PSCBC
PUBLIC SERVICE CO-ORDINATING BARGAINING COUNCIL

ARBITRATION AWARD

Case Number:	*PSCB196-13_14*
Senior Commission / Panellist:	*Martinus van Aarde*
Date of Award:	*26 October 2013*

In the **MATTER** between

PSA obo Members (Fleet Management)

(Applicant)

and

Department of Police, Roads & Transport

(Respondent)

Applicant's representative:	*AJ Greeff*
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1. Details of hearing / representation

The case was set down for an arbitration hearing on 4 October 2013 (09h00) at Bloemfontein, PSA Offices. Mr AJ Greeff: Official PSA represented the Applicants. Mr L Leeie: Deputy Director Labour Relations represented the Respondent (DPRT). The proceedings were digitally recorded (CD on case file with arbitrator's notes).

2. Issue(s) to be decided

This is an application in terms of the **Labour Relations Act 6/1995, section 24(2)/(5)**: interpretation/application of a collective agreement with specific reference to Resolution 3/1999 (Chapter 36, section 4): grading/appointment to post.

3. Background to dispute

3.1 The Applicants are employed by the Respondent in the Fleet Management Division. Applicants lodged a grievance on 24 April 2012 on the basis set down above. The grievance remained unresolved.

3.2 Subsequently, the Applicants lodged a formal dispute (LRA 7.11) on 18 June 2013. The case was then set down for a conciliation hearing on 13 August 2013. The dispute was declared unresolved in terms of **section 135(5)/LRA '95**. The Applicants then filed a Request for Arbitration on 13 August 2013 (the same day).

3.3 For so far as it may be relevant, I also feel obliged to record that a similar dispute was filed by NEHAWU on behalf of its own members (the conciliation proceedings had been set down on 4 October 2013). There might be other similar disputes as well.

4. Survey of Evidence / Argument

4.1 I have heard brief arguments from both parties. The parties however requested to file written (closing) submissions in support of their respective cases (see Annexure A - C respectively).

4.2 <u>Applicant's case (Annexure A/C)</u>

Applicants' arguments briefly boil down to the following─

4.2.1 the affected employees (applicants *et al*) are deployed at the Government Garage/RBE section occupying various administrative posts;

4.2.2 during the financial year 2010-2011, the Deputy Director: OD (AJ Hilder) submitted a report/recommendation to the Chief Director (KM Phetoa) and HOD to upgrade the posts of the employees at Fleet Management and promote them accordingly (both the Chief Director and HOD supported the recommendation (Annexure A.p.13-14). The recommendations were approved by the (then) MEC (Mr Thabo Manonyi) Annexure A.pp.28-31 dd. 20 January 2011;

4.2.3 The 'new' HOD (Mr Msibi) and MEC (Mr B Kompela) also approved the recommendations with effect from 13 December 2011;

4.2.4 The Applicants were accordingly promoted and received higher salaries for approximately three (3) months;

4.2.5 the upgrades/appointments were 'unilaterally' reversed by the (then) Acting HOD (Mr Mogesi) and the salary payments deducted from the employee' salaries;

4.2.6 Applicants' seek to reverse the decision of the HOD: Mr Mogesi and pray that their respective posts be once again upgraded as initially approved by the MEC with effective date 20 January 2011.

4.3 Respondent's case (Annexure B/D)

Respondent's arguments briefly boil down to the following—

4.3.1 the upgrades/appointments did not comply with the provisions of Chapter C, clause 1-6 as the posts in question were never subjected to a formal job-evaluation exercise to determine the correct job grade and/or the "recommendations of the JEP the subject of approval" (Annexure D.pp.8, 13-15);

4.3.2 it is argued that the (then) MEC (Mr Thabo Manyoni) had been misled into signing the submission which resulted in the upgrade/appointment of the said Applicants (Annexure D.pp.9-12). The purpose of the said submission was merely "to make recommendations *re* the approval of the incumbents (Applicants) in the upgraded posts" (*sic*).

