



ARBITRATION AWARD

Panelist: John Cheere Robertson
Case No.: PSCBC143-22/23
Date of Award: 09 January 2023

In the Matter between:

VB Ngcobo
(Applicant)

And

Department of Health: KZN (DoH KZN)
(1st Respondent)

Department of Public Service & Administration
(2nd Respondent)

Applicant's representative: Ms W Zama, Zama Attorneys
Applicants' address: Suite 603, Delta Towers
300 Anton Lembede Street
Durban, 4001
Telephone: 031 065 051
Email: info@zamaattorneys.co.za

1st Respondent's representative: Mr M Lembethe
1st Respondents address:
Email: mzovukile.lembethe@kznhealth.gov.za

2nd Respondent's representative: Mr H Nkupho
2nd Respondents address:
Email: hloniphani.nkupho@dpsa.gov.za

Details of hearing and representation

- 1 This matter was set down for arbitration under the auspices of the Public Service Coordinating Bargaining Council (PSCBC) in terms of section 24(5) of the Labour Relations Act 66 of 1995 (LRA)¹ on 22 November 2022 via the zoom digital platform. Ms W Zama (Zama Attorneys), represented Mr VB Ngcobo (applicant). Mr M Lembethe, represented the Department of Health Kwa-Zulu Natal (DoH KZN) (1st respondent). Mr H Nkupho represented the Department of Public Service and Administration (DPSA) (2nd respondent). The proceedings were digitally recorded. The parties submitted written closing arguments by 30 November 2022. I requested an extension within which to submit my award.

Issue in dispute

- 2 The issue to be determined is whether the respondents correctly interpreted or applied PSCBC Resolution 1/2012 (R 1/2012) read with PSCBC Resolution 3/2009 (R 3/2009) and dependent thereon-appropriate relief.

Background and survey of evidence

- 3 The parties agreed on a statement of agreed facts as follows:
 - 3.1 *The applicant party is Valerie Balindile Ngcobo. The applicant party referred a dispute concerning the interpretation or application of R 1/2012 / R 3/2009 (in particular Par. 3.6.3.2 of R 3/2009 & Par. 18.1 of R 1/2012) in respect of the applicant's dispute with the Department of Health KZN (1st respondent). The Department of Public Service & Administration (2nd respondent) has been joined as a party to these proceedings.*
 - 3.2 *The applicant is employed by the 1st respondent, namely the Department of Health KZN*
 - 3.3 *The applicant's employment details and post are set out below:*
 - i. *The applicant is:* Valerie Balindile Ngcobo
 - ii. *PERSAL number:* 60771585
 - iii. *Current Salary Level:* 11
 - iv. *Job Title:* Deputy Director; Human Resources
Prince Mshiyeni Memorial Hospital
Umlazi, Durban
 - v. *Salary grade level of this post:* Graded during 2002 at salary level 12.
Regraded and verified by MPSA at salary level 11 as of 20 11 2017. See below.

¹Read with Par. 4.1(c) of the Dispute Resolution Procedures, Annexure A of the Constitution of the PSCBC

- vi. The DoH KZN, job evaluated the post in question at Job weight of 698.28, level 12 (20 01 2011) (A50)
- vii. The post was advertised in 2015 at salary level 11. The applicant applied, was successful and appointed to the post at salary level 11 with effect from 01 09 2015
- viii. Date of Appointment to post in respect of which the dispute arises: 01 09 2015
- ix. Job evaluation / grading was done in respect of this post during 2002 and job graded at level 12. The post was later regraded recommended and approved by MPSA (as required from 01 08 2012 D25 -26) at level 11, on 20 11 2017.
- x. The applicant has completed 7 years in the post in question

3.4 The contents of the documents handed up Exhibit A1-A60, D1-D28 & R1-R45 are not in dispute are relevant and admissible and are admitted as evidence in this arbitration as to form and content and require no further proof as to authenticity, delivery and receipt.

Issue for determination

3.5 Whether the respondents correctly interpreted or applied Clause 18.1 of PSCBC Resolution 1/2012 read with clause 3.6.3.2 or PSCBC Resolution 3/2009 with regard to the upgrade of the applicant's salary from level 11–12 (Deputy Director), and dependent thereon appropriate relief.

