GPSSBC

AWARD

GPBC09/2018

IN THE GENERAL PUBLIC SERVICE SECTORAL BARGAINING COUNCIL (GPSSBC)

In the matter between

PSA obo D. VAN DYK **APPLICANT**

And

DEPARTMENT OF WATER AND SANITATION **RESPONDENT**

Case NO: GPBC09/2018

ARBITRATION AWARD

DETAILS OF HEARING AND REPRESENTATION

This matter was scheduled for arbitration on 25 June 2018 at the Offices of the Department of water and Sanitation, Grootdraai Dam in Standerton.

The employee party, Ms Dalene Van Dyk (hereinafter referred to as the Applicant), was represented by her union representative of PSA Mr Kobus Heyneck. The employer party, Department of Water Affairs and Sanitation (hereinafter referred to as the Respondent) was represented by its Labour Relations Officer Mr Derick Mitileni.

The parties indicated that there is no need for oral evidence and opted to send written heads of arguments. Parties then narrowed the issues to indicate common cause issues and issues in dispute.

ISSUE TO BE DECIDED

I have to decide whether, in the circumstances detailed hereunder, the Respondent acted unfairly by not promoting the Applicant from salary level 11 to salary level 12 as required by policy.

POINT IN LIMINE

Respondent in its submission raises a jurisdictional point which was not raised during the day of the arbitration when parties narrowed down issues and opted to deal with this matter in terms of written heads of arguments. Had it been raised I would have insisted on the point to be dealt with before parties can address me on merits. However both parties did address me on this point. The essence of the Respondent's argument is that Council does not have jurisdiction. The Respondent argues that the promotions are conducted in terms of the Conditions of Services which stipulates that the merit unit committee recommends to the moderating committee. Therefore the request of the Applicant that Council award that she be promoted with effect from July 2015 would be in violation of the collective agreement (conditions of service) because her promotion should be done

in accordance with that agreement. The ruling in favour of the Applicant will mean the Commissioner is amending the conditions of service and as such exceeding his powers. This will create precedence which will have serious financial consequences and prejudice for the Respondent. Council therefore does not have jurisdiction to promote the Applicant outside the conditions of service.

The Applicant argued that she has filed a dispute of promotion in terms of section 186(2)(a) of the Labour Relations Act 66 of 1995 as amended. The Applicant further argue that the Commissioner will not exceed his powers as the Applicant meets all the promotional requirements and does fit in the organisational structure.

I have considered the submissions of the parties and found the submission of the Respondent to be without basis. This is a promotional dispute which is regulated in terms of prescripts of the Respondent. Council has jurisdiction to hear matters relating to promotion. The point by the Respondent is dismissed.

BACKGROUND TO THE ISSUES

The Applicant is employed by the Respondent since 1998 February 02 and is currently serving as the Deputy Director Accounting earning a monthly gross salary of R43 619,63. The Respondent is the national Department of Water and Sanitation.

In terms of the Respondent's policy, if an employee has met certain requirements in a period of 2years then such employee has to be promoted. The Applicant alleges that she has met the requirements in terms of policy but that the Respondent refuses to promote her. The Applicant got aggrieved and lodged a grievance which was not successful. The Applicant was dissatisfied and referred the dispute to Council, but could not be resolved through conciliation. The Applicant seeks to be promoted from level 11 to level 12 in terms of policy.

The parties opted to send written heads of arguments since they insisted there was no necessity to lead oral evidence. The parties agreed to send the bundles with the arguments. The parties then agreed on the following as common cause issues:

Common Cause issues:

- The Applicant is a Deputy Director at salary level 11 notch 5.
- Both salary levels 11 and 12 has twelve notches.
- To move from salary level 11 to salary level 12 one has to meet the four requirements in terms of bundle A page 12.
- The Applicant does not have the degree or Diploma.
- The Applicant has met requirements 1 to 3.
- The reason for failure to promote the Applicant is that she did not meet requirement 4.

Issues in dispute:

- Whether the Applicant has met requirement 4.

SUMMARY OF THE APPLICANT'S CASE

The Applicant was assessed and received a class 1 merit assessment (136,5 score) on 1 July 2015. Class 1 merit is the highest classification or score a candidate can receive (see page 10 of bundle "A"). The Applicant then expected to be promoted as she met the RDR requirements for promotion from salary level 11 to salary level 12(see page 12 of bundle "A"). RDR stands for RANK DESIGNATIONS AND REQUIREMENTS (see page 20 of bundle "A").

The Applicant was aggrieved as the Respondent did not promote her from salary level 11 to 12 and she filed a grievance to this effect. A feedback letter was received by the Applicant indicating the reason for the non-promotion that states as follows: "*You cannot be promoted to salary level 12 as the Organizational Structure in line with the RDR does not allow for such promotion*." (see page 5 of bundle "A").

