third witness called to testify was one Chris Van Biljoen a Chief Provincial Inspector at salary level 10 who was with the respondent since December 2004. He worked within the Public Transportation Enforcement Unit responsible for operations. Prior to this he was a Principle Provincial Inspector at salary level 8. He was a founding member of the PTEU Unit when it was established in 2002. His evidence was that no other unit operated in the same position there was a specific set of skills that was required by the PTEU members specifically to deal with Taxi Violence in the Province. He compared the MTS Technical Compliance Officers to that of the PTEU members and stated that they did not have the authority to stop vehicles on a public road. He recalled the Marion Hill Toll Plaza road block when he also for the first time saw the Technical Compliance Officers in full uniform which they had not worn previously. Their insignia were that of Chief Provincial Inspector at salary level 10, therefore they had to be respected, as my equals.
37. He enquired as to how this had come about and was advised that it was done through an upgrade utilizing the scarce skills policy of the respondent. He had several meetings with the investigator Ms. J Blunt and was advised by herself that the scarce skills policy was utilized for the upgrade. He was of the view that MTS Technical Compliance Officers were not a scarce skill they merely looked after farm implements. He was aware that a number of staff had lodged grievances through their unions PSA and POPCRU stating

that the upgrade of Technical Compliance Officers was incorrectly done as a scarce skill as there are a number of officers within the department that can perform these functions. He was aware that a submission on behalf of the PTEU staff was submitted to the HOD for consideration in 2008 followed up by the letter of 2014 from Mr. Andrews, however, he was disappointed that the respondent was not following the necessary time frames to have the matter resolved. He was concerned with the different treatment being mooted out by the respondent. He was of the strongest opinion that his unit PTEU should have been classified as a scarce skill as they were the only unit in the country established for dealing with taxi violence and that other provinces have come to them for training and information on how this is done.

38. When comparing the appointment of the Technical Compliance Officers to that of the PTEU staff members he stated that the PTEU staff members had more authority. It was not fair to upgrade the Technical Compliance officers to salary level 9.
39. Under cross-examination he stated that he was a member of PSA. He was speaking on behalf of himself and not advocating the plight of the PTEU staff members. Both POPCRU and PSA submitted different grievances however, they worked together on the matter. He had no comment on whether the PTEU members should be upgraded as presented by Mr. Ngcobo but stated that the respondent was treating its staff in PTEU unfairly.

Respondents Submission

40. Mr Victor Shange was called as the Respondents first witness. He started in November 2004 as a Technical Compliance Officer, and is currently employed as the Deputy Director Vehicle Compliance (MTS). He was overall in charge of managing the section. He recalled two incidents were

his officers were called out to assist the PTEU staff in a road block. The one being in Pongola where they were required to inspect the modification of vehicles and the other being the road worthiness of buses. He stated that the qualification to be an examiner of vehicles can be obtained from the Traffic Training College undertaken for a period of 3 months and that the Technical Compliance Officers were all graded at Level A, however he was unsure if the PTEU staff were also examiners but was aware that some of them had the certificate. Private companies and other organisations also use this examiners certificate for compliance purposes.

41. He was unsure why Van Biljoen stated that his section only looked at farm implements as they undertook inspections, ensure conformance to SABS standards and compliance with National Road Traffic Act, general motor industry compliance, manufacturing compliance etc. The respondent was the custodian of all fleet with government and they were responsible for ensuring compliance.
42. When asked about the upgrade of the MTS staff to level 9 he said by then he had left the department and cannot comment. He stated that he was aware that the private sector and municipalities also had examiners of vehicles and that they were losing traffic officers to them as they paid better salaries and provided better working conditions. He was aware that there was a shortage of posts within his section but that the respondent had frozen them.
43. He was adamant that PTEU and MTS functions and responsibilities were different. He further affirmed that he was not part of the Marion Hill Toll Plaza road block.
44. Under cross-examination, he stated that he had about 13 years' experience in motor transport and that the qualification requirements of MTS were that they had to be a traffic officer with an examiners qualification (Grade A). He had not filled any post within MTS as head of

section, nor did anyone leave MTS whilst he was there. There was no high staff turnover. His view that nationally in South Africa we do not have enough examiners of vehicles, therefore he regarded them as a scarce skill.

