



PSCBC
PUBLIC SERVICE CO-ORDINATING BARGAINING COUNCIL

ARBITRATION AWARD

Case Number: PSCBC609-09/10
Senior Commissioner / Panellist: Martinus van Aarde
Date of Award: 25-Nov-2010

In the **MATTER** between

SAOU obo Patricia Mary Raubenheimer

(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 19 November 2010 (11h00) at Bloemfontein, Department of Education. Me. Magda Strydom: Official SAOU represented the Applicant (Raubenheimer). Mr. Khuduga Tlale: Deputy Director Dispute Resolution represented the Respondent (DOE). The proceedings were recorded (CD on file).

2. Issue(s) to be decided

The main issue in dispute relates to an application in terms of the **Labour Relations Act 66/1995, section 24(2)/(5)** re the interpretation/application of a collective agreement (Resolution 3/1999): The main question boils down to whether or not the Applicant was entitled to be appointed/promoted to job level 12/current position of Deputy Director: Finance and Supply Chain Management.

3. Background to dispute

3.1 The Applicant in this matter is Me. P. M. Raubenheimer. She is in the employment of the Respondent/Government since 13/06/1988. At present she occupies the position of Deputy Director: Finance & Supply Chain Management (Xhariep District Office) on job level 11 (the subject matter of the dispute as the post is graded at level 12).

3.2 The Applicant lodged a grievance on the basis set out above. Attempts to solve the issue internally have failed and the Applicant then filed a formal dispute (LRA 7.11) on 17/03/2010 on the same basis. The dispute was declared unresolved in terms of **section 135(5)/LRA '95** on 16/04/2010. The Applicant then filed a Request for Arbitration on 24/05/2010.

3.3 As pointed out, the case was set down for an arbitration hearing on 19/11/2010. Final closing arguments were submitted on 25/11/2010 – Annexure B & C. (See also par.5.9 *infra*.)

4. Survey of evidence / argument

4.1 The parties submitted a combined bundle of documents marked Annexure A.pp.1-117 as regards to the factual background/common cause to the dispute at hand. The parties also presented brief argument in support of their respective cases. I do not intend to repeat the arguments/documentary evidence before me in detail save to point out the following (in my opinion) material facts underlying the dispute—

4.1.1 the Applicant was transferred from HR (HQ) to the Xhariep District Office with effect from 01 (22)/03/2006 in terms of the **Public Service Act 1994, section 14(1)**. The transfer was approved with retention of rank, salary and conditions of service (*viz.* salary job level 11). She resumed duty on 22/03/2010 (Annexure A.pp.15-17);

4.1.2 prior to the transfer, the Applicant engaged into a discussion with the Director: Human Resources who indicated that the said post (Deputy Director: Finance & Supply Chain Management) will be split into two separate posts, and, that the Applicant will be responsible for the 'Admin-post'. The salary level of the post to be determined by a job evaluation. The post was however never split-up;

4.1.3 the Respondent then decided to advertise the (5x) posts of Deputy Director: Finance and Administration at the District Offices (*viz.* Motheo District Office Bloemfontein; Thabo Mofutsanyana District Office Phuthaditjaba; Leweleputswa District Office Welkom; Fezile Dabi District Office Sasolburg and Xhariep District Trompsburg);

4.1.4 said posts were all advertised on salary level 12. The job requirement was a 3 year Bachelor's Degree in Accounting or a B.Com or B. Compt or an equivalent qualification coupled with experience in financial accounting (Annexure A.p.20);

4.1.5 the Applicant then raised her concern about the advertisement of 'her' post at the Xhariep District Office. The parties engaged into various correspondences since August 2006 which resulted in a decision of the SG: Education that the Applicant "was

to remain at the Xhariep District Office as Deputy Director Financial and Supply Chain Management (Annexure A.pp.18-31);

4.1.6 the Applicant then again raised her concern about the grading of her post in April 2007. The Applicant's request for the upgrading of her salary to level 12 was turned down as she was "still carried against the post of level 12" and "that she does not have the necessary financial qualifications required for the post" (Annexure A.pp.32-36);

