



IN THE PUBLIC SERVICE CO-ORDINATING BARGAINING COUNCIL

ARBITRATION AWARD

Case Number: PSCB 145-13/14
Commissioner: Anthony Maré
Date of Award: 15 April 2014

In the **matter** between

Siyabulela Ndlwana
(Applicant)

and

Department of Education, Eastern Cape Province
(Respondent)

DETAILS OF HEARING AND REPRESENTATION

1. The arbitration in the above matter was held on 17 March 2014 at the Respondent's offices in Cofimvaba in the Eastern Cape. The Applicant was represented by an attorney, Mr Ndladlamba of Tunzi Attorneys. The Respondent was represented by Mr Nyalambisa. Closing arguments were submitted in writing and received on 4 April 2014.

ISSUE TO BE DETERMINED

2. I must decide whether the Applicant qualifies for a salary grade progression from salary Level 6 to salary Level 7, in terms of Resolution No. 3 of 2009.

BACKGROUND TO THE ISSUE

3. Applicant is currently employed as a Senior Administration Clerk for the Respondent in the Cofimvaba District in the Eastern Cape.
4. Since 1994 he was employed as an Educator under the Employment of Educators Act 76 of 1998 at Zakhele Junior Secondary School until he was relocated in 2005 to the "District office where he took up the position as a Senior Administrative Clerk on the same salary level (Level 6). In May 2007 he was translated to the Administrative function where he was appointed in terms of the Public Service Act 1994 as amended.
5. It is common cause that prior to May 2007 the Applicant was employed as an Educator under the Employment of Educators Act.
6. On 19 March 2010 the Human Resources Director: Administration, L M Stowman, released a memorandum which addressed the implementation of Grade Progression to Employees appointed in terms of the Public Service Act in accordance with Resolution No. 3 of 2009.
7. The memorandum reads as follows: *"Attached please find a copy of PSCBC Resolution No.3 of 2009 and lists of employees in your district, appointed in terms of the Public Service Act,*

1994 as amended and who have fifteen (15) years continuous service according to this office, for your urgent attention.

8. According to paragraph 3.6.2 of PSCBC Resolution No.3 of 2009, 'an employee on salary Level 4, 5, 6 or 7, who has completed **15 (fifteen) years of continuous service on a salary level, irrespective of the notch**, and has obtained at least satisfactory rating in his/her performance assessments (the average assessment over the last 2 year period will determine the performance rating) shall grade (salary level) progress to salary level 5, 6, 7 or 8 respectively.
9. The personal files and PERSAL records of all these employees must therefore please be checked and it must be verified whether they indeed have fifteen (15) years continuous service on a salary level. This office must please by **Friday, 02 April 2010** be provided with the names of all qualifying employees together with their present salary levels and confirmation of their average assessments over the last 2 years in the attached template so that the approval of the Head of Department can be obtained for the grade progression of such qualifying employees."
10. When it came to the Applicant's attention that his name appeared on the list attached to the memorandum, he started a process of enquiring as to why the collective agreement was never implemented as he remained on salary level 6.
11. After filing a formal grievance which was preceded by a number of letters from his attorney to the Respondent, a dispute was declared. The matter was unresolved at Conciliation and referred to Arbitration.

SURVEY OF EVIDENCE AND ARGUMENT

Respondent's evidence

12. Mr Pakade, the Deputy Director HR A and P, was the only witness for the Respondent. His evidence is as follows:
13. Applicant forfeited his benefits afforded him under Resolution No. 1 of 2007 because he was employed under the Public Service Act, 1994 when he joined the District office as an

Administrator in 2007. In terms of PSCBC Resolution 3 of 2009 it was mandatory to have had 15 years of service whilst appointed in terms of the Public Service Act in order for employees to qualify for a pay progression.

14. Pakade submitted that the Applicant did not have the required years of service to qualify under Resolution No. 3 of 2009 for a pay progression. Applicant had only 4 (four) years of service.
15. In explaining why the Applicant's name appeared on the list with those who qualified for pay progression, Pakade submitted the following: Paragraph 3 of the memorandum, *supra*, stated that the personnel files and PERSAL records of all the employees on the attached list were to be *checked* and *verified* (his emphasis) in order to determine whether they indeed had fifteen years of continuous service on the same salary level.
16. In his view, the Applicant had already benefited from the provisions of Resolution 1 of 2007 as an Educator. Reference was made to a number of the Applicant's pay increments.

Applicant's Evidence

17. Only the Applicant testified. A summary of his evidence is as follows:
18. Due to the fact that he could not stand up in front of children for reasons relating to his health, he requested a transfer to the District office. His request was granted and he was given a letter to this effect.
19. He was under the impression that he could return to being an educator once he recovered from his illness. It was the Applicant's view that his years of service with the state as the Employer would be recognized. Consequently, he was of the view that he qualified for a pay progression in terms of Resolution No. 3 of 2009. He had only ever received the usual annual increment whilst employed under the Employment of Educators Act.
20. Applicant further had an expectation that he qualified for a grade progression after his name appeared on the list attached to the Memorandum, *supra*.

