



ARBITRATION AWARD

Panellist/s: Vuyiso Ngcengi

Case No.: PSCB 515 17/18

Date of Award: 16 April 2018

In the ARBITRATION between:

NEHAWU obo Masemola PK

Applicant

And

Department of Sport, Arts & Culture, Limpopo

First Respondent

Department of Public Service & Administration

Second Respondent

Union/Applicant's representative: N T Mavhunga

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2nd respondent's representative: Mabu Mokgalapa

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DETAILS OF HEARING AND REPRESENTATION

1. This is an award regarding the dispute that deals with interpretation/application of a collective agreement, Resolution 1 of 2012 (the Resolution). The award is issued under the auspices of the Public Services Co-ordinating Bargaining Council (the Council).
2. The applicant was present and he was represented by Mr NT Mavhunga (Mavhunga) from Nehawu and the 1st respondent was represented by Ms D. Makhole, whilst the 2nd respondent was represented by Mr M Mokgalapa.
3. The dispute arose in 2016 and it was referred to the Council on 12 October 2017 in terms of s 24 (2) of the Labour Relations Act of 1995 as amended (the Act) for interpretation /application of a collective agreement dispute. A certificate of non-resolution of a dispute was issued by the Council on the 13th of November 2017 and thereafter, the applicant applied for arbitration on the 14th of November 2017.
4. The dispute was then set down for arbitration on the 22nd of February 2018 the employer's premises in Polokwane. The parties agreed to argue the matter on papers. The 1st and the 2nd respondents jointly submitted one affidavit and I received the last arguments, the employee's reply on 06 April 2018.

ISSUE TO BE DECIDED

5. Whether the 1st respondent has correctly interpreted and applied clause 18.1 of Resolution 1 of 2012 or not, when it staggered or phased implementation in a manner that differentiates between the function staff and corporate staff;
6. Whether the 1st respondent has correctly interpreted and applied clause 18.1 of Resolution 1 of 2012 or not, when it included the post occupied by the applicant for consultation with the Minister in line with the 2nd respondent Circular 4 of 2014;
7. Whether the 1st respondent has correctly interpreted and applied clause 18.1 of Resolution 1 of 2012, clause 3.5 (3.5.3) and clause 6 (6.1) and (6.2) of Resolution 3 of 2009 respectively or not, when it downgraded the post of Manager HOD Support to level 11 without a due process of job evaluation.
8. The applicant seeks that the following should be made as his relief, that:
 - (a) If Circular 4 of 2014 is found to be contravening s 5(4) of the Public Service Act, the 1st respondent must grade the post according to its available job evaluation outcome without consultation with the 2nd respondent.
 - (b) Clause 18.1 of Resolution 1 of 2012; clause 3.5 (3.5.1) and clause 6 (6.1) and (6.2) of PSCBC resolution 3 of 2009 respectively do not require the down grading of the post of Manager HoD Support to level 11 without a due process of job evaluation and that the post be re-graded to level 12 with retrospective effect from 1 August 2012 for purposes of its implementation.

BACKGROUND TO THE ISSUE

9. The applicant was appointed on the 1st of April 2015 as Manager – Head of Department Support (HoD) services on salary level 11. The position the applicant occupied was job evaluated and graded on post level 12 with effect from the 17th of August 2007.
10. The applicant firstly brought the matter to the attention of the 1st respondent on the 2nd of October 2015, and that was followed by a series of correspondences with the last one being on the 15th of February 2018 in which the 1st and the 2nd respondent indicated that they are at an advanced stage in developing generic job descriptions and grading levels for support staff in the offices of the Executive Authorities amongst others and therefore the incumbent of these posts should be kept on the current grading levels pending the finalization of the process alluded to above