4.1.7 this reply did not satisfy the Applicant and the parties engaged into a further paper-war. The Applicant also requested clarification from the DPSA on "what basis she is carried against the higher post" and pointed out that her grievance relates to "equal pay for equal work" (Annexure A.pp.37-50);

4.1.8 it is also common cause that the other four (4) incumbents since appointed at the various district offices were all appointed on salary level 12. No evidence was however put to me concerning the qualifications of the said incumbents;

4.1.9 on 15/12/2009 the MEC Education responded to the Applicant's grievance stating as follows:

"... please be informed that after thorough investigations regarding the matter, a decision was reached to transfer the Applicant to a post equivalent to her present salary level (11) Deputy Director with effect from 01/10/2009." (sic) – Annexure A.p.51.

4.1.10 the Applicant again requested an interpretation/clarification from the DPSA as to the question at hand (*viz.* whether an employee can be carried against a higher post). It is common cause that the DPSA never forwarded any clarification on this question despite the Respondent's undertaking to do so (Annexure A.pp.52-57 / 111-115);

4.1.11 the Applicant then lodged a formal dispute on the basis set out above;

4.1.12 it is furthermore common cause that the Applicant—

- (a) holds a BA (Hons); MA-degree;
- (b) received outstanding performance appraisal since 2006 to date (Annexure A.pp.58-98).

4.2 Respondent's arguments in essence boil down to the following—

- 4.2.1 the Applicant did not meet the job requirements (financial qualifications) set down for the post;
- 4.2.2 the Applicant accepted the transfer/post on a horizontal level (11)/same rank, salary and conditions of employment;
- 4.2.3 the Applicant only occupies the post temporarily (carried against the (higher) post).

Mr. Tiale seeks an interpretation/application of the governing policies/rules as to whether the Applicant's salary can be legally upgraded to level 12 (as claimed by the Applicant).

5. Analysis of evidence / argument

Having heard the arguments and perused the documentary evidence presented to me, I will now address the material issues separately.

5.1 This case is now long overdue (since March 2006) and it appears that the 'wheels of government indeed turn slowly at times. From the outset I must point out that the question at hand could easily have been addressed by the DPSA as requested (and undertook to do) as early as July 2008. Unfortunately, the question is now put to the Council to decide upon.

5.2 It is also common cause that the Applicant (on level 11) was initially transferred to the post of Deputy Director Financial & Supply Chain Management of the Xhariep District Office (on 22/03/2006). Said post was evaluated/approved on level 12. Since then the Applicant annually received an extraordinary rating/performance assessment. She also completed the required BAS

(financial) course with distinction and even received a cash bonus incentive for the period 2006/7/8.

5.3 With regards to the Applicant's initial placement in the said post (in March 2006) and her subsequent enquiry why the posts were advertised, the Respondent stated in his letter dated 10/10/2006 as follows—

“... At the time of the advertisement, the Department had in mind to place Mrs. Raubenheimer in a more suitable post, with reference to her qualifications. Unfortunately, by the time the advertisement was placed, I had not yet had the opportunity to discuss this matter with Mrs. Raubenheimer.

Presently I have not finalised this process but assure you the post will not be filled while she is currently still in the post...” (Annexure A.p.26)

And on 08/11/2006 the SG: Education again confirmed the abovementioned decision stating that—

“You are hereby informed that you are to remain at the Xhariep District Office as Deputy Director: Financial and Supply Chain Management.” (Annexure A.p.28)

And on 27/11/2006 the Superintendent General reconfirmed the contents of his/her earlier letter dated 10/10/2006 (Annexure A.p.26) but added to the last paragraph the following—

“... and the post has duly been withdrawn.” (Annexure A.p.31)

And on 01/10/2007 the Director HRM to some extent retracted from their earlier position stating that the Applicant did not meet the academic/financial requirements for the post (B.Comm Accounting/experience in financial accounting) and that she is “still carried against the post of level 12” (Annexure A.p.36). Same argument was put to me by Mr. Tiale as to why the Applicant's salary (since March 2006 to date) cannot be upgraded to level 12 in accordance to the other four incumbents at the District Offices.