The Parties Respective Cases

- 3.6 The applicant's case is to the effect that her letter of appointment, (R4) provided for the rectification of any over or underpayments on discovery. The applicant discovered that her appointment should be at salary level 12 during early 2022, lodged a grievance. The grievance was not resolved and the applicant subsequently referred a dispute to the PSCBC.
- 3.7 It is the applicants case that in terms of Clause 18.1 of Resolution 1/2012, the 1st respondent was required, on the date of implementation of R 1/2012, (31 07 2012 / 01 08 2012), to upgrade the applicant to salary level 12
- 3.8 The respondents argue that R 1/2012, applies only to those employees who were appointed prior to the implementation of R 1/2012. Further such appointees, could only be upgraded to salary level 12, subject to their posts having been graded and verified by the MPSA at salary level 12,

Relief

- 3.9 The applicant seeks as relief that the arbitrator find that:
- 3.10 The respondents did not interpret or apply 18.1 of Resolution 1/2012 correctly in not appointing the applicant to Salary level 12 with effect from 01 09 2015

3.11 Respondent appoints and remunerate applicant on Salary level 12 with effect from 01 09 2015

3.12 **The Respondents** seek that the status quo ante remains and the applicant's case be dismissed.

The applicants' submissions

- 4 The applicant was appointed at salary level 11 on 1 September 2015. She argues to the effect that during early 2022 she became aware that her post was graded at salary level 12. The offer of employment which she accepted contains a clause stating that any overpayment/underpayment erroneously effected will be recovered or rectified when discovered. Clause 18.1 of R 1/2012 entitles her to be placed on salary level 12 in that the post was job evaluated in March 2002 at salary level 12. The applicant refers to various arbitration awards in support of her contention that clause 18.1 of R 1/2012 applies to her appointment made on 01 September 2015 and that given that the post was graded at salary level 12, at the time of her appointment, she should have been appointed on salary level 12. The applicant also refers to the Labour Court judgement in *Makgoba MM and others v MEC for Health Limpopo and 3 others* (15 November 2021) (LC) case number JR1806/17 in support of her claim that clause 18.1 applies to her appointment.

The 1st respondent's submissions

- 5 The 1st respondent, relying on, DPSA circular 16/P dated 25 February 2013, the provisions of clause 18.1 of R 1/2012 and clause 3.6.3.2 of R 3/2009 argued that the resolutions as interpreted, applied only to employees who were appointed during the period 1 July 2020 2010 and 31 July 2012, that is, the period between the coming into operation of R 3/2009. In support of his contention the respondent relied on the case of *Yende v Public Service Coordinating Bargaining Council (PSCBC) and others* (C690/2018) [2021] ZALCCT 36 (2 June 2021) [28]-[31]. In the circumstances the applicant having been appointed on 1 September 2015, did not fall within the ambit of employees covered by clause 18.1 of R 1/2012.

The 2nd respondent's submissions

- 6 The 2nd respondent argued to the effect that the interpretation of a collective agreement involves the interpretation of the resolution/s and not selective provisions, regard should be had to the full context. To rely solely on the provisions of paragraph 18.1 of R 1/2012 was incorrect. The provision (clause 18.1 of R 1/2012) was not meant

to operate perpetually, but for the period 1 July 2010 to 31 July 2012 that is, the dates on which clause 3.6.3.2 of R 3/2009 and R 1/2012 came into effect. Clause 3.6.3.2 of R 3/2009 came into effect on 01 July 2009 and was amended via clause 18.1 of R 1/2012 on 31 July 2012. R 3/2009 provides that assistant directors and deputy directors be appointed on salary level 9 or 11 respectively, with effect from 1 July 2010. The applicant was not appointed prior to R 1/2012 and was appointed after 1 August 2012 in respect of a post advertised at level 11, which she accepted. In the circumstances, the 2nd respondent argued that the 1st respondent had correctly interpreted and implemented R 1/2012.

Analysis of evidence and argument

- 7 The applicant has referred a dispute relating to the interpretation or application of PSCBC Resolution 1/2012 and 3/2009 and I am required to determine whether the provisions, as interpreted apply to the applicant's situation.
- 8 Where a dispute exists as to the interpretation or application of a collective agreement an arbitrator is enjoined to adopt a practical and purposive² approach to the interpretation of the collective agreement in line with the purpose of and primary objectives of the LRA³, *taking into account the text used in the light of ordinary rules of grammar and syntax; the context in which the provision appears, the apparent purpose to which it is directed and the material known to those responsible for its production*⁴. Our courts have adopted a purposive approach to the interpretation of statutes including the LRA and collective agreements⁵.

