



ARBITRATION AWARD

Panellist/s: Thomas Mahasha
Case No.: GPBC1259/2019
Date of Award: 02 November 2020

In the ARBITRATION between:

PSA obo TE Mokoena

(Union / Applicant)

and

Department of Justice & Constitutional Development
(Respondent)

Union/Applicant's representative: Bongani Sipho Qankase

Union/Applicant's address: _____

Telephone: _____

Telefax: _____

Respondent's representative: Sethupi Ledwaba

Respondent's address: _____

Telephone: _____

Telefax: _____

DETAILS OF THE HEARING AND REPRESENTATION.

1. The matter was scheduled for arbitration on various dates and finalised on 24- 25 August 2020 and was held at GPSSBC Offices in Centurion.
2. The Applicant, Mr Tebogo Esmarald Mokoena, attended the hearing and was represented by Mr Bongane Sipho Qankase of PSA.
3. The Respondent also attended the hearing and was represented by Mr Sethupi Ledwaba Deputy Director Labour Relations and employee of the Respondent.
4. Both parties agreed to file written closing arguments on 28 August 2020.

ISSUE TO BE DECIDED.

5. I am required to determine whether or not the Respondent's decision not to pay performance bonus to the Applicant amounted to unfair labour practice as defined in section 186 (2) (a) of the Labour relations Act, and if so, the appropriate relief.

BACKGROUND TO THE ISSUE.

6. The Applicant was appointed as an administration clerk at Level 5 and based at Daveyton Magistrate Court and earning a monthly salary of R 16 018.97.
7. She declared a dispute with the Council alleging that the Respondent committed an unfair labour practice by not paying her performance bonus for the 2017/2018 financial year.
8. The matter could not be finalized on 18 November 2019 due to unavailability of the Respondent's witnesses. It was adjourned to 11 February 2020. The matter could not be set down on the agreed date.
9. It was set-down for two days, namely, 24th and 25th August 2020. It was arranged for virtual hearing which did not materialize because parties were not prepared for such an arrangement. An arrangement was made between the Council and the parties to hold a physical hearing on 25 August 2020.
10. There is a performance Management Policy at the workplace.
11. Parties exchanged one bundle of documents each. The Applicant's bundle is from page 1 to 68. The Respondent's bundle is from page 1 to 36.
12. The Applicant's recourse is to be paid performance bonus for 2017/2018 financial year and it was digitally recorded.

SURVEY OF EVIDENCE AND ARGUMENTS.

EVIDENCE BY THE APPLICANT.

13. Tebogo Emerald Mokoena testified under oath that Zonke Nqabeni had been her supervisor from 2016 to 2019.
14. Mr Ernest Nkabinde became her supervisor in 2019. She performed maintenance and admin duties as evidenced by pages 13, 14, 15, 16, 17, 19 and 22 to 58 of the applicant's bundle. She did maintenance duties on daily basis for the whole year.

- She had therefore gone an extra mile in performing her duties and therefore qualified for performance bonus.
15. She referred to an affidavit which was commissioned by a magistrate to prove that she was doing maintenance duties. She complied with clauses 3 (ii) and (iv) of the Performance Management Policy.
 16. On 13 April 2018, she signed an annual performance assessment instrument with Zonke Nqabeni, her former supervisor where they agreed to a score of 4 which would qualify her for a notch and a performance bonus.
 17. She was instructed by the Court Manager, Linkeld Jones, to reduce the score to three(3), which she did. The Key Performance Areas were not changed on the new annual performance instrument. Only the score was changed from four (4) to three (3) She then lodged a grievance on 17 August 2018, where she sought a rating of four.
 18. Under cross examination she testified that she qualified to be paid performance bonus because she was doing extra mile duties in the maintenance court. She was instructed to downgrade her scores.
 19. There is no clause in the policy that says she could be instructed to reduce her scores.
 20. The performance assessment instrument with the score of 4 was not submitted to the Moderation Committee. The Moderation Committee only considered the performance assessment instrument with the score of 3.
 21. She does not know how a moderation committee operates. According to her understanding, clause 6.5 (ii) page 5 of the respondent's bundle which deals with grade progression; is a standard rate. An employee who had gone extra mile in performing her duties qualifies for a performance bonus. She performed duties shown on page 27 of the applicant's bundle. She does not know if pages 27, 30, 31 to 45 and 64 fall within the 2017/2018 performance cycle.
 22. Under re-examination, she testified that she lodged a grievance on 17 August 2018 before the Moderation Committee could sit. She did ten cases on 24, 25, 26, 27 and 28 July 2017. The Court Manager submitted assessment instruments to the Moderation Committee.
 23. Even if she had given the assessment reviews with the score of 4 to the court Manager, he would not have submitted it to the Moderation Committee because he had instructed her to reduce the score to 3.
 24. The score of 4 is significantly above expectations. The performance instrument on page 20 of the respondent's bundle came into existence because she was instructed by the Court Manager to reduce the score to 3.