45. The second witness that was called was Ms. B Goss who was working with the respondent as the Admin Clerk since 2009. Her responsibilities were to handle complaints, grievances and disputes within the department. She was supervised by Ms. Nzuzi and now Mr. Henman. She handled the grievance of the applicants. She appointed the investigating officer, Ms. Blunt and awaited her report. When she received the report of the investigating officer she completed a submission to the MEC with all the necessary supporting documentation requesting the MEC to consider the report, however prior to the submission she had taken ill and did not submit the same. She confirmed that the source documents of the grievance file were taken by Ms. Nzuzi. She had become aware that the file was lost when she was dealing with the other dispute of CD Robson and Others regarding the same matter. They had not kept electronic copies of the files.
46. Under cross-examination, she stated that she had the delegated authority to appoint an investigating officer and was aware that the respondent had 30 days in which to finalise the grievance. The respondent has a pool of investigators and she appointed Ms. Blunt. At the time of the submission to the HOD she was off sick and Mr. Andrews prepared the submission to the MEC. She did have sight of the submission to the MEC. However, the file got lost. She requested for the file and looked everywhere but could not find it. She operated an unsophisticated filing system and that according to her the last person to handle the file was Ms. Nzuzi. She disagreed that she was not being truthful about the lost file. Under re-examination she testified that she had no reason to lie about the file being lost.
47. The final witness of the respondent who testified was Mrs. L Pelzer who joined the department in 1992 as an admin clerk and is currently the

Assistant Director HR. She was responsible for the life cycle of the employee from appointment to death and all the processes in between. She reports to the Acting Director Ms. Dlamini. She was aware of the upgrade and the dispute by the applicants. When posts are filled the necessary supporting documentation are stored off-site and she was aware that files were destroyed in the fire at the storage facility. The box allocation reference number DOT 1/2007 concerning the recruitment process of Technical Compliance Officers was destroyed in the fire. Under DOT 87/2007 the files containing the folders were destroyed in the fire however the second box containing the applications for the posts were returned to the department. These posts were advertised in 2006 for the Technical Compliance Officer posts.

48. She read into the record notes from a recruitment advertising book which her section kept to inform them of the details of all advertised post within the department. She confirmed that that on the 21 January 2005, 3 posts were advertised, on the 13 May 2005 one post was advertised and 14 August 2006 1 post was advertised of Technical Compliance Officers. She maintained that the Technical Compliance Officer posts were advertised previously at level 8 as they were evaluated as such. She was of the opinion that the HOD had the power and authority to upgrade the Technical Compliance officers from 8 to 9. She disagreed with Mr. Ngcobo that the post must be evaluated first. She advised that the Scarce Skills policy was a framework to compensate for scarce skills within the department.
49. Under cross-examination the witness testified that she had around 28 years of service with the respondent. She affirmed that the respondent had a records section within the department, however, recruitment records due to its volume was stored off site. There was no departmental policy on records management, however she was informed by the Archive Act. She was requested by Ms. B Goss to obtain the recruitment files under reference numbers 921269 and 921331 which were destroyed in the fire. According to her post file 87/20007 was destroyed in the fire.

50. She could not confirm whether there was a challenge with the recruitment of MTS Technical Compliance Officers. She further could not give evidence in respect of whether or not the Technical Compliance Officers were regarded as a scarce skill. When confronted with her evidence that there were only 5 posts advertised over two years for Technical Compliance Officers, how would you regard them as a scarce skill. She did not comment. She advised that under section C3 of the Public Service Regulations the HOD had the authority to upgrade posts.
51. Under re-examination she confirmed that the posts of Technical Compliance Officers came out at salary level 9 when it was evaluated in 2009. She could not comment on why there was no evaluation done prior to the upgrade nor for that matter whether the legal department had commented on the upgrade of the Technical Compliance Officers from level 8 to 9.