² See Hogg, P.W. 1992. *Constitutional Law of Canada*. 3rd edition. 809-815 to the effect that a purposive approach, unlike a generous broad or liberal approach, which may overshoot the meaning of a statute or in this case a collective agreement, may be helpful, but only so long as it is subordinate to purpose. A purposive approach will normally narrow the scope of meaning or a right to include activity that comes within that purpose and exclude activity that does not. This is echoed in the provisions of Section 1 & Section 3 of the Labour Relations Act, 66 of 1995.

³ *Assign Services (Pty) Ltd v NUMSA et al* (2018) ILJ 1911 (CC) [42] *The purpose of s 198A must be contextualized within the right to fair labour practices in s 23 of the Constitution and the purpose of the LRA as a whole* (As set out in s 1 of the LRA); *Western Cape Department of Health v Van Wyk & others* (2014) 35 ILJ 3078 (LAC) [22]. See also *Tabane v PSCBC and others* (LC) C27/15 (28 September 2017) [15]

⁴ *Natal Joint Municipal Pension Fund v Endumeni Municipality* (920/2010) [2012] ZASCA 13; [2012] 2 All SA 262 (SCA); 2012 (4) SA 593 (SCA) (16 March 2012) [18]. *SA Municipal Workers Union v SA Local Bargaining Council & others* (2012) 33 ILJ 353 (LAC) [15]. ...the language of the document falls to be construed in the light of its context and the apparent purpose to which it is directed as well as material known to those responsible for its production *DENOSA obo Du Toit & another v WC Department of Health & others* (2016) 37 ILJ 1819 (LAC). See also *CHEP South Africa (Pty) Ltd v Shardlow NO and others* [2019] JOL 40990 (LC) [19]-[20] citing *Assign Services (Pty) Ltd v NUMSA et al* (2018) ILJ 1911 (CC) [41], *Assign Services (Pty) Ltd v NUMSA et al* (2018) ILJ 1911 (CC) [41]

⁵ See *SAMWU v SALGA and others* (LAC), Case No. DA 06/09 dated 29 November 2011 [14] per Mlambo JP. *Western Cape Department of Health v Van Wyk & others* (2014) 35 ILJ 3078 (LAC) [21]-[22]. *NEHAWU v University of Cape Town and others* (2003) 24 ILJ 95 (CC) [40]-[41]

- 9 In the case of *The Natal Joint Municipal Pension Fund v Endumeni Municipality* (SCA) 2012 (4) SA 593 at [18] the SCA stated as follows:

“... Interpretation is the process of attributing meaning to the words used in a document, be it legislation some other statutory instrument, or contract, having regard to the context provided by reading the particular provision or provisions in the light of the document as a whole and the circumstances attendant upon its coming into existence. Whatever the nature of the document, consideration must be given to the language used in the light of the ordinary rules of grammar and syntax; the context in which the provision appears; the apparent purpose to which it is directed and the material known to those responsible for its production. Where more than one meaning is possible each possibility must be weighed in the light of all these factors. The process is objective not subjective. A sensible meaning is to be preferred to one that leads to insensible or unbusinesslike results or undermines the apparent purpose of the document. Judges must be alert to, and guard against, the temptation to substitute what they regard as reasonable, sensible or businesslike for the words actually used. To do so in regard to a statute or statutory instrument is to cross the divide between interpretation and legislation. In a contractual context, it is to make a contract for the parties other than the one that they in fact made. The inevitable point of departure is the language of the provision itself, read in context and having regard to the purpose of the provision and the background to the preparation and production of the document⁶”

- 10 The words “interpretation or application” in section 24 of the LRA should not be read disjunctively and ought to be read as being related: i.e. disputes about what an agreement means and what it is applicable to⁷. A dispute relating to interpretation of a collective agreement is where parties disagree over the meaning of the collective agreement or a particular provision thereof⁸. Typically the one party will assert that the other has incorrectly interpreted the meaning. A dispute about the application of a collective agreement requires, at a minimum, a difference of opinion about whether it can be invoked⁹, namely whether the agreement applies to a given situation at all or in a particular set of facts or circumstances (i.e. whether the activity which gives rise to the controversy is covered by the collective agreement¹⁰) once “application” is proven, the referring party can procure more than just a declaratory order, and can obtain, pursuant to such finding, substantive relief¹¹.

