

ARBITRATION AWARD

Case Number: PSCBC269-09/10
Senior Commission / Panellist: Martinus van Aarde
Date of Award: 1-Oct-2010

In the **MATTER** between

PSA obo M. C. Mngomezulu & 1 Other

(Applicant)

and

Department of Education (FS)

(Respondent)

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1. Details of hearing / representation

The case was set down for an arbitration hearing on 14 September 2010 at Bloemfontein, Department of Education (FS). Mr. Jaco Greeff: Official PSA represented the Applicants. Mr. Khudusa Tlale: Deputy Director Dispute Resolution represented the Respondent (DOE).

2. Issue(s) to be decided

2.1 This is an application in terms of the **Labour Relations Act 66/1995, section 24(2)/(5)** regarding the interpretation/application of a Collective Agreement/Resolution 3/1999 to be read with the Public Service Regulations 2001 (Chapter I Part V, clause C.7) and the Organisational and Human Resource Development Circular No.6/2007.

2.2 In essence, the main question boils down to whether the Applicants were entitled to upgrading to job level 12 with retrospective effect (01/08/2009).

3. Background to dispute

3.1 The Applicants in this matter are—

3.1.1 **M. C. Mngomezulu** and

3.1.2 **M. D. Mokhobo**

both Applicants are in the employment of the Respondent in the capacity of Deputy Director (at the time of the dispute on job level 11).

3.2 The posts of the Applicants were upgraded to level 12 in the course of 2007. The (then) MEC approved the upgrading on 16/07/2007, however, for some reason the approval was not implemented until 01/07/2010 (Annexure C & D).

3.3 Subsequently, the Applicants lodged a dispute (LRA 7.11) on 17/09/2009 after they have exhausted the internal remedies on the basis set out above. The case was then set down

for conciliation on 19/11/2009. The parties however failed to solve the dispute and a certificate of non-resolution was accordingly issued in terms of **section 135(5)/LRA '95**. The Applicants then filed a Request for Arbitration on 23/11/2009.

3.4 The case was initially set down for arbitration on 12/03/2010 before Panellist A. Osler. During the proceedings the parties engaged into an agreement on the basis that “the Respondent will notify the Applicants in writing on/before 31/03/2010 whether or not the salary upgrades of the relevant employees will be implemented and on what terms” (Annexure A.pp.2-6).

3.5 It is common cause that the said Applicants received the benefits of the upgrading of their respective posts with effect from 01/07/2010 (Annexure D). The Applicants however lay claim on the said benefits with retrospective effect from 01/08/2007, being the date of the approval/implementation by the then MEC in terms of the PSR 2001, clause C.7. The Applicants then requested the reinstatement of the arbitration hearing/subject matter of the dispute referred to the Council. The case was then re-enrolled for arbitration before myself on 14/09/2010.

4. Survey of Evidence / Argument

4.1 As pointed out, the main question is whether the Applicants are entitled to the upgrading of their respective posts to salary level 12 with retrospective effect (from 01/08/2007) as approved by the (then) MEC: Education in terms of the PSR 2001/clause C.7 (Annexure C).

4.2 For easy reference, clause C.7: Public Service Regulations, 2001 reads as follows—

“(C) Grading and Remuneration

(7) *The absorption of the incumbent employee in the higher-graded post as provided under regulation VC6 shall take effect on the first day of the month following the month during which the executing authority approves that absorption.”*

4.3 As indicated above, the parties submitted a combined bundle of documents marked Annexure A-D. The parties also presented brief oral arguments in this regard. The parties however

requested/consented to supplement their arguments with written submissions to be dealt with on paper – see Annexure E & F respectively.

5. Analysis of evidence / argument

5.1 Applicants' argument, in essence, boils down to that once the MEC approved of the JEP's recommendation, the Applicants are entitled to be upgraded and to receive the salary benefits of the upgraded post. In this regard the Applicants relied on the Public Service Regulation 2001: C7 referred to above.

5.2 Said regulation must also be seen/read with clause C5, which read as follows—

“C5. An executing authority may increase the salary of a post to a higher salary range in order to accord with the job weight, if—

(a) the job weight as measured by the job evaluation system indicates that the post was graded incorrectly; and

(b) the department's budget and the medium-term expenditure framework provide sufficient funds.” (own emphasis)

5.3 Having stated the above, it is thus clear that the mere fact that the JEP recommended an upgrade of a post does not mean that the incumbent employee is *per se* entitled to the salary benefits linked thereto. Same applies equally as to the 'approval' of the executive authority (the MEC). The latter's approval is also subject to the other preconditions, *viz.* whether the—

5.3.1 incumbent employee's 'promotion' was indeed approved on the higher level/specific salary level; and

5.3.2 post/appointment on the higher level is funded.

5.4 In *casu*, there is no convincing evidence before me that the (then) MEC (the honourable Me. M. A Tsopo) indeed approved the Applicants appointment on salary level 12. What appears from the documentation is that—

5.4.1 the (then) MEC “agreed with the recommendation of the Job Evaluation Panel as set out in par.12 (dated and signed 16/07/2007) – Annexure C;

5.4.2 for some reason the initial documentation got lost;

5.4.3 on re-submittance, the recommendation by the JEP was approved with amendments. Specifically that the ‘final approval’ is also subject to approval of the Treasury – Annexure D.

5.5 It is furthermore common cause that the Treasury did not approve of the ‘recommendation’ based on financial constraints. See Annexure D.p.14 read with the Sustainable Resource Management Circular No.3/2008 (pp.15-19/Annexure D).

5.6 I believe it is sufficient to say that the Constitutional Court (in **SAPS v PSA (2007) 5 BLLR 383 (CC)**) amply addressed the word ‘may’ in questions alike. Suffice to say that ‘may’ implies a discretion. See also **Besingh v Minister of Education & Culture: Province of Kwazulu Natal & Others (2003) 6 BLLR 598 (D)**; **Polokwane Local Municipality v SALGBC & Others (2008) 8 BLLR 783 (LC)**.

5.7 From the evidence it is furthermore clear that the Applicants’ promotion to salary level 12 was only formally approved with effect from 01/07/2010 (Annexure D.p.1).

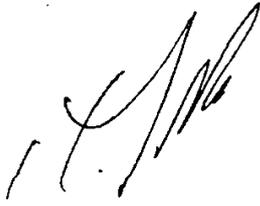
6. Award

In case PSCB269-09/10 the following Award is rendered—

6.1 The Applicants are not entitled to any retrospective appointment to salary level 12 as from 01/08/2007 for reasons mentioned.

6.2 The application before me is to be dismissed for reasons mentioned.

6.3 No order as to cost is made.



Signature: _____

Senior Commissioner: ***Martinus van Aarde*** _____

Sector: ***Education*** _____