EVIDENCE BY THE EMPLOYER.

25. **Ernest Nkabinde** testified that he is an administration officer at Daveyton Magistrate Court. The applicant reported to him with effect from April 2018. The Annual Assessment Performance Instrument on page (20) twenty of the respondent's bundle, was not submitted to him. It was signed by Nqabeni.
26. He was involved in submitting performance reviews (with a score of 3) on pages 19 to 31 of the respondent's bundle to the Moderation Committee. The applicant was rated a score of three (3) and recommended for a one notch because she did not provide evidence.

27. The moderation committee agreed with the score of three(3) which in terms of the scoring criteria, amounts to 100%.
28. The applicant was paid one notch on 13-12-2018. He could not comment on whether the applicant was to be paid performance bonus. He is not sure of the duties of the Court Manager, but knows that he signs performance reviews.
29. Under cross examination, he testified that he signs performance assessment instruments with subordinates. The performance assessment instrument on page 21 of the applicant's bundle which was signed by Ngabeni became an official document upon signature. He agreed that Ngabeni and the applicant agreed to a score of 4. He could not comment on whether the applicant was forced to reduce the score. When the supervisor and the applicant are done with assessment, the assessment instrument is sent to the Court Manager.
30. **Lincoln James Jones** testified that he was an acting Manager at maintenance section, Uitenhage Magistrate Court from 1 August 2017 to 1 January 2020. His role was that of an overseer. The applicant was reporting to Ngabeni. She agreed with her supervisor, Ngabeni, to a score of 4 which would qualify her for a performance bonus. The evidence submitted was not enough to justify the score of 4. In order to qualify for the score of 4, the applicant should perform duties beyond her KPA's.
31. The Applicant was called in a meeting to justify the score of 4. He informed the applicant that her explanation was inadequate and requested her to provide more motivation to justify the score of 4.
32. He did not only call the Applicant in a meeting where the issue of scores was discussed. He called other employees as well. He disagreed that he intimidated the applicant by calling her in a meeting and that he instructed her to change the score. He returned the assessment because he needed evidence such as copies of the court appearances and case references. The Responsibility to verify extra mile evidence was that of the applicant's supervisor, not his.
33. He agreed that it was the duty of the moderation committee to ascertain if the assessment qualified for the score of 4, and that he denied the Moderation Committee an opportunity to ascertain if the applicant qualified for the score of 4. He also agreed that case numbers serve as evidence for duties performed.
34. An affidavit by the magistrate implying that she performed duties of a maintenance officer was not submitted as evidence for consideration by the moderation committee.
35. Before close of business, Ngabeni submitted to him a performance assessment instrument with an agreed downgraded score of 3.
36. The performance assessment instrument with the score of 4 was never submitted to his office nor to the Moderation Committee. He was not part of the Moderation Committee.
37. During moderation, the team leader, who in this case is the supervisor, presents a report to justify the score of 4. In this case, the supervisor recommended 1 notch which was accepted by the applicant on 13 April 2018.
38. He never instructed Ngabeni to change the score of 4 to 3. Changing of scores happened in a meeting where the applicant was also present. If the applicant was not happy about the score of three, she should have escalated the matter to Violet Mudau, the Area Court Manager.
39. An assessment instrument with the score of 4 was not submitted to the moderation committee because it was never submitted to his office by the