⁶ See *Bonfiglioli SA (Pty) Ltd v MW Panaino* (LAC) Case No. CA 19/13 per Musi J dated 23 October 2014, [18] citing with approval, the position set out by the SCA in *Natal Joint Municipal Pension Fund v Endumeni Municipality* 2012 (4) SA 593 SCA at para [18]. See also *PSA and HC Gouvea v PSCBC, Commissioner R Lyster NO and Department of Land Affairs* (D751/09) [2013] ZALCD at [17] where Cele J cites with approval the approach used in *Natal Joint Municipal Pension Fund v Endumeni Municipality* supra

⁷ *HOSPERSA obo Tshambi & Department of Health*: KZN Case no. DA1/2015 24 March 2016 (LAC) [17] & [25]

⁸ *HOSPERSA obo Tshambi & Department of Health*: KZN Case no. DA1/2015 24 March 2016 (LAC) [17]

⁹ *HOSPERSA obo Tshambi & Department of Health*: KZN Case no. DA1/2015 24 March 2016 (LAC) [17]

¹⁰ *HOSPERSA obo Tshambi & Department of Health*: KZN Case no. DA1/2015 24 March 2016 (LAC) [29]

¹¹ *HOSPERSA obo Tshambi & Department of Health*: KZN Case no. DA1/2015 24 March 2016 (LAC) [22], see also Section 138(9) Labour Relations Act, 66 OF 1995

- 11 Where a collective agreement has been applied correctly, the Bargaining Council does not have jurisdiction to decide whether this is unfair¹². Where the agreement is not applicable to the facts of the case in question, self-evidently, it cannot find application.
- 12 The applicant referred to several awards and to the decision in the Labour Court matter of *Makgoba MM and others v MEC for Health Limpopo and 3 others* (15 November 2021) (LC) case number JR1806/17 (*Makgoba*) in support of her case. In *Makgoba* the applicants in question relied on the determination in the PSCBC award PSCB88–13/14 dated 6 June 2014. The Labour Court referred to the issue for determination in PSCB88–13/14 described by the arbitrator as follows: - whether clause 18.1 of PSCBC Resolution 1 of 2012 allows for a staggered or phased implementation or implementation in a manner that differentiates between the function staff and corporate staff. The arbitrator answered the question and concluded that:
- o Clause 18.1 of resolution 1 of 2012 should not be effected in a staged and / or staggered approach or in a manner that differentiates between categories of employees especially core and corporate service employees¹³.
 - o The respondent must apply the clause indiscriminately to all the employees whose posts on 1 August 2012 were graded on salary level 10 and 12 and to appoint and remunerate them accordingly on salary levels 10 and 12 respectively¹⁴.
- 13 In this matter (*Makgoba*) the applicants sought that the respondent complies with the award in PSCB88–13/14, in so far as they were concerned. At paragraph 7, the Labour Court stated as follows: *"As I understand them, they are arguing that their posts are graded on salary level 10 and 12 but the Department is paying them on a lower salary level. For them to be covered by the award, there is only one requirement/condition they have to meet, namely, that their posts should have been graded on salary levels 10 and 12 as at 01 August 2012."*

¹² *Department of the Premier, Western Cape v Platjies NO & others* (2013) 34 ILJ 2876 (LC) per Steenkamp J Par [46]-[47]

¹³ Paragraph 63 of PSCBC award PSCB88–13/14 dated 6 June 2014

¹⁴ Paragraph 64 of PSCBC award 88–13/14 dated 6 June 2014. At paragraph 45 of the award the arbitrator records as follows: *"As far as I could establish there is no dispute over or about the meaning of any provision in the clause nor is there a dispute about its application to a particular category of employees or set of circumstances. The parties are all ad idem that the provision is applicable to employees in the public service whose posts were graded on salary levels 10 and 12 as on 1 August 2012"*. Emphasis added