5.4 The Applicant and Me. Strydom relied on the application of Resolution 3/1999 read with the **Public Service Act** and other governing policies. Resolution 3/1999 deals with Remunerative

Allowances/Benefits. Clause 4 reads as follows (Annexure A.p.9)—

“4. Remuneration and regarding

4.1 In this agreement

- (a) job refers to a job or group of jobs covered by a single job title and job description;*
- (b) grades refer to a grade on the relevant salary scale;*
- (c) a job is overgraded if its salary reflects a grade higher than its job evaluation indicates; and*
- (d) a job is undergraded if its salary reflects a grade lower than its job evaluation indicates.*

4.2 If a job evaluation as provided under the Public Service Regulation indicates that a job has been overgraded

- (a) an incumbent employee shall remain on the same grade, with the associated salary and benefits;*
- (b) the employee shall not consider overgrading itself on grounds of redundancy;*
- (c) the employer may require an incumbent employee to undertake duties proportional to his/her grade. This process shall not mean only adding duties, but rather a restructuring of work to increase the value of the job.*

4.3 If a job evaluation as provided under the Public Service Regulation indicates that a job has been undergraded, the employer shall either

- (a) within a reasonable period of time endeavour to upgrade the position of an incumbent employee; or*
- (b) with the agreement of the affected employee, restructure his/her duties to reflect the trade determined by the job evaluation.” (own emphasis)*

5.4.2 The PSA Regulations (GG 05/01/2001): Part V reads furthermore as follows (Annexure A.pp.100-101)—

Part V: Compensation for employees

A: Principles

B: Determination of salary scales/allowances

C: Grading and Remuneration

C.1 An executing authority shall determine the grade of a post to correspond with its job weight and set the commencing salary of an employee on the minimum notch of the salary range attached to the relevant grade, unless the salary proves inadequate under the criteria in regulation V C.3.

C.2 If a job has a weight that applies to more than one salary range, the executing authority shall determine which of the relevant salary ranges to use.

- C.3 *An executing authority may set the salary for a post or an employee above the minimum notch of the salary range indicated by the job weight—*
- (a) *if she or he has evaluated the job, but cannot recruit or retain an employee with the necessary competencies, at the salary indicated by the job weight; and*
 - (b) *she or he shall record the reason why the salary indicated by the job weight was insufficient.*
- C.4 *If the job weight demonstrates that a filled post is overgraded or undergraded, an executing authority shall either effect changes to the work organisation or regrade the post according to the job weight and the relevant collective agreements, as provided in regulation V C.5 to C.7.*
- C.5 *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.*
- C.6 *If an executing authority increases the salary of a post as provided under regulation V C.5 she or he may continue to employ the incumbent employee in the higher-graded post without advertising the post if the incumbent—*
- (a) *already performs the duties of the post;*
 - (b) *has received satisfactory rating in her or his recent performance assessment; and*
 - (c) *starts employment at the minimum notch of the higher salary range.*
- C.7 *The absorption of the incumbent employee in the higher-graded post as provided under regulation V C.6 shall take effect on the first day of the month following the month during which the executing authority approves absorption.*
- C.8 *If an executing authority determines that the salary range of an occupied post exceeds the range indicated by the job weight, she or he shall—*
- (a) *if possible—*
 - (i) *redesign the job to equate with the job grade; or*
 - (ii) *transfer the incumbent to another job on the same salary range; and*
 - (b) *abide by relevant legislation and collective agreements.”*

5.4.3 Furthermore, the Job Evaluation Procedures: Employees appointed under the PSA provides as follows (Annexure A.pp.102-105).