4.3.3 when Mr Tim Mokhesi (the then Acting HOD) became aware of the 'error' he reversed the whole process in terms of section 5(7)(a) of the PSA 1994. Section 5(7)(a) reads as follows—

> *"A functionary shall correct any action or omission purportedly made in terms of this act by that functionary, if the action or omission was based on an error of fact or law or fraud and it is in the public interest to correct the action or omission."*

4.3.4 it is furthermore stated that "…unfortunately the same management of the Fleet Management submitted another submission requesting that the previous submission which was approved by Mr Thabo Manyoni and reversed by Mr Tim Mokhesi to the new HOD Mr JJ Msibi who was appointed on 1 November 2011. On the basis of the misrepresentation Mr Msibi recommended that the submission should be approved and which was subsequently approved by the (then) MEC (Mr B Kompela) on 31 December 2011".

5. Analysis of Evidence / Argument

Having heard both parties' arguments and perused the documentary evidence, I will address the material issues separately—

5.1 Grading of posts: Job Evaluation

5.1.1 I believe it is trite practice that the grading of posts in the Public Service is determined by a process of job evaluation. The process and underlying principles are governed by Resolution 3/1999 (clause 4) read with the Public Service Act and other governing policies (e.g. PSA Regulations [GG 05/01/2001]. Part V/C6: Job Evaluation Implementation Strategy (May 2007); Job Evaluation Procedures. For a detail quotation of the relevant provisions/principles, see my earlier award **SAUO obo PM Raubenheimer v Department of Education** **(2010)/PSCB609-09/10** dd. 25 November 2010. What is furthermore clear is that the 'Executing Authority' has a relative broad discretion whether or not to accept (approve) the recommendation of the Job Evaluation Panel (JEP). Various factors can play a role in this regard;

5.1.2 does this now mean that the Executing Authority (or MEC) can only entertain recommendations of the JEP/direct line of authority or can the MEC execute a discretion to upgrade a post/appoint an incumbent on a higher level on 'mere recommendation' of the line authority? I believe that the MEC (as in the case before me) has a wide discretion to upgrade a post/appoint an incumbent accordingly on a higher level. The provisions/regulations referred to above do not seem to limit the MEC's discretionary powers in this regard.

5.1.3 *In casu* the line authority recommended the upgrade/appointment of the posts of the Applicants which had been formally approved by the MEC (in succession). In fact, the employees reaped the benefit of a higher salary for a period of time. There is no conclusive evidence before me why or on what basis the (then) Acting HOD (Mr Mogesi) decided to reverse the MEC's (Mr Thabo Monyoni's) initial approval. I am of the opinion that the latter (HOD) do not have the power to reverse the MEC's decision on own accord even within the context of section 5(7)(a)/PSA. Even if I am wrong in this regard, it is clear that the MEC in succession (Mr B Kompela) once again approved the submissions on 13 December 2011. This latest decision was not formally reversed. I cannot align myself with the claim that the Executive authority (MEC's in succession) was misled and/or confronted by a misrepresentation of the facts. If that was indeed the case one would expect of the Respondent (HOD) to approach the MEC in a formal manner to reverse the initial decision. In such circumstances one would expect that the decision to 'undo' the original approval must be dealt with by the MEC him-/herself on acceptable grounds.

5.1.4 Having stated the above, I am of the opinion that the Applicants (and most likely other employees in similar positions) were rightfully appointed to the upgraded posts as set out in Annexure A with effect from 1 January 2012 (given the benefit of the doubt of the decision to the Respondent).

5.2 Deduction of salary increases

5.2.1 In terms of the Acting HOD's decision referred to above, the Respondent (Finance Department) was instructed to deduct the payments received by the Applicants (and others alike) in terms of their upgraded position(s). This decision is also questionable (although not specifically argued by the Applicants).

