THE LABOUR COURT OF SOUTH AFRICA, GQEBERHA

REPORTABLE

Case no: PR 240 / 22

In the matter between:

DEPARTMENT OF WATER AND SANITATION **Applicant**

And

GENERAL PUBLIC SERVICE SECTORAL BARGAINING COUNCIL **First Respondent**

W BLUNDIN *N.O.* (AS ARBITRATOR) **Second Respondent**

COBUS FERREIRA **Third Respondent**

Heard: **28 February 2024**

Delivered: **1 March 2024**

This judgment was handed down electronically by circulation to the parties and legal representatives by email. The date and time for hand-down is deemed to be 1 March 2024

Summary: Bargaining Council arbitration proceedings – review of arbitration award – test for review – s 145 of LRA 1995 – principles considered – unreasonable outcome approach applied

Unfair labour practice – promotion – meaning of promotion determined – employee in fact promoted by employer – finding of arbitrator that no promotion exists unreasonable

Unfair labour practice – performance rewards determined by regulations – terms of regulations considered – employee not meeting requirements of regulations to qualify for rewards – arbitrator's finding that employee entitled to rewards unreasonable

Unfair labour practice – relief sought – employee required to prove the relief employee is claiming – employee failing to provide any evidence substantiating relief sought – arbitrator's award of relief arbitrary and without foundation in fact

Review application – proper case for review made out – review application granted and arbitration award substituted with award that no unfair labour practice having been committed by employer

Judgement

SNYMAN, AJ

Introduction

[1] The applicant has brought an application in terms of section 145, as read with section 158(1)(g), of the Labour Relations Act (LRA)[1], to review and set aside an arbitration award handed down by an arbitrator of the General Public Service Sectoral Bargaining Council (GPSSBC), being the first respondent. The arbitration award in question was handed down by the second respondent in his capacity as arbitrator appointed by the GPSSBC and concerned a dispute involving an unfair labour practice relating to benefits referred by the third respondent to the GPSSBC. The second respondent held that the third respondent had been visited with an unfair labour practice by the applicant, and afforded the third respondent substantive relief as a result.

[2] The arbitration award of the second respondent was handed down on 30 October 2020. However, this was not the final version of the arbitration award, as the third respondent applied for variation. The variation ruling, dated 6 July 2021, was only handed down on 21 July 2021, and this then constituted the final arbitration award handed down by the second respondent. The review application was brought on 20 August 2021, which is within the six weeks' time limit in terms of section 145(1) of the LRA, following this variation. The review application is accordingly

[1] Act 66 of 1995 (as amended).

properly before Court for determination. The application has been opposed by the third respondent.

[3] I will now proceed to decide the applicant's review application, starting with the setting out of the relevant factual background. For ease of reference, I will refer to the applicant as '*the Department*'.

The relevant background

[4] Fortunately, all the pertinent facts in this matter relevant to deciding the review application were either undisputed or common cause. These facts are set out below.

[5] The Department is a National Government Department, responsible for water and sanitation. The third respondent is currently employed by the Department as a Control Engineering Technician Grade B, deployed at the Department's operations in the Eastern Cape.

[6] The third respondent had commenced employment with the Department in 2014 as a Control Engineering Technician Grade A. This was a salary level 10 position. It is also an Occupation Specific Dispensation (OSD) position.

[7] It appears that there are a number of measures in place in the Department where it comes to rewarding employees that exceed performance expectations. These measures are found in policies, regulations and frameworks, which documents were placed before the second respondent in the arbitration, as evidence.

[8] The first policy to consider is the Performance Management and Development Policy of 1 May 2013 (PMDP), applicable in the Department only. The PMDP was signed and implemented by the Department on 21 February 2014. In terms of the PMDP, performance of employees is measured in a prescribed performance cycle, which is from 1 April of the financial year to 31 March of the following financial year. In short, performance is measured between 1 April and 31 March. It is also required, in clause 6.2.1, that all employees must enter into performance agreements by 31

May of each performance cycle, in order to qualify for performance incentives. The performance criteria against which the employee is measured consists of Key Result Areas (KRAs) and Generic Assessment Factors (GAFs). A percentage weighting is applied, and the employee must at least reach 100%. The process of assessment takes place over four quarters, being 31 July, 31 October, 31 January and 30 April, as compulsory performance assessments. In these formal assessments, a five point rating scale is applied, with "1" being unacceptable performance, and "5" being outstanding performance. Based on these quarterly assessments, an annual performance assessment report is prepared which is moderated by a Branch Moderation Committee.