“Clause 5: Options with regard to the implementation of the outcome of job evaluation

- 5.1 *If it is found that a filled post is overgraded (i.e. the current salary grade is higher than it should be) or undergraded (i.e. the current salary grade is lower than it should be) the Executing Authority must either effect changes to the work organisation or regrade the post (Public Service Regulation 1/V/C.4).*
- 5.2 *If it is decided to effect changes to the work organisation, the job must be redesigned to ensure that its demands are in line with the recommended salary grade. In the case where a job is overgraded, it will mean that some responsibilities have to be taken away from the post. If the post is undergraded, responsibilities have to be added to the post.*
- 5.3 *Where a post have been undergraded and it is decided to upgrade the post, the Executing Authority may keep the incumbent in the higher-graded post without advertising it, or may advertise the post (Public Service Regulation 1/V/C.6). In cases where the Executing Authority decides to keep the incumbent in the higher-graded post without advertising it, it must be based on the condition that she/he already performs the duties of the post, and was satisfactory rated during her/his most recent performance assessment. The minimum notch of the higher salary grade must also be allocated to the incumbent.*
- 5.4 *Should the Executing Authority decides to absorb the incumbent (employee) in the higher-graded post, it will be implemented with effect of the first day of the month following the month during which the executing authority approves the absorption (Public Service Regulation 1/V/C.7).*

5.4.4 And in terms of the Free State Provincial Government: Job Evaluation Implementation Strategy (May 2007) reads as follows (Annexure A.pp.106-110)—

“6.13.1: Upgrading of Posts

Posts can be upgraded when the job evaluation system indicates that the job was graded incorrectly and if the department’s budget and the medium-term expenditure framework provide sufficient funds (PSR Part V/C.6). The relevant programme manager will have to certify that funds are available before an upgrading is implemented. Part XXXVI of the Public Service Co-ordinating Bargaining Council, Resolution 3 of 1999, which states—

“If a job evaluation as provided under the Public Service Regulation indicates that a job has been undergraded (must be upgraded) the employer shall either

- (a) within a reasonable period of time, endeavour to upgrade the position of an incumbent employee, or*
- (b) with the agreement of the affected employee, restructure her or his duties to reflect the grade determined by the job evaluation.”*

The following must also be taken into consideration when decisions regarding

upgrading of employees into upgraded positions are taken into consideration.

In cases where filled posts are to be upgraded, the Executing Authority or delegates should decide whether the incumbent should continue to be employed in the higher graded post as provided for in PSR Part V/C.6. The decision will have to be made in consultation with the direct supervisor and Head of Department to determine whether the incumbent of the post complies with the requirements in the Regulations for continued employment in the upgraded post. (In terms of PSR 1/V/C.5 the incumbent must already perform the duties attached to the upgraded post and he/she must have received a rating of at least "acceptable" in his/her most recent performance assessment.) The expression "performance assessment" should be interpreted to refer to any performance assessment (as long as it is the most recent one) and not only to the "annual performance assessment" of an incumbent. Based on that an assessment of an employee must be undertaken as soon as a decision was taken that a post should be upgraded. If this is not possible the Supervisor must specify the reasons and indicate when the assessment is going to take place. If an assessment is immediately possible it should be completed and the Supervisor must sign a written declaration that the incumbent's performance is acceptable measured against the key responsibilities of the post.

*The implementation date of an upgrade should be from the first day of the month following the month during which the executing authority approves the continued **employment of the incumbent against the higher-graded post.** It is important to note that the upgrading of an incumbent whose post has been upgraded may not be retrospective. To promote sound labour relations the upgrade of a post that is linked with the upgrade of an individual should be handled simultaneously to prevent a situation where there is an **unnecessary long** time lapse between the upgrade of the post and the upgrade of the individual which may lead to grievances. **Departments are also encouraged to ensure that the recommendation of the Panel on the grading of a post is submitted to the responsible Executing Authority as soon as the Department has obtained the Panel's recommendation, thereby ensuring that there is not an unnecessary long time lapse between the recommendation of the Panel and the final decision of the Executing Authority on the grading of a post..***

The date of seniority of the incumbent in the upgraded position should also change to the date of upgrade. This is based on the Incentive Policy Framework linked to Departmental Performance and Development Management Systems of employees on salary level 1-12 from the Department of Public Service and Administration (DPSA). The policy framework states that an employee must complete a continuous period of at least 12 months on her or his notch before being evaluated for the next notch. The Performance Management System for the Senior Management Service issued by DPSA also states that a SMS Member must at least be in service for a period of 24 months on their current remuneration package on 1 April 2003 before qualifying to be assessed for a further notch.