According to the RDR requirements on level 11 and level 12 the post names are exactly the same. Level 11 and level 12 is both a Deputy Director Accounting. The RDR is promotion driven and not appointment in a post. Members are growing in salary levels due to promotion. The organizational structure of 2015 (see page 21 to 23) clearly shows that members grows in salary levels. The following members did grow on the same posts level with promotion from salary level 11 to salary level 12:

N Lutya

Mama FP

Wilkens J

The following members are on level 12 (see page 22): reporting directly to a level 12 Andre van Heerden:

Zandi Zenani

Riaan Statten

Francois Havenga

Annemerei Hlume

Hannes Potgieter

It is therefore not clear why the department said "*You cannot be promoted to salary level 12 as the Organizational Structure in line with the RDR does not allow for such promotion*." The Applicant is already in the post of the organizational structure and need to grow on the same way as others have grown. Also see the e-mail between Flip van der Walt from PSA and AC v Heerden of the department where he indicated that other units also have more than one Works accountant on level 12. He also indicated that employees on the same level still reports to one another. In his opinion the Applicant was due for a promotion to level 12. (see page 19 of bundle "A").

Further, the Respondent's version that the Applicant did nothing from 2015 when she knew she qualified is not correct as she has engaged the management since then until when she realised she would not be assisted, then lodged a dispute.

SUMMARY OF THE RESPONDENTS' SUBMISSION

The Applicant is employed by the Respondent as Standard Contract in terms of the Conditions of Services for employees employed in terms of section 76 of the National Water Act 36 of 1998. The Applicant lodged a grievance regarding her promotion in June 2017. She had been on salary level 11 (Deputy Director: Accountant) with effect from 01 July 2013 as per page 9 to 17 of Applicant's bundle.

The Applicant has been aware since 2015 that she met the requirements to be promoted but she did nothing or did not expect to be promoted because she knew since her supervisor is on that salary level it was not possible for her to be promoted to that level. This response that she does not fit in the organizational structure, after the merit assessment, was communicated to the Applicant in three consecutive years. The date that the Applicant argues she became aware of the omission is misleading.

She was aware that there was that there are employees on the same level with their supervisors but did nothing about it. She used to sit in the merit unit committee and knew that others were reporting to supervisors on same salary level but did not protest and no records of her complaint exist.

Not promoting the Applicant cannot be viewed as an unfair labour practice as this rules are not only applicable to the Applicant. There have been several employees who were not promoted to level 12 after been on level 11 for two years, but only being promoted to level 12 after 2, 4 or 5 years of being on level 11.

ANALYSIS OF EVIDENCE AND ARGUMENTS

I have to decide whether, in the circumstances detailed hereunder, the Respondent acted unfairly by not promoting the Applicant from salary level 11 to salary level 12 as required by policy.

"*The unfair labour practice definition includes unfair conduct by an employer relating to promotion of an employee...Employees may, amongst others, claim that the employer failed to follow agreed promotion policies and procedures or failed to adhere to advertised criteria…it is possible that in the absence of a satisfactory explanation from the employer an arbitrator will assume that the employer had acted in bad faith and therefore unfairly*." (Grogan; Workplace law; 9th edition).

The onus to prove the facts on which an allegation of such an unfair labour practice falls on the Applicant. In this case it is common cause that the requirements for promotion in terms of the RDR are that:

1.1 Class I merit (127 to 150 points) + appropriate experience and qualifications according to RDR.

1.2 Class II merit (127 to 150 points) + appropriate experience and qualifications according to RDR.

1.3 Class II merit (127 to 150 points) + appropriate experience and qualifications according to RDR.

1.4 Promotion to higher ranks must fit into the Organisational Structure

It is further common cause that the Applicant met the first three of this requirements. The Respondent disputes that the Applicant met the fourth requirement of fitting into the Organisational Structure. The Applicant's case is that this reason is baseless as the Respondent has promoted other employees from level 11 to level 12 and that others are at level 12 reporting to a supervisor at level 12.

The reasons given by the Respondent for not promoting the Applicant are contradictory as the Respondent in its submission concede that the Applicant did meet the requirements for promotion however that the Applicant did not complain at the correct time. Further the Respondent concede that there are other employees who were promoted in terms of RDR from level 11 to level 12 but that they first had to wait for 3, 4 or 5 years before such is done. The Respondent does not show from which policy have such waiting period decisions and criteria (on a number of waiting years) being based. I find the conduct of the Respondent to be arbitrary and the explanation by the Respondent not to promote the Applicant not satisfactory.

Form the circumstances outlined above I find that the Respondent has committed an unfair labour practice by not promoting the Applicant at the time when she met the requirements for promotion.

AWARD

1. The Respondent is ordered to promote the Applicant with effect from the 15 July 2015 from level 11 to level 12 entry level.
2. The Respondent is ordered to effect paragraph 1 above on or before the 30th October 2018.

3. I make no order as to costs.

MARTIN SAMBO

PANELLIST

12 September 2018