[9] The annual performance assessment report of an employee as moderated and accepted by the Branch Moderation Committee then forms the basis for determining whether the employee would be entitled to a performance assessment reward as determined by the PMDP. In the case of OSD positions, the following conditions apply for an employee to qualify for the performance incentives: (1) the employee must complete a continuous period of 12 months (1 April to 31 March) on a salary notch and achieve between 100% and 129% to obtain a one notch progression as an incentive; (2) the employee must complete a continuous period of 12 months (1 April to 31 March) on a salary notch and achieve between 130% and 149% to obtain a two notch progression as an incentive, limited to a maximum of 20% of employees; and (3) the employee must complete a continuous period of 12 months (1 April to 31 March) on a salary notch and achieve 150% and above to obtain a three notch progression as an incentive, limited to a maximum of 10% of employees. And where it comes to a performance incentive bonus, the employee must complete a continuous period of 12 months (1 April to 31 March) on the employee's salary level and receive an assessment that indicate the employee's performance was above average.

[10] The next document to consider is the Public Service Regulations of 2016 (PSR).[2] This current version of the PSR (at that time) came into operation on 1 August 2016. The PSR would of course apply to all Government Departments, and

[2] As promulgated by way of GN R877 contained in GG 40167 of 29 July 2016.

not just the Department. In part 5 of the PSR, provision is made for performance management. However, in terms of the PSR, each individual Department remains responsible for determining its own performance management system, which must be approved by the executive authority of each Department concerned. In general terms, the PSR provides the guidelines / minimum requirements to be applied when a Government Department implements such a performance management system. This is evident from clause 73 of the PSR, which specifically provides that each executive authority shall establish a performance incentive scheme to reward employees, and the relevant Head of Department will formulate the scheme in writing determining the nature, rules and control measures of the scheme.

[11] Of importance to the case *in casu* is clause 72 of the PSR, which provides that all employees must enter into a performance agreement within two months of the beginning of any financial year. Where an employee changes position, a new performance agreement is required for that position, considering clause 72(2), where it is provided that:

'If, during the performance cycle, an employee is appointed, seconded or transferred to another post or position at the same salary level, a new performance agreement or agreement of a similar nature shall be entered into for the new post or position and the performance assessment shall take both periods of work in the cycle into consideration.'

In addition, clause 72(7) provides that no employee shall qualify for performance rewards, including pay progression, if the employee has not signed such a performance agreement as prescribed.

[12] There is no evidence that the PMDP was substituted by any other written performance incentive scheme in the Department itself. In fact, as will be discussed below, it appears that the very terms of the PMDP was more or less applied when assessing the performance of the third respondent, and then, ultimately, when refusing to grant him performance rewards in 2019. For these reasons, it still remains relevant to consider the terms of the PMDP, despite a number of other

subsequent regulatory measures applicable to all Government Departments, discussed below.

[13] The next policy of relevance is the 2017 Incentive Policy Framework for Non-Occupation Specific Dispensation (OSD) employees on salary levels 1 to 12 and employees covered by OSDs, issued by the Department of Public Service and Administration (the 2017 Framework). It also applies to all Government Departments. The 2017 Framework appears to have been issued pursuant to clause 73 of the PSR. It does appear to supplement what is contained the PMDP in the Department itself, and thus needs to be considered. In terms of the 2017 Framework, the performance cycle remains 1 April to 31 March. However, the 2017 Framework now defines pay progression as follows: '*… progression to a higher notch within the same salary level/scale, limited to a single notch per pay progression for non-OSD employees and the number of notches provided for in the respective OSD for OSD employees.*'. The pay progression cycle is defined as: '*… a continuous period of 24 months, running from 1 April to 31 March of the year following the next year, for 1st time participants, and 12 months, running from 1 April to 31 March of the next year, for employees other than 1st time participants.*'. A first (1st) time participant is defined as a '*new appointee*' in a production or supervisory / managerial OSD or Non-OSD post.

[14] Also, in terms of clause 8 of the 2017 Framework, employees are eligible for a pay progression on 1 July, based on the outcome of the employee's performance assessment in the previous performance cycle. Clause 7 however provides that pay progression is based upon actual service on a particular salary level for the period as determined in the 2017 Framework, and the achievement of the required / prescribed performance rating for that same period. Once again, the period is prescribed as being 1 April to 31 March. In terms of clause 17.2, an OSD employee is excluded from pay progression if that employee is awarded a personal salary above the minimum of the scale attached to his or her OSD post, or where applicable the scale attached to a grade of an OSD post.

