

# **ARBITRATION AWARD**

**IN THE GENERAL PUBLIC SERVICE SECTORAL BARGAINING COUNCIL  
Held at Cape Town**

**Commissioner:** Jacques Buitendag  
**Case No.:** GPBC134/2016  
**Date of Award:** 24 May 2017

**In the matter between:**

**NEHAWU obo P R Zako**

**Applicant**

**And**

**Department of Agriculture, Forestry and Fisheries**

**Respondent**

**Applicant's representative:** M Mdledle

**Email:** msimelelomdledle@gmail.com

**Respondent's representative:** A Frans

**Email:** ArthurF@daff.gov.za

## **PARTICULARS OF PROCEEDINGS AND REPRESENTATION**

1. An arbitration hearing under the auspice of the GPSSPC took place on 27 February- and 2 May 2017 at the premises of the Respondent, the Department of Agriculture, Forestry and Fisheries. The proceedings were digitally recorded.
2. Mr. M. Mdledle, a shop steward of NEHAWU, represented the Applicant, Mr. P R Zako. Mr. A. Frans represented the Respondent. The parties were allowed to submit written closing arguments. Mr. Frans submitted his arguments on 8 May 2017 and I received Mr. Mdledle' s arguments on 11 May 2017. I consider 11 May 2017 being the last day of the arbitration.

## **THE ISSUE IN DISPUTE**

3. The issue to determine is whether the Respondent committed an unfair labour practice in relation to benefits.

## **BACKGROUND TO THE ISSUE**

4. The Applicant, Mr. Zako, is employed by the Respondent as a Control Marine Conservation Inspector on salary level 9 which is equivalent to an Assistant Director position. The Respondent has an *Employee Performance Management and Development System (EPMDS)* in place. In terms of this policy each employee must have a performance work plan which links his/her job description to Key Performance Areas (KRA's), outputs and activities for each annual assessment cycle. There was no work plan in place for the Applicant in respect of the 2014/15 assessment cycle. In order for an employee to qualify for performance awards a work plan and 2 bi-annual performance reviews must be submitted to Human Resources. Although no work plan or properly constituted KRA's were in place for the Applicant, his performance was nevertheless assessed by an assessment committee. He received a score of 133% for the 2014/15 performance cycle but did not receive a merit award and/or pay progression. He was informed by Mr. Frans, the Respondent's Acting Director: Integrated Human Resource Management, that the assessment committee has erred in assessing his performance.
5. The Applicant claims that the Respondent has acted unfairly against him in relation to the 2014/15 performance cycle. He claims that he is his entitled to a merit award and pay progression. The Respondent claims that no unfair labour practice was committed.

## **SUMMARY OF EVIDENCE AND ARGUMENT**

6. I have considered all the evidence and argument, but because section 138(7) of the LRA requires an award to be issued with brief reasons for the findings, I shall only refer to the evidence and argument that I regard as necessary to substantiate my findings in the determination of the dispute.

### **The Applicant's case**

7. **Mr. Puka Roland Zako** testified under oath. He was appointed in 2001 in the Chief Directorate Monitoring, Control & Surveillance. The Applicant testified he had a signed work plan in 2013 when he was based in Port Elizabeth. An Acting Director, Ms. Savel, was appointed in 2014. There were two regional managers at the time, Ms. Augustus and Mr. Mdwala. Mr. Zako testified that reported to Ms. Augustus. In a meeting between Ms. Savel, Ms. Augustus and himself it was decided that they, Mr. Zako and Ms. Augustus must develop a more suitable work plan for him. Ms. Augustus however refused to supervise him. Mr. Zako testified about numerous attempts made to meet with his supervisor. It came to naught. No work plan was developed and he was also not supplied with KRA's. In October 2014 a meeting was held between Ms. Savel, Mr. Frans, Ms. Augustus and himself in respect of the development of a work plan. The meeting did not resolve the matter between him and his supervisor and a work plan was never developed.
8. Mr. Zako testified that bi-annual performance assessment reports were submitted for assessments to an assessment committee. As he had no work plan he listed his work / achievements for each month. He was evaluated and achieved a score of 133% for both assessments which entitled him to a merit B bonus.
9. Mr. Zako acknowledged that he has no an automatic right to a merit award and pay progression. Mr. Zako was referred to a memorandum dated 16 May 2014 in which it is inter alia stipulated that in terms of the EPMS each employee must at the start of the financial year (1 April) complete a work plan that links the job description with KRA outputs and activities and that the individual work plans must be captured on PERSAL before 30 June. The memorandum also states that employees should note that the non-submission of a work plan will disqualify them from any financial incentives that is provided for in the DPSA Directive on performance incentives to employees. Mr. Zako was also referred to a memorandum dated 2 June 2014 which stipulates that signed performance work plans and personal development plans must be submitted to the relevant HR components on or before 10 June 2014 and that non-compliance with the EPMS will lead to an employee forfeiting any financial incentives that are derived from the policy. Mr. Zako testified that it was not his responsibility to come up with a work plan and that he never stopped asking for a work plan.