As a general rule, the incumbent should continue to be employed in the upgraded post,

provided that he/she complies with the requirements contained in the PSR Part V/C.6. If exceptional circumstances exist for the Executing Authority to exercise his/her discretion to the contrary (for example proven serious misconduct) the post should be advertised.

To further guide this process the following categories of upgrades could be used as a guideline:

- *An existing filled post is upgraded and its terms of which the job content have not been changed at all or the post stayed 70% and more the same:*
 - *Existing incumbent to be promoted accordingly, subject to a satisfactory performance assessment.*
- *Existing filled posts that are “split” into two or more posts (one on a higher level and one on a similar level) due to re-structuring:*
 - *Existing incumbent to be promoted into the higher post subject thereto that the job content has not changed considerably (post stayed 70% and more the same in comparison to his/her salary level if the job content has changed considerably (more than 30% in comparison to his/her job content). If the “splitting” results in two posts on a similar salary grading, the employer must decide, in consultation with the incumbent, on the placement, taking into account the skills and knowledge of the incumbent in comparison to that of the “split” post(s).*
- *Vacant posts where serving officials have been acting in that are upgraded and in terms of which the job contents have not changed at all:*
 - *Post to be advertised. Job incumbents who act have no right to the higher post.”*

5.5 From the above, it is quite clear that the Applicant was transferred from HQ (HR) as deputy Director level 11 to one of the vacant posts of Deputy Director: Financial & Supply Chain Management in March 2006. All five (5) posts were evaluated on level 12, and save for the Applicant the other four (4) incumbent employees were all appointed on the relevant salary level (level 12). The Applicant then engaged into a paper-war for almost 4,5 years in an endeavour to also be upgraded to level 12, however without any success and/or interference from DPSA to clarify the question at hand.

5.6 Having regard to the documentary evidence/argument before me, it also appears that the Applicant was indeed permanently absorbed in the post of Deputy Director: Financial & Supply Chain

Management on/about 27/11/2006 (see letters from the Superintendent General Education per Annexure A.p.28 & 31). In this regard, I fail to understand the Director: HRM's response dated 01/10/2007 (Annexure A.p.36) that the Applicant is "still carried against the post at level 12 due to the fact that she does not have a B.Comm Accounting degree coupled with experience in financial accounting". Having regards to the Applicant's performance assessments since her deployment to the said post, her general performance was rated "significantly above expectations" (70-80%) - Annexure A.p.67. Furthermore, as required by the assessment she also completed the Basic Accounting System-courses *cum laude* (90%).

5.7 With regard to the governing provisions (Resolution 3/1999) the Respondent had basically two options in terms of clause 4.3(a)/(b), viz—

- (a) "within a reasonable period of time endeavour to upgrade the position of an incumbent employee; or
- (b) with the agreement of the affected employee, restructure his/her duties to reflect the grade determined by the job evaluation".

Instead, the Respondent decided to absorb the Applicant in the said post and as such reaped the benefits of her outstanding output/performance however on a lower salary than her counterparts. The Respondent made a firm election in this regard and condoned the specific job requirements (financial qualifications).

5.7.1 Obviously, sub-paragraph (b) is not relevant as the post (job content) was already graded on level 12, and, as such performed by the Applicant with distinction.

5.7.2 I am also of the opinion that the "reasonable time period" must also be read with clause C: PS Regulation referred to above, especially clause 6 & 7 read with clause 5.3/4: Implementation of job evaluation outcomes and clause 6.13.1: Job Evaluation Implementation Strategy (ad par. 5.4.4 *supra*).