[15] Next, and in April 2018, the Department of Public Service and Administration issued a determination and directive relating to the performance management and

development of employees (the 2018 Directive). The 2018 Directive came into effect on 1 April 2018. It is recorded in clause 1.5 of the 2018 Directive that: '*National and Provincial Departments are expected to review/amend their PMDS policies to align them to the PSR and this Determination and Directive*'. There is no evidence that any amendment of the PMDP was carried out by the Department as prescribed by the 2018 Directive. Nonetheless, the terms of the 2018 Directive shall be considered as also applicable in this case.

[16] The 2018 Directive continued to make the signing of performance agreements compulsory for any employee to qualify for any kind of performance reward.[3] The performance management cycle must still be linked to a financial year, with performance agreements having to be concluded for each performance management cycle and be signed and submitted by 31 May. A newly appointed employee shall sign and submit a performance agreement within three months after being appointed. Further, the 2018 Directive does provide some elaboration on the issue of the conclusion of performance agreements in clauses 7.3 to 7.5, which read:

'7.3 An employee who is appointed, seconded or transferred to another post or position at the same salary level must enter into a new PA or agreement of a similar nature for the new post or position within three calendar months of his/her appointment/secondment/ transfer. …

7.4 An employee who does not comply with the requirements in paragraphs 7.1, 7.2 and 7.3 above, shall not qualify for any performance rewards, i.e. pay progression and performance bonus …

7.5 Employees are discouraged from amending a PA or an agreement of a similar nature in the last quarter of the performance cycle (i.e. 1 January to 31 March), unless changes to the employee's job description, job grade, organisational structure of the department or its functions or amendments to the objectives and priorities result in significant changes to the content of the job of the employee.'

[3] See clauses 7.1 and 7.2 of the 2018 Directive.

[17] The 2018 Directive introduces a four point rating scale, with “1” being not effective, and “4” being highly effective. The criteria used still entails KRAs and GAFs being scored on this basis. The minimum required for rewards is still a 100% scoring, and it is the annual assessment that determines whether the objectives have been met, and pertains to the entire period of April to March. In the course of the performance assessment cycle, the employee is still evaluated quarterly, however the first and third quarter assessments are only informal assessments, whilst the half way (second quarter) assessment and the final assessment are formal assessments. All these assessments are then also encapsulated in an annual assessment, and the Department Moderating Committee moderates the annual assessments and determines if the employee qualifies for rewards. It remains up to the individual Departments to demine exactly what the rewards are, and what the qualifying criteria are for such awards.

[18] It was common cause that since being appointed in 2014, the third respondent had been concluding annual performance agreements with the Department. The performance agreement for the period 1 April 2018 to 31 March 2019 for the 2018/2019 financial year formed part of the documentary evidence before the second respondent. What is apparent from this agreement is that it was signed with the third respondent as ‘*Control Engineer Technician Grade A*’.

[19] In the context of the entire regulatory framework set out above, I now turn to what happened to the third respondent. In 2018, he applied for the position of Manager: Water and Sanitation at the Sarah Baartman Municipality, which is outside the Department. His application for that position was successful and he was offered that position. There is however no evidence of the grade, level or salary associated with that offer. It appears that when this happened, and order to retain him, the Department on 8 November 2018 offered the third respondent the position of Control Engineer Technician Grade B. This was a grade level 12 position, having a salary scale of between R725 112.00 and R1 036 557.00 per annum. The third respondent was offered the position at the salary notch in this scale of R866 967.00 per annum. It involved an increase of just short of R400 000.00 per annum of his salary in his previous position. The third respondent accepted the position, and his appointment to that position became effective on 1 December 2018. It was common cause that no

new performance agreement was concluded relating to this position at that salary level.

[20] It was also common cause that the third respondent was subjected to all the performance assessments pursuant to his 2018/2019 performance agreement. His annual performance assessment was done on 18 April 2019 and submitted to the Department Moderating Committee for moderation. In a letter dated 14 November 2019, the third respondent was however informed that he would not be receiving a pay progression, on the basis that he was a '*first time participant*'. This effectively meant that the Department considered him to be a new appointee in the position he took up on 1 December 2018. It was stated that his salary would thus remain at R912 048.00.

[21] This outcome prompted the third respondent to file a grievance on 22 November 2019. In this grievance, the third respondent contended that his 2018/2019 annual assessment was not done as prescribed by clause 44 of the PSR. In this regard, the relevant parts of clause 44 reads:

'(1) Subject to subregulation (2) to (4) an executive authority may set the salary of an employee above the minimum notch of the salary level indicated by the job weight —
(a) if he or she has evaluated the job;
(b) if he or she requires to retain or recruit an employee with the necessary competencies; and
(c) he or she shall record the reason why the higher salary was awarded.