- Applicant or her supervisor. Instead, the assessment instrument with the score of 3 was submitted. Effective handling and attending to all enquiries/complaints pertaining to maintenance was the applicant's Key performance area.
40. The Applicant was appointed as a maintenance clerk. It is expected of the maintenance officer to do mediation and settle difficult cases. While Mulongwa was on leave, the Applicant performed her duties. Future maintenance is the responsibility of the maintenance officer.
 41. In terms of the reports submitted by the applicant, she went an extra mile when performing KRA's 2 and 4. However, the supervisor should have verified the information and submitted verified information for consideration by the moderation committee. There was no evidence presented to prove that she performed duties of a maintenance office. Evidence shown on pages 31 and 32 to 46 of the Applicant's bundle is for 2018/2019 financial year. It is not applicable to 2017/2018 financial year.
 42. The Applicant did not submit evidence to prove that she performed Mr Tlokotsi's duties while he was on leave as required by clause 7.5 of the Performance Management Policy. Inputs without evidence are not sufficient to warrant the score of 4.
 43. During cross examination; he testified that it was the supervisor's responsibility to provide extra mile evidence to the moderation committee. He was not aware that the Applicant had lodged a grievance. If he had received it, he could have escalated it to the Area Court Manager.
 44. He agreed that he would not have known about information on pages 22 to 59 of the applicant's bundle. Even if he had seen the information, he would have returned the assessment reviews for want of evidence.
 45. He agreed that mid term reviews are to be sent to Human Resources office. Annual assessment reviews are in terms of the policy not sent to H.R. If information on pages 22 to 59 was submitted, he could have decided otherwise.
 46. The annual performance cycle starts from April and ends in March of the following year.
 47. **Ntombizonke Ngabeni** testified that she was doing supervisory duties to the applicant. She thought the applicant deserved to be awarded performance bonus because she was performing maintenance duties.
 48. She does not know the performance policy. She signed a performance agreement with the applicant. According to her the Applicant did not perform poorly during the mid-term and quarterly reviews. The applicant submitted evidence to justify the score of 4. She was called by the manager to present to the panel to justify the score of 4. She was told to add more evidence. She met with the applicant who was not happy, and decided to agree to a score of 3. She did not know what else to do because according to her, the applicant performed extra mile duties. She agreed with the applicant. She does not know the affidavit on page 61 of the applicant's bundle. She knows the documents on pages 22 to 59 because they were submitted to her.
 49. The Applicant assisted in conducting investigations while the investigator was absent. She also offered assistance when the prosecutor was absent. There was compliance with clause 7.7 (viii) of the Performance Management Policy because the reviews were returned to her as the supervisor. There were two performance assessment instruments because the second one came after the reviews were returned for corrections. She did not submit the assessment reviews with the

score of 4 because it would not be accepted by the manager. She does not know the grievance form on page 2 of the applicant's bundle, but the applicant had informed her that she had lodged a grievance.

50. In terms of the policy, disagreements are dealt with in the next level of supervision. If there are no disagreements, the assessment instrument is signed and submitted to the Moderation Committee.
51. There was no disagreement between her and the applicant.
52. Under cross examination she testified that she stands by the rating of 4. She was told by the manager that the Applicant had to put more inputs on daily basis. The panel is not a moderation committee.
53. The Applicant deserved a score of 4 because she performed duties as an investigator and maintenance officer.

ANALYSIS OF EVIDENCE AND FINDINGS.