ANALYSIS OF EVIDENCE AND ARGUMENT

52. I have considered the arguments of the parties as well as the documentary evidence submitted.
53. The applicant claim that the respondent committed an unfair labour practice relating promotion and benefits, as the MTS employees who made submissions were upgraded with salary increase and change in rank.
54. The relief that the applicants seek is promotion with all benefits retrospectively from 1 February 2007, as well as compensation and costs.
55. The dispute was referred to arbitration in terms of section 186(2)(a) of the Labour Relations Act 66 of 1995.

56. In terms of section 186(2) (a) of the Labour Relations Act 66 of 1995, an unfair labour practice means any act or omission that arises between an employer and an employee involving-

(a) Unfair conduct by the employer relating to the promotion, demotion, probation (excluding disputes about dismissal for reason related to probation) or training of an employee or relating to the probation of benefits to an employee.

57. The issues before me as determined by the parties in their pre-arbitration minute is confirmed as follows:

- **Whether or not an unfair labour practice was committed by the Respondent when it upgraded or promoted the employees within the Motor Transport Services, Technical Compliance Unit and in doing so excluded the Applicants;**
- **Whether or not the upgrade or promotion of employees within the Motor Transport Services, Technical Compliance Unit complied with the regulatory framework and requirements; and**
- **Whether or not employees and or personnel within the Motor Transport Services qualified to be classified as scarce skills as contended by the Respondent.**

58. The first issue to be determined is whether or not the employees employed by the Motor Transport Services qualified to be classified as a scarce skill. The evidence suggest that they were not. In fact, the evidence of them being classified as scarce skills were opinions of various individuals including Ms. S Grobbelaar (Author of the submission dated 10 January 2007, Manager MTS, Ms. V Cunliffe: Senior General Manager Corporate Services and the Head of Transport Dr. KB Mbanjwa. By their own submission they defined: *"a scarce skill as "occupations or sub categories within an occupation for which the employer experiences various degrees of*

difficulty to recruit and retain services" As, a rule such employee requires an advanced knowledge in a field of science or learning required by prolonged course of study, and/ or specialised instruction. The work requires consistent exercise of discretion and judgement and is predominantly intellectual and varied in character. Furthermore, vacancies should prove difficult to fill and the demand for a particular skill/s outweigh supply".
(page 24 Bundle F).

59. This definition was not amplified and made applicable to the Technical Compliance Officers except to say that at para 4.3 of the submission on **page 25 of Bundle "F** mentioned was made of "due to the nature of the functions and specialised knowledge required to effectively perform these functions there was a lack of suitably qualified applicants in the recruitment process. The writers do not substantiate the efforts made by the department to recruit and retain such skills except a broad statement of challenges of recruitment.
60. From the verified evidence before me I have confirmed that only 5 posts of Technical Compliance Officers were advertised over a period of two years. Furthermore, according to the submission for the upgrade the MTS section had 10 posts attached to it, 1 Manager and 9 employees of which 6 were filled and 3 vacant. The respondents witness Victor Shange confirmed that for the period that he had worked in the MTS section, he had not filled any posts within MTS as head of section, nor did anyone leave MTS whilst he was there. There was no high staff turnover.
61. The scarce skill Framework for the Determination and Compensation for Scarce Skills in the Public Service was introduced in 2004 and the respondent argued that it utilized this framework for the upgrade of the MTS employees. Firstly, the framework provides for a scarce skills allowance which is no-pensionable allowance, calculated as a percentage of the employee's basic monthly salary (Notch), and payable on a monthly basis. Had this policy been used the respondent would have been compelled to

comply with it, they failed to do so. Secondly, the Framework clearly stipulates that the determination of a scarce skill is subject to the determination and approval by the Minister for Public Service and Administration (MPSA) in consultation with the Minister of Finance. In the submission for the upgrade of the MTS employees in determining the upgrade of the Technical Compliance Officers as a scarce skill, this provision of the Framework was not complied with.