## **The Respondent's case**

10. **Ms. Lunga Madolo** testified under oath. She is an HR Officer and work with the EPMDS. She testified that an employee can only qualify for a pay progression and merit award if a signed work plan is in place. She testified that it is both the supervisor and employee's responsibility to complete a work plan. Ms. Madolo referred to Mr. Zako's performance assessment report where the KRA's only refers to months. She testified that a month does not constitute KRA's and that no weights can be attached thereto.
11. Ms. Madolo was referred to par. 7.3 of the EPMDS which inter alia stipulates that the supervisor must develop and ensure the implementation of the performance work plan. She agreed that is unfair if an employee is not supplied with a work plan.

## **Closing arguments**

12. The written closing arguments of both parties are part of the record. I have taken it into account. I don't find it necessary to repeat it here in full. I will briefly summarize it. If I do not refer to a particular argument, it does not mean that I have not consider it.
13. Mr. Mdledle referred to the memorandum of Mr. Frans which he wrote to the Applicant and wherein it was indicated that his colleagues from head office had an independent review of the Applicant's performance documentation in respect of the 2014/2015 EPMDS cycle. In the memorandum it was highlighted that no signed work plan in respect of the 2014/2015 cycle was submitted to HR; and although weights of 20% have been attached to the KRA's there were no properly constituted KRA's. The memorandum indicated that even though the Applicant's performance was discussed at a properly constituted assessment committee, the assessment committee had erred by assessing the Applicant's performance given that there was no work plan in place and no properly constituted KRA's. Mr. Mdledle argued that it was "procedurally unfair" towards the Applicant as Mr. Frans and his colleagues acted outside the provisions of the EPMDS as nowhere in the EPMDS they are given powers to overturn the recommendations of an assessment committee.
14. He also referred paragraph 7.3.1 of the EPMDS which directs that the supervisor must develop and ensure the implementation of the performance work plan for each employee under his/her supervision. Mr. Mdledle argues that the then supervisor of the Applicant, Ms. Augustus, has failed to develop the performance work plan of the Applicant for the 2014/15 financial year. He submitted that the responsibility of the supervisor to develop the performance work plan for the Applicant cannot be shifted to the the Applicant. The Respondent must take responsibility of the supervisor's failure and not punish the Applicant.

15. Mr. Mdledle submitted that the Applicant has done everything within his powers to get his 2014/15 work plan developed but due to lack of commitment from his supervisor all attempts made by the Applicant remain futile.
16. Mr. Mdledle submitted that regard must be had to the testimony of the Respondent's witness and the fact that the assessment committee recommended a score of 133% which in terms of the EPMDS means that the Applicant qualified for a category B merit award. Accordingly, the Applicant qualified for a 10% merit incentive of approximately R29 600.00 of his annual salary of approximately R296 000.00. Furthermore, the Applicant qualified a pay progression to one (1) notch above his salary notch of R296 000.00 per annum. Consequently, the Applicant should have been progressed to a salary notch of approximately R316 000.00 per annum.
17. Mr. Frans submitted that the Applicant was at pains to point out that he tried to meet with his supervisor to finalise his work plan and whilst the policy does say that a supervisor must draw up a work plan for an employee it is common cause that this cannot be imposed on any employee and is therefore more of a consultative process where parties try to reach consensus on what would constitute the KRA's. The Applicant agreed that the KRA's which was constructed on the assessment reports is not aligned to what the policy says. The circulars made it clear that any non-compliance with the EPMDS will lead to a situation that an employee will not be able to receive any financial incentives that flow from the EPMDS. Further to this, the letter issued by HR following a concern raised by the Applicant correctly sums up the situation. Not only did the Applicant not submit his work plan which was supposed to be submitted to HR by end April but also the KRA's in his 2 bi-annual reviews were not properly constituted. The assessment committee had erred in reviewing the performance of the Applicant when clearly his bi-annual reviews did not conform to the policy.
18. Mr. Frans argues that Mr. Zako has not made out a case that he was treated unfairly. There is no automatic right for any employee to receive a pay progression or merit bonus and there was no omission on the part of the Respondent when it decided to not implement any financial incentive to the Applicant due to the fact that there was no work plan submitted for him and secondly for not having properly constituted KRA's.