SURVEY OF EVIDENCE AND ARGUMENT

The employee through his union argues as follows:-

11. It is my interpretation that should the parties in the Council have intended to differentiate or discriminate against certain category of employees, as far as the Resolution clause 18.1 is concerned, such would have been expressed in particular and specific terms with the Resolution.
12. Clause 18.1 of the Resolution is therefore couched in a clear and unambiguous terms and does not distinguish between any categories of employees. The correct interpretation is that which accords with the Act which, inter alia, promotes labour peace in the workplace and that it would not have been the intention of parties to the agreement to create categories of employees or discriminating against others, as this will be tantamount to disturbing labour peace.
13. Whilst the 2nd respondent is empowered by section 5(1)(2)(3) the Public Service Act, 1994 as amended (the PSA) to make any determination, when issuing any directive, s 5(4) of the PSA provides that any act by functionary in terms of the PSA may not be contrary to the provisions of – *(a) "any collective agreement contemplated in terms of 15 (i) of schedule 7 of the Act, or (b) any collective agreement concluded by the bargaining council established in terms of the PSA for the Public Service as a whole or for a particular sector in the public service."*
14. Thus any act in terms of s 5 (1)(2)(3) of the PSA is invalidated by s 5(4) of the same, should such an act as provided for, contravene the latter provision.
15. Thus circular 4 of 2014 on implementation of the amendment to Resolution 3 of 2009 and the grading of jobs / posts on salary levels 9/10 and 11/12 provides for differentiation between categories of employees stated as core and corporate service employees for the purpose of implementation of clause 18.1 of the Resolution, which is the direct contravention to provisions of s 5(4)(a) and (b) of the PSA and a misinterpretation or rather an amendment to the resolution itself.
16. I hold that clause 18.1 of the Resolution applies to all categories of employees and thus failure by the 1st respondent to re-grade/re-evaluate the post of Manager HoD Support services since August 2007

and the availability of job evaluation outcomes effective from August 2007 as per job evaluation, means that the post remains at a job grading of level 12 and the current incumbent should have been appointed at level 12 as the level of such a post has not been altered by any job evaluation, even after August 2012.

17. Should Circular 4 of 2014 on implementation of the amendment to resolution 3 of 2009 and the grading of jobs/posts on salary levels 9/10 and 11/12 be found to have been consistent with clause 18.1 of the Resolution and not a direct misinterpretation and incorrect application of clause 18.1 of the Resolution, item 5 of circular 4 of 2014 provides conditions for consultation with the 2nd respondent for jobs in corporate services.
18. It was provided in 5 (a) that *"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 availability of results."*
19. Thus item 5(b) and (c) respectively provides that (a) "should executive authorities grade new jobs/posts or re-grade existing jobs within the corporate services environment at salary levels 9/10/11/12, the grade 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" and (b) "where job evaluation and grading process has never been conducted and where there are no records on 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 regarded from a running date".
20. In this instance, the post of Manager: HoD Support Services may not be subjected to consultation with the 2nd respondent as the job does not fall within the categories stated above, and therefore there was no need to consult the 2nd respondent, given that the position in dispute was last evaluated on August 2007. Noting item 7 of circular 4 of 2014, with the consideration if the grading of all posts/jobs, it should be ensured that *"due job evaluation processes be followed in terms of prescripts, including circular 16/p dated 12 September 2011 to prevent any unnecessary queries, grievances and disputes"*.
21. The 1st respondent in seeking the 2nd respondent's advice on implementation of clause 18.1 of the Resolution and consulting the 2nd respondent did not apply clause 18.1 of the Resolution correctly. The said post was supposed to have been automatically at level 12 as on August 2012.
22. Thirdly, job grading in the public service is premised on an outcome generated through application of a job evaluation and job grading system or systems determined by the Minister as provided for in the Public Service Regulations, regulation 41(a) and (b). This emphasis is also made in clause 3.5 (3.5.1) of resolution 3 of 2009 that "posts are graded based on the outcome of a job-evaluation".

23. Any provision or determination, the issuing of any directive or the taking of any decision issued through the PSA, contrary to clause 3.5 (3.5.1) or resolution 3 of 2009 that *“posts are graded based on the outcome of a job evaluation”* and which does not comply to clause 6(6.1) and (6,2) on interpretation and application of resolution 3 of 2009, by an executive functionary will be invalid and therefore this decision is invalid because section 5 (4) provides that any (as defined in section 5 (1) of the functionary in terms of the PSA may not be contrary to the provisions of – (a) *“any collective agreement contemplated in item 15 (1) of schedule 7 to the Labour Relations Act”* of (b) *“any collective agreement concluded by a bargaining council established in terms of the said Act for the Public Service as a whole or for a particular sector in the public service”*.
24. Job evaluation is a pre-requisite for job evaluation outcomes, on which basis posts in the public service are graded. This means that given that the post of a Manager: HoD Support Services’ job evaluation outcome in effect was issued in August 2007 and no job evaluation was conducted ever since, the 1st respondent downgraded the post and “thumb sucked” its grade without applying the Ministerial job evaluation and job grading system and that cannot be correct.