(2) The setting of a higher salary notch, as contemplated in subregulation (1) to retain an employee (herein called the "counter offer") shall only take place on the first day of the month following the date of approval, if —
(a) the employee has received an employment offer (herein called the "external offer") from any other body or organ of state;
(b) the department has verified the validity and content of the external offer;
(c) the counter offer made is limited to the salary notch closest to the external offer; and
(d) the counter-offer shall not exceed the salary level of the post.

(4) If an employee is awarded a higher salary notch or a higher salary level in terms of subregulation (1) to (3), he or she shall not be disqualified from progression to a higher notch or grade if he or she meets the requirements for such progression.'

[22] According to the third respondent, he was entitled to a 1.5% pay progression and a performance bonus by virtue of the outcome of this 2018 / 2019 annual performance assessment, because he qualified for it in terms of such assessment. Where it comes to the offer he had accepted with effect form 1 December 2018, the third respondent contended that it was a situation of being awarded a higher salary level as contemplated by clause 44(4) of the PSR, and as such, he was not disqualified from pay progression.

[23] On 17 December 2019, the third respondent received the outcome of his grievance from the Department. He was informed that he was promoted by way of the offer and acceptance of the Control Engineer Technician Grade B position, to salary level 12, and therefore he was not paid the performance assessment for the period 1 April 2018 to 31 March 2019. In essence, and according to the Department, he was disqualified from receiving the performance award for that period of assessment because he was promoted and a new appointee to that promoted position.

[24] On 19 December 2019, the third respondent referred an unfair labour practice dispute relating to benefits to the GPSSBC. In this referral, the third respondent stated that even though he accepted the offer, there was no change to his work, duties and projects. He referred to his grievance and contended that the Department failed to properly take the provisions of the PSR into account. As to his performance bonus, the third respondent stated that it is measured against actual performance throughout the year and should not be linked to salary. The third respondent prayed that he be awarded his pay progression and performance remuneration.

[25] This dispute remained unresolved at conciliation on 3 February 2020, and the GPSSBC issued a certificate of failure to settle, describing the dispute that remained

unresolved as an unfair labour practice relating to benefits. This was followed by a referral to arbitration by the third respondent on 24 February 2020.

[26] The dispute ultimately came before the second respondent for arbitration on 15 October 2020. In his arbitration award handed down on 30 October 2020, the second respondent recorded that the issue in dispute was whether the third respondent was entitled to '*grade progression*' for the year 2018/2019. The second respondent reasoned that the third respondent was appointed Control Engineering Technician Grade B which always remained the same. He recorded that after the third respondent receiving the offer from Sarah Baartman Municipality, the applicant *'… offer to retain the Applicant (referring to the current third respondent) in the same position and the same salary level…*' (sic). According the second respondent, the KPAs of the third respondent remained the same. In this context, the second respondent determined that he was required to decide whether the third respondent had been promoted, and considering all these factors, the third respondent was not promoted.

[27] The second respondent also dealt with the applicant's reliance on clause 72(2) of the PSR, and held that the clause did not include '*retention*'. According to the second respondent, he could understand why the clause provided that a new performance agreement should be signed, because the KPAs of an employee would change if there is a promotion, however in this case it did not change. Also as far as the second respondent was concerned, clause 72(2) did not assist the applicant, as it only applied to transfer and secondment.

[28] The second respondent concluded that the applicant had committed an unfair labour practice when it '*withheld the benefits in relation to progression*' from the third respondent for the 2018/2019 period. The second respondent then made a monetary award in favour of the third respondent, ordering the applicant to pay a pay progression sum of R19 388.50, and a performance bonus of R56 532.00. In is not indicated in the award how these amounts were arrived at.

[29] In the variation ruling of 6 July 2021, the second respondent added the relief that the third respondent's pay progression must be implemented on PERSAL to give effect to the 2018/2019 pay progression.

[30] The aforesaid arbitration award of the second respondent, as varied, then gave rise to the current review application.