62. Accordingly, I find that the respondent did not comply with its own policy framework in determining that the Technical Compliance Officers were in fact a scarce skill. And even if they were a scarce skill, the respondent failed to obtain the necessary authorization and approval for the same from the Minister of Public Service and Administration in consultation with the Minister of Finance. Furthermore, the upgrade from salary level 8 to 9 at the time was possibly unlawful, given that the policy Framework did not make provision for a salary upgrade but a scarce skill allowance.
63. In the respondent's closing arguments, they make mention that the upgrade was done in accordance with the Public Service Regulations 2001, applicable at the time. The Respondent made an error in that they stated that the upgrade was from salary level 9 to salary level 10, in fact it was from salary level 8 to salary level 9 and not 2008 but 2007. It was only after the benchmarking exercise conducted in 2009, by the Department of Public Service and Administration that the upgrade increased to salary level 10. In my view the upgrade from 9 to 10 should not have been implemented due to the fact that there were no management functions that the MTS technical Compliance Officers were required to perform, and even if they were performing any management functions, this evidence was never submitted.
64. At paragraph 5.4 contained on **page 85 of Bundle "F"** the circular regarding benchmarking, the following was stated: *"It is important to note that the translation of employees to the higher graded posts should be*

considered based on their competencies to perform the work attached to the posts. There was no evidence submitted that the individual employees upgraded to level 10 were competent to do the work.

65. In PART V. Compensation for Employees C. Grading and Remuneration and in particular C.3, C.4 and C.5 the Executing Authority has been empowered to make a determination, however such determination is subjected to the executing authority first evaluating the job, second determining challenges with recruitment and retention and thirdly recording the reason why the salary was insufficient.
66. On examination of the facts before me, the post of MTS employees that of the Technical Compliance Officers were never evaluated before the upgrade was done. The Head of Organisational Development Mr. S Ngcobo testified that at the time the submission was done there was no job evaluation undertaken to determine the job weight of the Technical Compliance Officer posts. The Technical Compliance Officer positions was last evaluated in 2003.
67. Furthermore, the investigation report also found that the job title was unilaterally changed by the respondent such a change can only come about after an evaluation of the job is undertaken. Mr. Ngcobo expressed his view as Head of Organisational Development that the upgrade was unlawful and should only have occurred after the completion of the job evaluation process.
68. Secondly, as determined in the afore-mentioned paragraphs there was insufficient evidence to support the view that there were challenges with the recruitment and retention of staff within the MTS section in particular those posts of Technical Compliance Officers. This is further corroborated by the evidence of the investigating Officer of the applicant's grievance.

69. Thirdly, the executing authority did not provide any reasons for his decision to upgrade the MTS employees.
70. Accordingly I find that the decision to upgrade the Technical Compliance Officers from salary level 8 to 9 was not in compliance with the Public Service Regulations, 2001.
71. As pointed out by the respondent in their closing arguments that that the decision of the employer can only be interfered with if the decision or managerial prerogative was not properly exercised. **The court in Aries V CCMA & Others (2006) 27 ILJ 2324 (LC)** held that an employee can only succeed in having the exercise of a discretion of an employer interfered with if it is demonstrated that the discretion was exercised capriciously, or for insubstantial reasons, or based upon any wrong principle or in a biased manner. **In casu**, and according to the evidence before me, the decision exercised by the respondent to upgrade the MTS employees from salary level 8 to 9 was exercised capriciously, for insubstantial reasons, and based upon the wrong principles and was carried out in a biased manner.
72. The decision to promote the MTS employees did not occur in the true sense of a normal recruitment process where a vacancy or newly created post within an organisation is advertised, employees apply, they are shortlisted according to the requirements of the post interviewed and tested if necessary and then a final decision is made to appoint an individual employee/s. Where the appointment is of such a nature that the appointed individual/s was currently earning a salary level 8 and is now being appointed to a salary level 9, promotion occurs. Furthermore, the Technical Compliance Officers had to wear uniform and the rank had changed together with the insignia that goes with the newly created rank, therefore in my view promotion occurred.
73. The MTS employee salaries were upgraded and accordingly they were remunerated at a higher level, thus a promotion did occur, which in my

view as stated earlier was not determined in accordance with the Public Service Regulations, 2001.