- 14 At paragraph 8 of the judgment, the Labour Court with reference to documents handed up, in particular, *“a memorandum from Organisational Design and Effective Services dated 10 November 2014 and approved by the Head of the Department on 20 November 2014. The memorandum states under background that the department had prior to 01 July 2010 and 31 July 2012 subjected several jobs to the evaluation process. These posts were presented to the Job Evaluation Panel and consequently recommended at various salary levels as determined by the EQUATE job weight ranges. Submissions were then forwarded to the HOD and consequently approved by the HOD for implementation.”*¹⁵ And that *“[t]he Head of the Department approved the recommendations, effectively accepting the outcome of the evaluation process conducted between 09 July 2010 and 31 July 2012”*¹⁶. In the circumstances the Labour Court granted the applicants the relief they sought.
- 15 That the posts should have been graded on salary levels 10 and 12, within the period 1 July 2010 to 31 July 2012 is in line with the meaning of clause 18.1 of R 1/2012. However, whether or not the applicants / employees in question were appointed during the period 1 July 2010 to 31 July 2012, (i.e. the implementation date¹⁷ of clause 3.6.3.2 of R 3/2009 and the date that R 1/2012 came into effect, the operative period) is not stated in the award. In the instant matter the applicant was appointed after 31 July 2012 on 1 September 2015. In the circumstances, the case of Mokgoba is not on all fours with that of the applicant. Both parties referred to various awards. Arbitration awards are persuasive in nature and not binding. I have perused them and taken note of their respective determinations. In so far as the various awards differ from my reasoning, set out below, I respectfully differ.
- 16 In so far as the applicant may rely on the argument that clause 18.1 of R 1/2012 should not be effected in a staged or staggered approach or in a manner that differentiates between categories of employees, also referred to in *Makgoba*, which has now been confirmed by the Labour Court¹⁸, this does not arise. This is so, because

¹⁵ Paragraph 8 of *Makgoba MM and others v MEC for Health Limpopo and 3 others* (15 November 2021) (LC) case number JR1806/17

¹⁶ Paragraph 9 of *Makgoba MM and others v MEC for Health Limpopo and 3 others* (15 November 2021) (LC) case number JR1806/17

¹⁷ See clause 5.1 if resolution 3/2009.

¹⁸ *Makgoba MM and others v MEC for Health Limpopo and 3 others* (15 November 2021) (LC) case number JR1806/17

given the applicants' circumstances, clause 18.1 of R 1/2012 read with clause 3.6.3.2 of Resolution 3/1999 does not find application, as set out below.

17 In so far as the applicant claims rectification of her contract on the basis of the clause in her offer of employment to the effect that *"any overpayment/underpayment erroneously effected will be recovered or rectified when discovered"* such claim does not fall within the interpretation or application of clause 18.1 of R 1/2012 read with R 3/2009.

18 Clause 18.1 of PSCBC R 1/2012, which is signed by the parties to the PSCBC and came into effect on **31 July 2012**, amended PSCBC R 3/2009 by providing that employees *"whose posts are graded on salary levels 10 and 12 to be appointed and remunerated on salary levels 10 and 12 respectively"*. Clause 5.1 of PSCBC R 3/2009 (R 3/2009) provides that the provisions of the agreement shall take effect from 1 April 2009, except for clauses 3.6.2 and 3.6.3, which shall take effect from 1 April 2010. Clause 3.6.3.2 provides that *"employees ... appointed as Assistant Directors and Deputy Directors shall with effect from 1 July 2010, be on salary levels 9 and 11 respectively"*. In the circumstances, the applicable period in respect of which clause 18.1 finds operation, is 1 July 2010 to 31 July 2012.

19 R 3/2009 amongst other things provides as follows:

1 **OBJECTIVE**

- 1.1 To give effect to clause 5 of Resolution 1 of 2007 by introducing a revised salary structure for all occupational categories **graded on salary levels 1-12** not covered by any Occupation Specific Dispensation (OSD)
- 1.2 To introduce a career pathing model and **grade progression** for identified salary levels.

...

3 **PARTIES TO THE COUNCIL AGREE**
Grade Progression Model

3.5 The grade progression model is based on the following principles:

- 3.5.1 **Posts are graded based on the outcome of Job Evaluation,**
- 3.5.2 Recognition of performance; and
- 3.5.3 Completed continuous years of service on a salary level irrespective of the notch

...

3.6.3 **Salary levels 9-10 and salary levels 11-12**

3.6.3.2 The commencing salary for all employees on posts not covered by any OSD as per PSCBC Resolutions 1 of 2007 and 3 of 2008, and appointed as Assistant Directors and Deputy Directors shall, **with effect from 1 July 2010, be on salary levels 9 and 11 respectively.**

...