21. In his view, Resolution No. 3 of 2009 did not apply to those employees covered by Resolution No. 1 of 2007 and No. 3 of 2008 dealing with Occupation Specific Dispensations (OSD).
22. It was only fair, he asserted, that he qualified for pay progression under PSCB Resolution No. 3 of 2009. He was already working in the District as an Administrator when PSCB Resolution No. 1 of 2007 was first implemented. It followed that he was not covered by PSCB Resolution 1 of 2007 and PSCB Resolution No. 3 of 2008 which specifically covered Educators.
23. Applicant asserted that he had 15 years of service with the state as the employee but conceded that he had not completed all these years whilst he was employed under the Public Service Act 94 as amended since May 2007.
24. He further stated that it was never explained to him that he would forfeit a pay progression benefit if he relocated to the District office.
25. Consequently, he asserted, it was unfair that he did not qualify for a pay progression only because he was "caught in the middle" of the PSCBC Resolution No. 3 of 2009 and PSCBC Resolution No. 1 of 2007.

SUMMARY

26. The dispute was referred as a dispute concerning the interpretation of Resolution 3 of 2009 in order to establish whether the Applicant qualified for a grade progression under this resolution.
27. In summary, the basis on which the Applicant is relying is founded on the following grounds :
28. Firstly, Applicant's name appeared on a list of employees who had completed 15 years of continuous service at the same salary level. Applicant had completed 15 years of service and had not in that time received a salary level increase that he felt he was entitled to.
29. Secondly, Applicant was translated to the Administration District office before the implementation date of PSCBC Resolution No. 1 of 2007 and therefore was not covered by the said Resolution which was applicable to, *inter alia*, Educators. He reasoned that it followed that he would then enjoy all the benefits of PSCBC Resolution No. 3 of 2009.

30. It is common cause that Resolution No. 3 of 2009 which deals with the revised salary structure for employees on salary levels 1-12 currently applies to the Applicant.

ANALYSIS OF EVIDENCE AND ARGUMENT

31. Respondent was clearly wrong when Mr Pakade suggested the Applicant had already benefited from pay progression under Resolution No. 1 of 2007.

32. The evidence revealed that the Applicant only received annual adjustments to his salary and not a pay progression to another salary level whilst employed under the Educators Employment Act.

33. Resolution No. 3 of 2009 at Clause 3.6.2.2 stipulates that employees on salary level 6 who have completed 15 years of continuous service on a salary level, and had obtained at least a satisfactory rating in his/her performance shall grade progress to salary level 7 (in this case). Resolution 3 of 2009 further stipulates that it applies to employees level 1-12 **not** covered by an Occupation Specific Dispensation. At the time Resolution No. 3 of 2009 came into force the Applicant was not covered by any Collective Agreement binding him to OSD. Therefore Resolution No. 3 of 2009 is the only Collective Agreement applicable to the Applicant.

34. Respondent argues that most of the Applicant's working years were served out in terms of a different Act whilst he was an educator and therefore those years of service cannot be recognized in terms of Resolution No. 3 of 2009 which expressly excludes those covered by OSD.

35. Resolution PSCBC No. 3 of 2009 does not stipulate whether employees who had previous years of service under an Occupation Specific Dispensation would be taken into account when calculating the years of service in terms of that Resolution for pay progression.

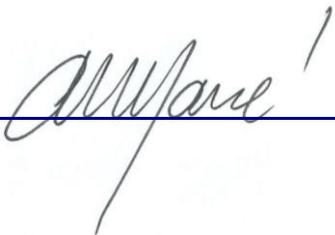
36. Clause 2.2.1 of the Resolution No. 3 of 2009 reads as follows: *This agreement is not applicable to the following employees covered by Occupation Specific Dispensations referred in the PSCBC Resolution No. 1 of 2007 and 3 of 2008.*

37. The Objective of Resolution No. 3 of 2009 states: To give effect to clause 5 of Resolution No. 1 of 2007 (Pay Progression for Employees not covered by revised occupational specific salary structures). Clause 5 only makes reference to salary level increases for levels 1 and 2. It further states : *by introducing a revised salary structure for all occupational categories graded on salary levels 1-12 not covered by any Occupation Specific Dispensation.*
38. Nowhere in Resolution No. 3 of 2009 does it state that past service of employees who previously fell under OSD would not be recognized for purposes of pay progression in terms of that resolution. Resolution No. 3 of 2009 merely states that it applies to a class of employee that fall outside the scope of those employees employed in terms of Occupation Specific Dispensation, which includes the Applicant in this instance.
39. I agree with the Applicant that whilst it was the parties intention not to allow employees to benefit under both Resolution No. 3 of 2009 and Resolution 1 of 2007, it was never intended to exclude those employees within the same department that were translated from one occupation to another or “caught in the middle”.
40. Clause 3.6.2.2 of Resolution No. 3 of 2009 only makes reference to 15 years of continuous service on the same salary level. Because it does not specify that their 15 years of service must be served by employees whilst they were employed in terms of the Public Service Act, it should be given a wider interpretation to include those employees, other than those that currently fell under OSD, who had 15 years of continuous service in the Department of Education on the same salary level irrespective of where this service was rendered.
41. My interpretation of Resolution No. 3 of 2009, (and not the memo), is that the Applicant’s previous years of service under OSD should be recognized for purposes of a pay progression.
42. My interpretation of ‘continuous service’ is service within the Department of Education, irrespective of the Act under which the employee was employed.
43. The argument that employees could then benefit twice is unsustainable in that the Resolution stipulates that the employee must not have received a salary level increase in fifteen years in order to qualify for pay progression.

AWARD

44. The Applicant, subject to having obtained a satisfactory performance rating, qualifies to progress from Level 6 to Level 7.
45. Resolution No. 3 of 2009 covers employees previously and not currently, covered by Occupation Specific Dispensation referred to in the PSCB Resolution 1 of 2007 and 3 of 2008.
46. There is no costs order.

Signature:



Panelist :

Anthony Maré