5.8 In *casu*, the Respondent hardly took any positive steps to address the Applicant's grievance/dispute as to her claim to be upgraded from level 11 to 12 in the same capacity/post she occupied since March 2006. Me Strydom's argument relates to 'equal pay for equal work'. Although the Applicant did not *per se* lodge the dispute in terms of the **Employment Equity Act 55 1998** (unfair discrimination, in which case the Council lacks jurisdiction to entertain the dispute), I am of the opinion that the dicta relating to such disputes is equally relevant as to the question before me. In **Louw v Golden Arrow Bus Services (Pty) Ltd. (2000) 21 ILJ 188 (LC)** the Court held as follows—

"... It is not an unfair labour practice to pay different wages for equal work or for work of equal value. It is however an unfair labour practice to pay different wages for equal work or work of equal value if the reason or motive, being the cause for so doing, is direct or indirect discrimination on arbitrary grounds of the listed grounds, e.g. race or ethnic origin."

See also **Mangena & Others v FILASA (Pty) Ltd. & Others (2010) 31 ILJ 662 (LC)**; **Ntai & Others v SA Breweries (2001) 22 ILJ 214 (LC)**.

5.9 Having regard to Mr. Tlale's arguments set out in par 4.2 above, I cannot align myself thereto. In fact, it also appears that the Respondent is not sure itself as to whether the Applicant is entitled to be upgraded to level 12 in the specific circumstances, hence the call on the arbitrator to make an appropriate award in this regard (the DPSA failing to do so, if the matter was indeed referred for clarification at all). I must also point out that I am quite surprised by the Respondent's closing arguments (Annexure C). The Respondent's (initial) closing arguments are set out in par.4.2 above. At closing of its case, Mr. Tlale stated that he does not wish to supplement his closing arguments any further (whilst Me. Strydom requested to file additional submissions). Having received the Respondent's 'final' closing arguments, the Respondent simply stated that "the Council lacks jurisdiction to make an order to upgrade the Applicant to a higher post" (*sic*). One would expect of the Respondent to put proper arguments before me during the process and afford the Applicant the opportunity to argue same – to do so at this late hour can only frustrate the process even more.

5.10 Having stated the above, there is no doubt in my mind that the Respondent failed to observe its own procedures as contained in the governing collective agreements/policies referred to above, and in doing so, deprived the Applicant of being upgraded/appointed to level 12. I also believe that the Respondent had ample time to address the Applicant's grievance and/or to take alternative steps as provided for.

5.1.1 The next question to be addressed relates to the appropriate relief and especially the effective date thereof. As pointed out, the Respondent did not *per se* challenged the Council's jurisdiction to make an award to reflect same, but also seeks a directive whether the Applicant is entitled to be upgraded to level 12 in the specific circumstances. Having regard to the PS Regulations C.6/7 read with clause 5.3/4: Implementation of Job Evaluation referred to above, it appears that the new salary level needs to be "implemented with effect from the first day of the month following the month during which the executive authority approves the absorption (PSR 1/V/C.7)". It also appears that Annexure A.pp.28 & 31 serves as approval (condonation thereof although not expressly expressed as such) by the Superintendent General: Education (dated 07/11/2006) that the Applicant was duly absorbed in the post she still occupies (despite the 'decision' of the Director: HRM a year later) - Annexure A.p.36. At best it can thus be argued that the Applicant was entitled to be upgraded after her first successful performance assessment in 2006/7 and with effect from 1 July 2007.

6. Award

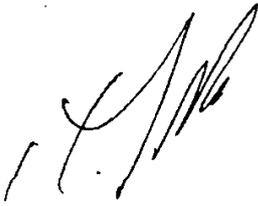
In case PSCB 609-09/10 the following award is rendered—

6.1 The Respondent (Department of Education, FS) failed to observe/comply with its own collective agreements/policies referred to above.

6.2 The Respondent is hereby ordered to appoint the Applicant (Mrs. Patricia Mary Raubenheimer) to level 12, and, to adjust her basic salary in accordance to the minimum notch of salary grade 12 with effect from 1 July 2007.

6.3 All back-payments (including any accrued increases if applicable) to be made by the Respondent to the Applicant on/before 31 December 2010, if not, then the Respondent is furthermore ordered to pay interest on the said amount calculated at a rate of 1,5% per month until final date of payment. (Obviously, said payments are subject to normal tax-deductions.)

6.4 No order as to cost is made.



Signature: _____

Senior Commissioner: **Martinus van Aarde**

Sector: **Education**