5 **DATE OF IMPLEMENTATION**

5.1 *The provisions of this Agreement shall take effect from 1 April 2009, except for clauses 3.6.2 and 3.6.3, which shall take effect from 1 April 2010*¹⁹

(Emphasis added)

- 20 PSCBC R 3/2009 applies to salary levels 4-5; 5-6; 6-7; 7-8 and 9-10 and 11-12 with effect from 1 April 2010²⁰. Grade progression in terms of R 3/2009 was capped for employees on salary level 3, 8, and 10 and these employees cannot grade progress from salary levels 3 to 4, from salary level 8 to 9 and from salary level 10 to 11²¹.
- 21 R 3/2009 introduced a revised salary structure and salary (grade) progression model, applicable to employees on salary levels 1 to 12, who were appointed in terms of the Public Service Act, 1994 and who were not covered by the Occupation Specific Dispensations (OSD) per PSCBC Resolutions 1/2007 and 3/2008.
- 22 Clause 3.6.3.1²² provides that with effect from **1 April 2010** (salary adjusted from 01 July annually) an employee, on salary levels 9 and 11, subject to satisfactory performance assessment ratings and with 15 years' continuous service, shall grade (salary level) progress to salary level **10** and **12** respectively. (The salary levels for Assistant Director and Deputy Director are 9-10 and 11-12 respectively.)
- 23 In terms of Clause 3.6.3.2²³, the commencing salary for all employees on posts not covered by OSD, and appointed as Assistant Directors and Deputy Directors shall, with effect from **1 July 2010**, be on salary levels **9** and **11** respectively.
- 24 In the circumstances, and in accordance with the provisions of PSCBC R 3/2009, salary levels 10 and 12 were effectively done away with for purposes of appointment of Assistant Directors and Deputy Directors respectively. As from 1 July 2010 appointments could only be made in respect of Assistant Directors and Deputy Directors on salary levels 9 and 11 respectively²⁴.

¹⁹ Clause 3.6.3.2 of R 3/2009 provides that the commencing salary for employees appointed as Assistant Directors and Deputy Directors shall, with effect from 1 July 2010, be on salary levels 9 and 11 respectively

²⁰ Clauses 3.6.2.2, 3.6.3.1 & 5.1 of PSCBC Resolution 3/2009

²¹ Clause 3.6.2.3 of PSCBC Resolution 3/2009

²² PSCBC Resolution 3/2009

²³ PSCBC Resolution 3/2009

²⁴ Clause 3.6.3.2 of PSCBC Resolution 3/2009

25 The grade progression model is set out in Clause 3.5 of R 3/2009, see above and is based on the following principles:

- “3.5.1 Posts are graded based on the outcome of Job Evaluation,
- 3.5.2 Recognition of performance; and
- 3.5.3 Completed continuous years of service on a salary level irrespective of the notch”

26 The grade progression model is based *inter alia* on job evaluation in the public service. R 3/2009 does not deal with job evaluation and in fact recognises that this is one of the principles on which the grade progression model is based²⁵. Job evaluation, which includes the allocation or revision of job weight ranges in the Public Service, is vested in the Minister of the Department of Public Service and Administration (MPSA). In other words, R 3/2009 does not apply to or determine job evaluation. This is a function vested in the MPSA, exercised in terms of the Public Service Act, 1994 and the Public Service Regulations. See e.g. sections 3 (1) regarding norms and standards and section 1 as to the meaning of employment practices, in the Public Service Act, 1994²⁶ as follows:

“1 **Definitions**

In this Act, unless the context otherwise indicates-

...

“Employment Practice” includes-

- (a) recruitment procedures, advertising and selection criteria;
- (b) appointment and appointment process;
- (c) job and occupational classification and grading;**
- (d) remuneration and other conditions of service;**
- (e) job assignments;
- (f) the working environment;
- (g) work facilities;
- (h) training and development;
- (i) employee performance management system and practices;
- (j) transfer and secondment;
- (k) discipline;
- (l) management of poor performance and ill health;
- (m) termination of employment

...

3 (1) The Minister is responsible for establishing **norms and standards** relating to:

- (a) the function of the public service;
- (b) the organisational structures and establishments of departments and other organisational and governance arrangements in the public service;
- (c) the conditions of service and other employment practices for employees;**
- (d) labour relations in the public service;
- (e) health and wellness of employees;
- (f) information management in the public service;
- (g) electronic government;
- (h) integrity, ethics, conduct and anti-corruption in the public service; and