5.2.2 Salary deductions are governed by the **Basic Conditions of Employment Act 1997, section 34**. The relevant provisions read as follows—

> *34(1) An employer <u>may not</u> make any deduction from am employee's remuneration <u>unless</u>—*
>
> *(a) subject to subsection (2), the employee in writing agrees to the deduction in respect of a debt specified in the agreement; or*
>
> *(b) the deduction is required or permitted in terms of a law, collective agreement, court order or arbitration award.*
>
> *(2) A deduction in terms of subsection (1)(a) may be made to reimburse an employer for loss or damage only if—*
>
> *(a) the loss or damage occurred in the course of employment and was due to the fault of the employee;*
>
> *(b) the employer has followed a fair procedure and has given the employee a reasonable opportunity to show why the deductions should not be made;*
>
> *(c) the total amount of the debt does not exceed the actual amount of the loss or damage; and*
>
> *(d) the total deductions from the employee's remuneration in terms of this subsection do not exceed one-quarter of the employee's remuneration in money.*
>
> *(3) A deduction in terms of subsection (1)(a) in respect of any goods purchased by the employee must specify the nature and quantity of the goods;*
>
> *(4) An employer who deducts an amount from an employee's remuneration in terms of subsection (1) for payment to another person in accordance with the time period and other requirements specified in the agreement, law, court order or arbitration award.*
>
> *(5) An employer may not require or permit an employee to—*
>
> *(a) repay any remuneration except for overpayments previously made by the employer resulting from an error in calculating the employee's remuneration; or*
>
> *(b) acknowledge receipt of an amount greater than the remuneration actually received."*

5.2.3 Similar questions were also put to our Labour Court in the past. See *inter alia* **<u>Threewaterkloof Municipality *v* SALGBC & Others</u> (2010)/LC966-08 (LC)**; **<u>POPCRU obo Moyo *v* Minister of Correctional Services & Others</u> (2013) 34ILJ 992 (LC)**. See also Worklaw June 2013.

5.2.4 *In casu* it appears that the Respondent acted on the decision of the HOD (Mogesi) to reverse the MEC's decisions and deducted payments already made to the Applicants in terms of **section 34(5)(a)** *supra* – "overpayments made by the employer resulting from an error in calculation of the employee's remuneration". It also appears that this 'decision' was executed unilaterally. In **<u>Jonker *v* Wireless Payment Systems CC</u> (2010) 31 ILJ 381 (LC)** the Labour Court held that as a general rule the **BCEA** prohibits deductions from employees' salaries without their prior consent, however, deductions without consent are permitted where the employee had been overpaid in error. In such instances, the employer merely had to advise the employee of the error in payment and the amount of the deduction to be made. As pointed out, I have serious doubts whether the Applicants 'upgrades/appointments' were indeed the result of a *bona fide* error by the Respondent.

5.2.5 And in **Cenge & Others *v* MEC, Department of Health (EC) (2012) 33 1443 (LC)** the Labour Court stated as follows—

> *" … In terms of section 34 (BCEA) it is clear that the only basis on which the employer would be entitled to make the deduction would be under the provision of section 34(1)(a) or (b) or section 34(5)(a)."*

Prof. A Rycroft (Worklaw, June 2013) however questioned above dicta as a correct interpretation of section 34(5)(a) as being an exemption to the requirements of section 34(1). It thus appears that the employee's written consent is required before the employer could make any deduction from an employee's salary even in case of a *bona fide* error.

5.2.6 Be that as it may, I am of the opinion that the Respondent unilaterally deducted the salary payments (contra to approval of the MEC) from the salaries of the Applicants contra to **section 34(4)**.

6. Award

In case **PSCB196-13_14** the following award is rendered—

6.1 The upgrade of the Applicants' posts and their subsequent appointment to a higher salary level were formally approved by the Executing Authority (the MEC's in succession) within the context of Resolution 3/1999. I accept the latter approval (dd. 13 December 2011) of Mr B Kompela (MEC) to be valid.

6.2 The Respondent is hereby ordered to reinstate the initial decision of the MEC (Mr Kompela) to upgrade the Applicants' posts as per Annexure A to remunerate the Applicants accordingly with effect from 1 January 2012 in terms of Chapter C7/Public Service Regulations (obviously, I am not in a position to reconcile the Applicants' salary positions and/or entitlement to annual general salary increases and other benefits).

6.3 Said salary adjustments must be paid to the Applicants on/before 30 November 2013.

6.4. No order as to cost is made.

Signature:

Panellist: ***Martinus van Aarde***