



ARBITRATION AWARD

Arbitrator: **Joseph Wilson Thee**

Case No: **PSCB 78-16/17**

Date of Award: **28 November 2016**

In the matter between:

NPSWU OBO MATHEKGANE & 2 OTHER

Applicants

and

DEPARTMENT OF WATER AND SANITATION

Respondent

Applicant's representative:

Union/Applicant's address:

7 Swart Drive

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Respondent's representative:

Respondent's address: 185 François Baard Street

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DETAILS OF HEARING AND REPRESENTATION

1. This is the award in the matter between Makhekgana and 2 others, the employees and the Department of Water and Sanitation, the employer.
2. For convenience sake I will refer to the employees as the Applicants and to the employer as the Respondent.
3. The arbitration hearing was held under the auspices of the PSCBC in terms of Section 24 of the Labour Relations Act, as amended ("the Act") and the award will be issued in terms of Section 138(7) of the Act.
4. The arbitration hearing took place on 12 September 2016 at the PSCBC offices in Centurion Pretoria.
5. The Applicant was present and was represented by Mr Sylvester Monnamme, an official from Public Service Association (PSA), a trade union organisation.
6. The Respondent was represented by Mr Edgar Lamola.
7. The proceedings were digitally recorded and conducted in English.
8. Both parties submitted their respective bundle of documents at the commencement of the proceedings. The documents were accepted for what it purports to be what it is except for the issues in dispute.
9. Both parties agreed to submit written Heads of Arguments by 20 September 2016. I received the arguments on 11 November 2016.

ISSUE TO BE DECIDED

10. I must decide whether the Respondent was in breach of the provisions of Resolution 1 of 2012. The Applicant sought to be upgraded from salary level 9 to 10.

BACKGROUND TO THE DISPUTE

11. It is common cause that the Applicants were employed as Consultant Administrators on a fixed term contract for the period 1 August 2012 until their contracts were terminated on 30 September 2015. The Applicants contend that they are covered by Resolution 1 of 2012 and that they are entitled to be remunerated for the period in question.

CLOSING HEADS OF ARGUMENT

THE APPLICANT'S CASE

12. Mr. Monnamme submitted the following. The Applicants were appointed on salary level 9 on 1 January 2012 when they were deployed to the Office of the Director General.
13. The Department of Public Service and Administration (DPSA) guide to Job Evaluation states that an employer is compelled to evaluate newly defined posts and jobs linked to a vacant post on grade 9 or higher with the prescribed job evaluation system before filling such posts.
14. In this instance the posts were Job Evaluated and completed in full consultation with DPSA, and a motivation was submitted as to why the posts should re-graded. The Applicants were employed by the State and is covered by the scope of the Council. Resolution 3 of 2009 provides that the Applicants to be paid irrespective whether they are contract or part time employees and ne treated on the same basis as permanent employees.
15. The Respondent's argument that the Applicants were not on the structure should be rejected taking into account the results of the Job Evaluation process. The Applicants questioned the rationale how the Respondent had determined the salary level of the Applicants.

THE RESPONDENT'S CASE

16. Mr. Lamola submitted the following. It is common cause that the Applicants were on a fixed term contract from 1 August 2012 to 30 September 2015. They were recruited to performed administrative duties for a specific project.
17. The Applicants were employed on a contract basis at the time and their post were subjected to Job Evaluation and therefore do not qualify. There is a clear difference between a post and a job. A post only has two functions while a job can be assigned too many posts. Meaning where a job had been previously evaluated, it can be applied to a newly established post whether of a temporary or permanent nature.
18. In the present case the posts / contracts in dispute were contracted to a terms and reference of the Business Process Re-engineering Committee (BPRC) appointed by the Respondent to deal with the organisational structure review project that had a beginning and an end.
19. The post of the Applicants were additional to the staff establishment in the office of the Director General's personal structure and it was never ever approved on the organisational structure due to the nature of the work demands that had clear time frames.