²⁵ See e.g. Clause 3.5.1 and 3.6.2.10 of PSCBC Resolution 3/2009

²⁶ See also Public Service Regulations Ch 1, Part IV, B1 & B2

- (i) *transformation, reform, innovation and any other matter to improve the effectiveness and efficiency of the public service and its service delivery to the public*
 - (2) *The Minister shall give effect to subsection (1) by making regulations, **determinations and directives**²⁷, and by performing any other acts provided for in this Act."*
- 27 On **31 July 2012** PSCBC Resolution 1/2012 (R 1/2012) came into effect²⁸. PSCBC R 1/2012, *inter alia* has as one of its objectives to amend particular PSCBC resolutions. Clause 18 headed **AMENDMENTS TO PCSCBC RESOLUTION 3 OF 2009** reads as follows:
- 18.1 *Clause 3.6.3.2 of PSCBC Resolution 3 of 2009 is hereby amended to **allow employees whose posts are graded on salary levels 10 and 12 to be appointed and remunerated on salary levels 10 and 12 respectively***
 - 18.2 *The PSCBC to commence a process of review of the current provisions of PSCBC Resolution 3 of 2009.*
- 28 In terms of Circular 16/P dated 25 February 2013 (A19-A21), an implementation directive in respect of Clause 18.1 of PSCBC R 1/2012, the MPSA directed that in respect of posts graded on salary levels 10 and 12 since the implementation of PSCBC R 3/2009 that amongst other things:
- "To ensure that the implementation of Clause 18.1 of the Resolution is done in a uniform manner, the MPSA directed in terms of PSR Chapter 1, Part I G -**"that only employees serving in posts that were graded on salary levels 10 and 12 since the implementation of Resolution 3 of 2009 up to and including 31 July 2012, be automatically absorbed into the regraded posts with effect from 1 August 2012, on condition that such posts were previously job evaluated and graded at salary levels 10 or 12 in terms of the revised job weight ranges as specified in terms of Circular 16/P dated 12 September 2011."***²⁹
- 29 In terms of Circular 4 of 2014 (16/P) dated 5 August 2014 (A22-A23), an implementation directive in respect of Clause 18.1 of R 1/2012, to be read with Circulars 16/P dated 12 September 2011 and 25 February 2013, the following is set out:

²⁷ In terms of sections 5 (6)(a), 5 (6)(b) and 5 (4)(b) of the Public Service Act, 1994, a collective agreement concluded in a bargaining council established for the whole or a particular sector in the public service, shall in respect of conditions of service of employees appointed in terms of the Public Service Act, be deemed a determination by the MPSA in terms of section 3(5). The MPSA for purposes of the proper implementation of the collective agreement, may elucidate or supplement such determination by means of a directive, provided the directive is not in conflict with or derogates from the terms of the agreement.

²⁸ Clause 25.1 provides that the agreement will come into effect on the date it enjoys majority support, this was 31 July 2012

²⁹ Paragraph 5(a)(iv) DPSA Circular 16/P dated 25 February 2013 (R86)

- "4 The MPSA has further directed the measures here-under in respect of the grading of Assistant Director (ASD) and Deputy Director (DD) jobs/posts on salary levels 9/10 and 11/12. These grading measures are meant to clarify grading processes and procedures in respect of ASD and DD posts graded on salary levels 9, 10, 11 and 12. These procedures are in line with the new Directive on co-ordination processes, which was forwarded to departments on 14 February 2014 (annexure A).
- 5 Jobs in corporate services appear transverse in all departments in the Public Service and similar jobs must be graded similarly. Departments are required to consult the MPSA on the grading of ASD and DD posts/jobs on salary levels 9, 10, 11 and 12 within corporate services (Program 1) with effect from 1 August 2012. The following principles shall apply in this regard:
- (a) The Minister directs in terms of PSCBC Resolution 1 of 2012 Clause 18.1 and as set out in Circular 16/P dated 25 February 2013 that all posts/jobs that were **graded on salary levels 10 and 12 between 1 July 2010 and 31 July 2012** and whose incumbents were **appointed on salary levels 9 and 11 be automatically upgraded to salary levels 10 and 12 respectively with effect from 1 August 2012**, subject to the availability of supporting **job evaluation results**.
 - (b) The MPSA directs in terms of Section 3. (1)(c) and 3.(2) of the Public Service Act that "Should executive authorities grade new jobs/posts or regrade existing jobs/posts within the corporate service environment at salary levels 9, 10, 11 or 12, the grades of such jobs/posts must be consulted with and approved by the MPSA before a final decision on the grade of the post is taken." This directive is applicable to posts/jobs and employees who were appointed on or after 1 August 2012.
 - (c) The Minister also directs that where job evaluation and grading process has never been conducted and where there are no records of any job evaluation being conducted in the past, such jobs/posts should be job evaluated and consulted with the MPSA and full motivation should be provided why these posts/jobs should not be regraded from a running date."
- 30 Clause 3.6.3.2 of R 3/2009 provides that the commencing salary for employees appointed as Assistant Directors and Deputy Directors shall be on salary level 9 and 11 respectively, with effect from 1 July 2010. Clause 18.1 of R 1/2012 which came into effect on 31 July 2012, amends Clause 3.6.3.2 with respect to employees whose posts are graded on salary levels 10 and 12 (who were appointed on salary levels 9 and 11) to be automatically remunerated³⁰ on salary levels 10 and 12 respectively.
- 31 Clause 18.1 of R 1/2012 must be interpreted in accordance with the objectives of R 1/2012 and the provisions of Clause 3.6.3.2 of R 3/2009, in line with the purpose / objective and context of R 3/2009. In addition and in so far as time frames are relevant, due consideration must be taken of the operative period of clause **18.1** of R 1/2012 read with clause 3.6.3.2 of R 3/2009 respectively, namely **1 July 2010 to 31 July 2012**.