54. Section 186(2) (a) of the LRA defines unfair labour practice, as "*any unfair act or omission that arises between the employer and an employee involving unfair conduct by the employer relating to the promotion.....of an employee or relating to provision of benefits to an employee*".
55. The general rule is that he/she who alleges a fact must prove it on a balance of probabilities. In an unfair labour practice, such as the present case, the onus rests with the applicant to prove an unfair labour practice.
56. The Applicant challenged failure to award her performance bonus because according to her, she met the requirements as set out in the criteria for obtaining such. In determining whether the Respondent committed an unfair labour practice, I must also be mindful of the objectives of the Performance Management Policy which provides for effective mobilization of human resources in pursuit of prioritizing and achieving the Departmental strategic objectives. Therefore, performance practice also specifically recognizes organizational goals in performance remuneration. The integral part of performance and performance pay is attaining of the respondent's values and objectives.
57. Despite the objective qualifying criteria prescribed, that must be met by an employee, the decision whether or not to pay a performance bonus to an employee was always subject to the exercise of discretion by the respondent, as an employer, in order to adhere to organizational objectives and values as well.
58. However, there is no such a thing as an unfettered discretion. The discretion must always be tested against the tenets of fairness.
59. The next question is therefore, whether the Respondent exercised its discretion unfairly in not granting performance bonus to the applicant. In *National Coalition for Gay and Lesbian Equality and Others, v Minister of Home Affairs and Others*, it was held that "*a decision would be open to successful challenge if the discretion was not judicially exercised and in particular:had been influenced by wrong principles or a misdirection on the facts, or that it had reached a decision which in the result could not reasonably have been made by a court properly directing itself to all the relevant facts and principles*".
60. It is common cause that there was a meeting where Nqabeni was called to justify the applicant's score of 4 before the panel. It was recommended to Nqabeni during the meeting that she should provide means of verification to justify the

score of 4. Such evidence was not submitted. The applicant did not provide reasons why she could not submit extra means of verification as requested. It is my considered view that the applicant could not submit extra means of verification because it was not available.

61. It is common cause that such was not submitted. Instead, she and the Applicant agreed to a score of 3. I did not find anything wrong with Linkeld Jones' decision to return the reviews to the supervisor for compliance. In my view, such an action was aimed at ensuring that payment of performance bonus was linked to achieving the strategic objectives of the organization and ensuring compliance with clause 7.5 (iv) of the Performance Management Policy. The score of 4 should not be seen as the only criterion to justify payment of performance bonus. The employee is in terms of clause 7.5(iv) of the Performance Management Policy, required to keep evidence of achievements of the agreed objectives.
62. It was Linkeld Jones' unchallenged testimony that the means of verification on pages 22 to 59 of the applicant's bundle were not submitted for consideration by the moderation committee. Furthermore, Nqabeni testified that she never saw the affidavit confirming that the applicant assisted in performing maintenance duties. The applicant's decision to submit an assessment instrument with the score of 3 was her own. I agree with the respondent that the applicant did not submit enough evidence to justify the score of 4.
63. There was no evidence to justify the Applicant's testimony that she was instructed to alter the score from 4 to 3. What became evidently clear was that the applicant was requested to submit extra means of verification; which she did not.
64. Clause 7.7 (iv) of the Performance Management Policy provides: 'moderation Committee shall ensure that moderation is limited to what is presented in the assessment report'. It is therefore unfair to expect the moderation committee to consider an assessment instrument with a rating of 4 if it was not submitted by the Applicant or her supervisor, for consideration. The Moderation Committee would, in doing so, be acting ultra vires.
65. There was nothing wrong with the performance assessment instrument with the score of 3 which was voluntarily submitted by the applicant, hence payment of a notch. It was Linkeld Jones's unchallenged testimony that if the applicant was not happy about a request to submit extra means of verification, she should have escalated the matter to the next level of Management, which is the Area Court Manager. Instead of doing so, the applicant agreed with her supervisor to the score of 3.
66. However, there was something wrong with the performance assessment instrument with the score of 4, which was returned for corrections, because it was not supported by evidence nor submitted to the Moderation Committee for consideration of payment of performance bonus. Because a performance assessment instrument with the score of 4 was not submitted for consideration by the Moderation Committee, it is in my view; not a subject of consideration in determining whether the respondent committed an unfair labour practice.
67. It is therefore immaterial whether or not the applicant went an extra mile in performing her duties and whether or not she qualified for the score of 4. What is material is that the applicant submitted the instrument with a rating of 3 through which she already benefited by being awarded a notch.

68. The Applicant did not prove on a balance of probabilities that the Respondent committed an unfair labour practice when it refused to pay her performance bonus.

AWARD.

69. The Applicant's claim of unfair labour practice is dismissed.

A handwritten signature in black ink, consisting of a series of loops and a long horizontal stroke at the bottom.

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MAHASHA TM

GPSSBC PANELIST