The 1st and the 2nd respondents responded as follows:-

25. Pre-PSCBC Resolution 3 of 2009, the Public Service Regulations (PSR) Chapter 1 part VC.1 (43)(2) PSR 2016 applied which stipulated that *“an executive authority shall determine the grade of a post to correspond with its job weight and set the commencing salary of the employees on the minimum notch of the salary range attached to the relevant grade”*. The situation was that if a post was graded, for instance, at salary level 10 or 12 the employee had to be appointed and remunerated on the relevant salary level. However, the grade of a post determined with job evaluation is not a constant that can be carried into the future ad-infinite. The PSR has several stipulations that require that the grade of a post should be considered continuously to ensure that it is justifiable and correct considering changing circumstances like new regulatory requirements.
26. The applicant was appointed on 01 April 2015 when there are new measures that are applicable on Corporate Services / Program 1 jobs/posts at salary levels 9, 10, 11 and 12. It is a requirement that this post had to be consulted first and approved by the MPSA before the grade of the post is taken (page 41-42 of bundle A). Although the applicant was appointed before the MPSA could respond to the first respondent on the grade of the post, it has subsequently responded (page 55 of bundle A), that the employee occupying this post should be kept on the current grade pending the finalization of the development of generic job descriptions and grading levels for the support staff in the Offices of the DGs/HODs and DDGs. The current grade meant salary level 11 in case of Deputy Director post as graded by the department.

27. Clause 3.6.3.2 of the Resolution stipulates that *“The commencing salaries for all employees on posts not covered by an OSD as per PSCBC Resolution 1 of 2007 and 3 of 2008, and appointed as Assistant Directors and Deputy Directors shall with effect from 01 July 2010, be on salary levels 9 and 11 respectively”*. Irrespective of whether the posts are graded on salary levels 10 or 12, the employees in the posts had to be appointed and remunerated on salary levels 9 and 11 only. The clause in effect suspended the appointment of employees on salary levels 10 and 12.
28. Clause 18.1 of Resolution 1 of 2012 stipulates that *“Clause 3.6.3.2 of 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 at salary levels 10 and 12 respectively”*. This clause amended the suspension alluded to earlier.
29. Resolution 1 of 2012 was implemented through the directives contained in Circular 16/P dated 25 February 2013 and 4 of 2014 and 5 of 2014 and in these circular the following were determined:
- (a) “To ensure that the implementation of Clause 18.1 of the Resolution (1 of 2012) is done in a uniform manner, the Minister Directed in terms of PSR Chapter 1 part 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 re-graded posts with effect from 01 August 2012, on condition that such posts were previously job evaluated and graded at salary level 10 or 12 in terms of the revised job weight ranges as specified in terms of Circular 16/P dated 12 September 2011”.
30. The implementation of Clause 18.1 was done at 01 August 2012 for employees in service on 01 August 2012 that were affected between 01 July 2010 and 31 July 2012 by the Resolution. All posts graded and employees appointed on 01 August 2012 and thereafter should be done in terms of the stipulations of the Public Service Regulations with regard to the grading of jobs and appointment of employees. The implementation measure is therefore not applicable to employees appointed on or after this date and therefore the 1st respondent applied the implementation measure with regard to Clause 18.1 of resolution 1 of 2012 correctly.
31. The departments through various workshops were advised by the DPSA that they should fill Assistant and Deputy Directors on salary levels 9 and 11 as if the PSCBC Resolution 3 of 2009 was still applicable, while a response from the MPSA on consulted posts proposed to prevent reversals of grades from higher to lower salary levels and the recovery of overpaid salaries.

ANALYSIS OF EVIDENCE AND ARGUMENT

32. Both parties submitted detailed and persuasive arguments and it is not my intention to repeat all the arguments in this award, save to say that I will summarize arguments for the purposes of the determination.