³⁰ For employees qualifying in terms of clause 18.1 of R 1/2012, their salaries should be upgraded as from 1 August 2012, i.e. the date of R 1/2012.

32 I find accordingly that the provisions in question apply to employees appointed as Assistant Directors and Deputy Directors at salary levels 9 and 11 during the period 1 July 2010 to 31 July 2012 ³¹ (the operative period) and whose posts were graded on salary levels 10 and 12 respectively. The applicant was appointed as Deputy Director level 11 on 1 September 2015. In the circumstances the provisions of clause 18.1 of R 1/2012 read with R 3/2009, do not apply to the applicant, as she was appointed on 1 September 2015 and clause 18.1 cannot be of assistance to her in her claim to be placed on salary level 12.

33 The applicant has the onus to prove her case. The onus is determined on the balance of probability. In order to qualify to be appointed and remunerated on salary level 12, in terms of clause 18.1 of R 1/2012 read with clause 3.6.3.2 of R 3/2009, the applicant should have been appointed to a post at salary level 12 during the operative period namely, 1 July 2010 to 31 July 2012. The applicant was appointed at salary level 11 on 1 September 2015, i.e., outside the operative period. Accordingly the provisions of Clause 3.6.3.2 of R 3/2009 as amended by clause 18.1 of R 1/2012 do not find application in her case.

34 It follows, therefore, that unless appointed to the position of Assistant Director or Deputy Director, graded at level 11 or 12, respectively, during the period 01 July 2010 to 31 July 2012, that In order to qualify for grade (salary) progression from salary level 9 to 10 or 11 to 12, such Assistant Director or Deputy Director, in terms of R3/2009 would have to:

- o complete 15 years / 12 years continuous service³²,
- o in a post graded on the outcome of a job evaluation, and
- o obtain the necessary performance recognition

The applicant has not completed 15 years and accordingly cannot claim to be grade (salary) progressed in terms of R 3/2009 either.

35 In the circumstances I find that the 1st and 2nd respondents have not failed to apply the provisions of Clause 18.1 of R 1/2012 read with Clause 3.6.3.2 of R 3/2009, as interpreted, in failing to appoint and remunerate the applicant on salary level 12.

³¹ Support for this view can be found in *Yende v Public Service Co-ordinating Bargaining Council (PSCBC) and Others* (C 690/2018) [2021] ZALCCT 36 (2 June 2021) [11]-[20], [29]-[31], which dealt with an application for the late application for review and dealt with the arbitrator's reasoning vis a vis clause 18.1 of Resolution 1/2012 read with Resolution 3/2009. The application for condonation was dismissed on the basis of the inordinate delay, the poor explanation therefor and poor prospects of success.

³² See clause 3.5, 3.6.3.1 & 3.6.3.4.1 of R 3/2009

AWARD

- 36 The applicant, Valerie Balindile Ngcobo, has failed to prove that she is entitled to be appointed and remunerated at salary level 12, with effect from 1 August 2012, in terms of Clause 18.1 of PSCBC Resolution 1/2012 read with PSCBC Resolution 3/2009.
- 37 The provisions of clause 18.1 of PSCBC Resolution 1/2012 read with clause 3.6.3.2 of PSCBC Resolution 3/2009 do not apply to the applicant
- 38 The applicant's claim is dismissed.

A handwritten signature in black ink, appearing to be 'J.C.R.' with a stylized flourish.

John Cheere Robertson
PSCBC Panellist