73. Accordingly, I find that the respondents decision to upgrade the MTS employees for the period 1 February 2007 up to and including the date prior to the implementation of the job evaluation results of 2009 to be possible unlawful. However, this possible unlawful act was regularized by the job evaluation results in 2009 which confirmed that the salary level of the technical Compliance Officers came out at salary level 9.
74. What becomes of the PTEU employees, the applicants, In, my view they were robbed of the possibility of an upgrade. Janet Blunt in her investigation report stated as follows: "She recommended that if this division is the same position as the technical Compliance Division whereby they also not able to retain suitable candidates for their positions, the decision should also use the same mandate utilized by the Motor Transport Services to motivate for the upgrading of their posts in order to recruit and retain suitable staff".
75. As stated earlier the submission of the PTEU employees had gone missing hence the comment that they were robbed of a possible upgrade. In my view the solution to their dispute lies in this possibility to be considered for an upgrade. That a new submission is made to the HOD taking into account the requirements of such new submission in terms of the Public Service Regulations of 2016 and any Retention Policy that might exist within the Department of Transport or within the Department of Public Services and Administration that is applicable to the respondent.
76. A further possibility exists where the respondent applies for the PTEU posts to be re-evaluated through the job evaluation process in the hope that there is sufficient evidence to warrant an increase in job worth as in the case of the MTS employees. Thus, resulting in a possible increase in salary grade.

77. With regard to whether or not the respondent committed an unfair labour practice when it upgraded or promoted the employees within the Motor Transport Services, Technical Compliance Unit and in doing so excluded the Applicants. As pointed out by the respondent in their closing arguments the court in **Ncane VR Lyster NO (2017) 4 BLLR 350 (LAC)** stated that “When it comes to evaluating the suitability of a candidate for promotion, good labour relations expect and employer to act fairly but also acknowledges that this is not a mechanical process and that there is a justifiable element of subjectivity or discretion involved. It is for this reason that the discretion of an arbitrator to interfere with an employer’s substantive decision to promote certain person is limited and an arbitrator may only interfere where the decision is irrational, grossly unreasonable or mala fides.
78. In order for the applicants to prove that the respondent committed an unfair labour practice regarding promotion, against them, the applicants had to prove that the respondent advertised posts or the opportunity for promotion existed. In this regard the only evidence that was suggested was the submission that was apparently lost in the system.
79. The applicants themselves did not have a copy of such submission and relied on the respondent to make a submission on their behalf to the HOD for consideration. The second issue is that the applicant did not provided any information that they responded to an advert for promotion or for that matter that they substantiated their arguments for promotion in the lost submission. And, thirdly they were denied promotion despite them being the best candidates for the promotion. The applicants did not prove that they met any of the requirements for the promotion.
80. Furthermore, in the absence of the submission on their behalf, there was no promotion to decide upon. In any event the applicants do not enjoy an automatic right to promotion.

81. The applicants focused on what has been determined in this arbitration as a possible unlawful act by the HOD to upgrade the MTS employees. The applicants to date has not taken the decision of the HOD on review in terms of applicable legislation available to them. Therefore, with regard to the issue of the respondent committing an unfair labour practice-promotion against them, I. accordingly, find that the respondent did not commit an unfair labour practice against the applicants.

Conclusion

82. Based on the evidence or lack thereof before me the respondent did not commit an unfair labour practice against the applicants.

83. There are no order of costs, except the costs order against the respondent in respect to the Ruling made *"that the Respondent has failed to demonstrate, on the facts, that it would not enjoy a fair hearing and is therefore dilatory and fruitless which has wasted all the parties' resources and time. Therefore, costs will follow the dismissal of this application"*

AWARD

84. **Based on the evidence or lack thereof before me the respondent did not commit an unfair labour practice against the applicants.**

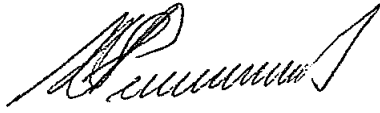
85. **The respondent is ordered to pay costs to the applicants in respect of the**



KEVIN PERUMAL

Ruling issued against them on the 28 April 2020.

ARBITRATOR



KEVIN PERUMAL

ARBITRATOR

DATED THIS 5th DAY OF OCTOBER 2020