## **ANALYSES OF EVIDENCE AND ARGUMENT**

19. Section 186(2)(a) of the Labour Relations Act, 66 of 1995, defines an unfair labour practise as any unfair act or omission that arises between an employer and an employee involving inter alia the conduct by the employer relating to benefits.
20. In *Appolo Tyres (Pty) Ltd v CCMA and others* [2013] 5 BLLR 434 (LAC) Musi AJA said the following at par 50: *"In my view the better approach would be to interpret the term benefit to include a right or entitlement with which an employee is entitled (ex contractu or ex lege including rights judicially created) as well as an advantage or privilege which has been offered or granted to an employee in terms of a policy or practise subject to the employer's discretion. In my judgement "benefit" in section 186(2)(a) of the Act means existing advantages or privileges to which an employee is entitled as a right or granted in terms of a policy or practice subject to the employer's discretion. In as far as Hospersa, GS4 Security and Scheepers postulate a different approach they are, with respect, wrong"*.
21. It is apparent that performance awards in terms of the Respondent's EPMDS falls squarely within the definition of a benefit for the purposes of section 186(2)(a) of the LRA. It is trite that the onus is on the Applicant to prove unfair conduct on the part of the Respondent in relation to benefits.
22. I will start by briefly explaining the Respondent's EPMDS. The EPMDS applies to employees employed by the Respondent on salary level 1 – 12. The aims of the EPMDS are to optimize an employee's output in terms of quality, quantity and thereby improve the Respondent's overall performance and service delivery. In terms of the EPMDS each employee must have an agreed performance work plan that links the job description to KRA's, outputs and activities. The employer and employee enters into a performance agreement in which the duties and responsibilities (KRA's) are defined. The EPMDS performance cycle starts on 1 April of a year and ends on 31 March of the following year. Formal assessments are conducted on a bi-annual basis. Employees must sign performance work plans and personal development plans for each performance cycle before 30 April of each year. Employees are assessed against the agreed performance standards. It is the responsibility of the supervisors/managers to continuously monitor and assess the work of employees and have review/feedback sessions with employees which include two bi-annual assessments. During these sessions a supervisor must inter alia develop, discuss and revise the employee's performance work plan and where necessary initiate possible amendments to the work plan. The supervisor must then submit bi-annual assessment reports to an assessment committee. Good and outstanding performance is rewarded with a one notch pay progression and employees who perform exceptional is rewarded by means of a merit award. To achieve a merit award an employee must achieve a final score of at least 130%.

23. Mr. Mdledle argued that Mr. Frans, the Acting Director Integrated Human Resource Management and his colleagues have acted outside the provisions of the EPMDS as they have no powers to overturn the recommendations of an assessment committee. I do however agree with Mr. Frans that the assessment committee had erred in terms of the EPMDS in reviewing the performance of the Applicant when his bi-annual assessment reviews did not conform to the provisions of the EPMDS. The assessment committee is, in terms of the EPMDS tasked to evaluate the assessment scores of employees awarded against *set performance standards* (my emphasis). It is inexplicable how the assessment committee could have evaluated the Applicant's performance as there were no performance work plan or KRA's in place, thus no set performance standards, for the 2014/15 financial year. I agree with Ms. Madolo that a month of year cannot be regarded as a KRA. It is evident from reading the EPMDS that an employee does not have an automatic right to performance awards and the memoranda dated 16 May 2014 and 2 June 2014 make it clear that the non-submission of a work plan disqualifies an employee from any financial incentives that is provided for in the EPMDS. The Applicant prays that I grant him a category B merit award and a pay progression as relief but I cannot on the available evidence determine that the Applicant has indeed qualified for such awards.
24. The matter does however not end here. In terms of section 186(2)(a) of LRA *any unfair act or omission* by an employer relating to benefits will constitute an unfair labour practise (my emphasis). Mr. Frans submitted that a work plan cannot be imposed on an employee and that the development of a work plan is more of a consultative process where parties try to reach consensus on what would constitute the KRA's. This may be true, but the tail can also not wag the dog. An employer must determine the responsibilities and duties of an employee and not the other way round. It is not for an employee to determine what his or her KRA's must be. In this regard Mr. Mdledle has also pointed out that paragraph 7.3.1 of the EPMDS provides that the supervisor must inter alia develop and ensure the implementation of the performance work plan for each employee under his/her supervision. I agree with Mr. Mdledle that the responsibility of the Applicant's then supervisor to have developed a performance work plan cannot be shifted to the Applicant.
25. There was no evidence that the Applicant somehow obstructed the development of a work plan. If this has been the case, I would have had less sympathy for the Applicant's case. It is however evident from the Applicant's testimony that he has made several attempts to obtain a work plan for the 2014/15 financial year but that his efforts were to no avail. By omitting to provide the Applicant with a work plan and properly constituted KRA's for the 2014/15 financial year the Respondent has in fact deprived the Applicant of an opportunity to be awarded any financial benefit derived from the EPMDS. I find that the Respondent has indeed committed an unfair labour practice in relation to benefits because of the omission to provide the

Applicant with a work plan and proper KRA's. On 1 April 2014 the Applicant earned R296100 per annum. I consider compensation as a solatium in the amount of R49350.00 (equal to two months' remuneration) to be just and equitable.

### **AWARD**

1. The Applicant has discharged the onus of proving that the Respondent committed an unfair labour practice relating to benefits. I order the Respondent, the Department of Agriculture, Forestry and Fisheries to pay Forty-Nine Thousand Three Hundred and Fifty Rand to the Applicant, Mr. P R Zako.
2. The Respondent must pay the total amount of Forty-Nine Thousand Three Hundred and Fifty Rand to the Applicant before close of business on 25 June 2017.
3. Interest will accrue on the compensation amount from 26 June 2017 in accordance with section 143(2) of the LRA.
4. I make no order as to cost.



GPSSBC Panellist: Jacques Buitendag