33. A dispute over the interpretation of a collective agreement exists when the parties disagree over the meaning of a particular provision and a dispute over the application of a collective agreement arises when the parties disagree over whether the agreement applies to a particular set of facts or circumstances
34. Clause 3.6.3.2 of the Resolution stipulates that *“The commencing salaries for all employees on posts not covered by an OSD as per PSCBC Resolution 1 of 2007 and 3 of 2008, and appointed as Assistant Directors and Deputy Directors shall with effect from 01 July 2010, be on salary levels 9 and 11 respectively”*.
35. Clause 18.1 of Resolution 1 of 2012 stipulates that *“Clause 3.6.3.2 of 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 at salary levels 10 and 12 respectively”*.
36. The employee submitted that a determination by the Minister serves to guide departments and must not as a matter of fact be conflicting or running counter to, not in accord with, incompatible with any collective agreement concluded by a bargaining council. The employee further submitted that posts are graded based on the outcome of a job evaluation and as a result of the 1st respondent and the 2nd respondent’s failure to evaluate the post of the employee, the results of the job evaluation conducted in August 2007 are still valid.
37. The employee further submitted that clause 18.1 of Resolution 1 of 2012 was meant to allow all employees who are occupying posts which were graded on salary levels 10 and 12 to be appointed and remunerated at salary levels 10 and 12 with effect from August 2012 and that if the Council intended to set limits and periods, this would have been expressly stated in the resolution and further that there is no evidence arising from the same resolution to the effect that job evaluation and categorization of employees are a necessary measure for proper implementation of the resolution itself. To this end, the employee argued that the categorization is in conflict with resolution 1 of 2012.
38. It is clear that clause 18.1 of resolution 1 of 2012 as it is, was meant to correct the stagnation created by clause 3.6.3.2 of Resolution 3 of 2009 stated above and it can only apply to employees that were graded on salary levels 10 and 12 since implementation of Resolution 3 of 2009 up to and including 31 July 2012. I therefore do not agree with the employee’s submission on this issue as that seeks to stretch the said clause to include “all” employees, whereas in my view, it never sought to include all employees but only the employees who were affected by clause 3.6.3.2 of resolution 3 of 2009 and it is also my view that the amendment was referring to employees in present tense, that is employees who were in service up to 31 July 2012. It is common cause that the employee was not affected by clause 3.6.3.2 and as a result, he cannot rely on resolution 1 of 2012 to argue his case as that was meant to amend clause 3.6.3.2.

39. Circular 16/P (5)(b) (on page 41-42 of bundle) as stated in paragraph 20 above, in its last sentence states that *"This Directive is applicable to posts/jobs and employees who were appointed on or after 1 August 2012"*. However, it is worth noting that this last sentence cannot in my view be divorced from clause 5 (b) and to that end, it cannot apply to the position occupied by the applicant, unless the position has been re-graded as it is common cause that this position has been in existence and it was last graded on August 2007. It is therefore my interpretation that the 1st respondent did not have to consult the 2nd respondent on this position.
40. Circular 16/P (5)(a) (page 41 of bundle) states that "in terms of Resolution 1 of 2012 clause 18.1 and as set out in Circular 16/P dated 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 01 August 2012". On interpretation of this clause, I agree with the respondents' submission as stated in paragraph 31 above, as I have already stated that the applicant cannot rely on clause 18.1 of the Resolution.
41. It is not in dispute that the employee occupies a position that was graded at level 12 in 2007. However, what I am required to determine in this instance is only the interpretation and application of the agreements and it is my view that the 1st and the 2nd respondents have correctly interpreted and applied clause 18.1 of the Resolution.
42. I do not have the powers to instruct the first respondent to grade the post occupied by the applicant, neither am I required to determine the fairness of the 1st respondent's action in appointing the applicant on grade 11, when the position is graded on level 12.

AWARD

43. The 1st respondent has incorrectly interpreted and applied clause 18.1 of Resolution 1 of 2012 when it included the post occupied by the applicant for consultation with the Minister in line with the second respondent Circular 4 of 2014.
44. The 1st and the 2nd respondents have correctly interpreted and applied clause 18.1 of Resolution 1 of 2012 and for the purposes of automatically upgrading the applicant, the application is dismissed.



Panellist/s: Vuyiso Ngcengeni

Sector: PSCBC