20. These posts were never subjected to Job Evaluation processes as the required job content were bench marked with existing jobs within the Respondent's establishment and it was never graded at salary level 10.
21. At the time the BPRC job/post of Personal Assistant was closely related to the Personal Assistant jobs. However, it was later changed to avoid confusion with the DPSA coordinated processes for Secretaries and Personal Assistants.
22. The job title is currently known as Office Manager. The content and requirement of the Office Manager matches those that have been presented in the job profile. The post level that corresponds to this was initially determined through the DPSA coordination process at salary level 9.
23. The posts in dispute were not on the approved structure as it was created on PERSAL system on a contractual basis and for the purposes of the BPRC project. The Respondent only creates approved posts on the structure on a permanent basis. Any additional staff on the Respondent's establishment post is created on PERSAL.
24. Upon termination of the Applicants contracts the posts were abolished on the PERSAL system and cease to exist. The post of Assistant Director: Business Process Re-Engineering Support never existed prior to the BPRC project, and therefore no profile or Job Evaluation related to the post of Assistant Director: Business Process Re-Engineering existed. The nature of the job was to provide support services. The jobs in the Applicant's bundle differ substantially with the job content in question. For the above reasons the Applicants posts were correctly graded as salary level 9.

ANALYSIS OF EVIDENCE AND ARGUMENT

25. I must determine whether the Respondent is in breach of Resolution 1 of 2012. Resolution 1 of 2012 in para 3.6.2.2 provides the following. *Resolution 3 of 2009 is thereby amended to allow employees whose posts are graded on salary level 10 and 12 to be appointed and remunerated on salary level 10 and 12 respectively.*
26. When interpreting collective agreements arbitrators should follow the judgement of the LAC in the matter between **North East Cape Forests v SAAPAWU & others (2) 1997 (18) ILJ971 (LAC)**. The court held that:

"A Collective Agreement in terms of the Act is not an ordinary contract and the context within which a collect agreement operates under the Act is vastly different from a commercial contract. Froneman DJP has indicated that the primary objects of the Act were better served by a "practical approach to the interpretation and application of Collective Agreements rather than by reference to purely contractual principles". This is not to say however that the ordinary principles of interpretation of contract are never appropriate when interpreting and applying collective agreements. In Northern Cape Forests the Court merely stressed that the interpreter should ask the further question whether an interpretation yielded by these principles accords with objectives of the

LRA. The fact is that a collective agreement is a written memorandum which is meant to reflect the terms and conditions to which parties have agreed at the time they concluded the agreement. The courts and arbitrators must therefore strive to give effect to that intention. Thus the Courts frequently apply the 'parole evidence' rule- that is that evidence outside the written agreement itself is not generally permissible when the words of the memorandum are clear- when interpreting collective agreements."

27. I acknowledge the written Heads of Argument as submitted by both parties. I had the opportunity to study and to consider their respective arguments.
28. Let me firstly deal with the issue of the Applicants employment status. I am not sure why the Applicants representative raised the issue in his argument about the Applicants employment status. I must assume it was not raised for argument but for the sake of emphasis as the employment status of the Applicants was never raised by the Respondent.
29. In my view the scope of the resolution are clear as it binds both the Employer and Employees including temporary of fulltime employees who were employed by the State and fall within in the registered scope of the Council
30. In my assessment the real issue to be determined is whether the Applicants were indeed appointed on salary level 9 and whether they are entitled to the grade progression to the next salary level. Interestingly enough the Applicants representative concedes that the Applicants were appointed at salary level 9.
31. He then went on to what the DPSA Guide provides about Job Evaluation especially before new posts are filed. He then contradicts himself and I became concerned as to what the Applicant's case is before me. Is his case about Job Evaluation. Perhaps the important point that is missed by the Applicants is that they were appointed in their respective positions as Assistant Directors in different portfolios. It is common cause that they were appointed on a clearly defined employment contract that governs the terms and conditions of the relationship.
32. In this regard, I perused the bundle of documents and noted that a motivational letter was forwarded to the Acting Deputy Director; Corporate Services requesting approval for the Applicants to be appointed as Assistant Director: Business Process Re-engineering Support on salary level 9 on a twelve months contract.
33. Furthermore the incumbents were identified as additional to the structure of the Acting Director General's office to assist a Team of Professionals during the Re –Engineering of the Department.
34. Generally speaking fixed term contracts are linked to a time frame and a specific event. In this case the Applicants were appointed to a clear time from and a specific event.

35. The application for approval was motivated for an appointment on salary level 9. Furthermore in terms of the conditions for appointment, Chapter 1, part V 11, B1 (b) it states, *an executive authority may, where the employment is temporary, appoint an employee under a special contract.*

36. In the light of the above facts, I make the following finding

AWARD

37. I find that:

38. The Respondent is not in breach of Resolution 1 of 2012.

39. The Applicants are not entitled to be upgraded for the period and the relief sought by the Applicants.

Panellist: **Joseph Wilson Thee**