The test for review

[31] The test for review to be applied is trite. In *Sidumo and Another v Rustenburg Platinum Mines Ltd and Others,*[4] the Court held that '*the reasonableness standard should now suffuse s 145 of the LRA*', and that the threshold test for the reasonableness of an award was: *'… Is the decision reached by the commissioner one that a reasonable decision-maker could not reach?...'*[5]. This means that the award in question is tested against all the facts before the arbitrator to ascertain if it meets the requirement of reasonableness.[6] In conducting this test it is always necessary and important for the Court to enquire into and consider the merits of the matter and the entire evidence on record in deciding what is reasonable.[7] In *Herholdt v Nedbank Ltd and Another*[8] the Court said:

'A result will only be unreasonable if it is one that a reasonable arbitrator could not reach on all the material that was before the arbitrator. Material errors of fact, as well as the weight and relevance to be attached to the particular facts, are not in and of themselves sufficient for an award to be set aside, but are only of consequence if their effect is to render the outcome unreasonable. …'

[4] (2007) 28 ILJ 2405 (CC).
[5] Id at para 110. See also *CUSA v Tao Ying Metal Industries and Others* (2008) 29 ILJ 2461 (CC) at para 134; *Fidelity Cash Management Service v Commission for Conciliation, Mediation and Arbitration and Others* (2008) 29 *ILJ* 964 (LAC) at para 96.
[6] See *Duncanmec (Pty) Ltd v Gaylard NO and Others* (2018) 39 ILJ 2633 (CC) at para 43.
[7] Id at para 41.
[8] (2013) 34 *ILJ* 2795 (SCA) at para 25. See also *Gold Fields Mining South Africa (Pty) Ltd (Kloof Gold Mine) v Commission for Conciliation, Mediation and Arbitration and Others* (2014) 35 ILJ 943 (LAC) at para 14; *Monare v SA Tourism and Others* (2016) 37 ILJ 394 (LAC) at para 59; *Quest Flexible Staffing Solutions (Pty) Ltd (A Division of Adcorp Fulfilment Services (Pty) Ltd) v Legobate* (2015) 36 ILJ 968 (LAC) at paras 15 – 17; *National Union of Mineworkers and Another v Commission for Conciliation, Mediation and Arbitration and Others* (2015) 36 ILJ 2038 (LAC) at para 16.

[32] Based on the aforesaid, the first enquiry is to establish if there a failure or error on the part of the arbitrator. Second, and where there is such a failure or error, it must be shown that the outcome arrived at by the arbitrator was unreasonable as a result. It would only be if the consideration of the evidence and issues before the arbitrator shows that the outcome arrived at by the arbitrator cannot be sustained on any grounds, and the irregularity, failure or error concerned is the only basis to sustain the outcome the arbitrator arrived at, that the review application would succeed.[9] As said in *Anglo Platinum (Pty) Ltd (Bafokeng Rasemone Mine) v De Beer and Others*[10]:

'… the reviewing court must consider the totality of evidence with a view to determining whether the result is capable of justification. Unless the evidence viewed as a whole causes the result to be unreasonable, errors of fact and the like are of no consequence and do not serve as a basis for a review …'

[33] As against the above principles and test, I will now turn to deciding the merits of the applicant's application to review and set aside the arbitration award of the second respondent.

Analysis

[34] In this instance, the third respondent's case was founded on an unfair labour practice in terms of section 186(2)(a) of the LRA,[11] and in particular, that the Department refused / failed to afford him pay progression and a performance bonus in terms of the Department performance management scheme and the provisions of the PSR. This would indeed be an unfair labour practice relating to benefits. It is trite that the third respondent had the *onus* to prove the existence of such an unfair labour practice.[12] As to how the unfair labour practice is to be established, the Court

[9] See *Campbell Scientific Africa (Pty) Ltd v Simmers and Others* (2016) 37 ILJ 116 (LAC) at para 32.
[10] (2015) 36 ILJ 1453 (LAC) at para 12.
[11] The section reads: ''*Unfair labour practice' means any unfair act or omission that arises between an employer and an employee involving (a) unfair conduct by the employer relating to the promotion, demotion, probation or training of an employee or relating to the provision of benefits to an employee'*.
[12] See *National Education, Health and Allied Workers' Union obo Manyana and Another v Masege NO and Others* [2016] JOL 35711 (LC) at para 46; *City of Cape Town v SA Municipal Workers Union on behalf of Sylvester and Others* (2013) 34 ILJ 1156 (LC) at para 19; *National Commissioner of the SA Police Service v Basson and Others* (2006) 27 ILJ 614 (LC) at para 7; *Trade and Investment SA*

in *Department of Justice v Commission for Conciliation, Mediation and Arbitration and Others*[13] gave the following guidance:

'An employee who complains that the employer's decision or conduct in not appointing him constitutes an unfair labour practice must first establish the existence of such decision or conduct. If that decision or conduct is not established, that is the end of the matter. If that decision or conduct is proved, the enquiry into whether the conduct was unfair can then follow. This is not one of those cases such as disputes relating to unfair discrimination and disputes relating to freedom of association where if the employee proves the conduct complained of, the legislation then requires the employer to prove that such conduct was fair or lawful and, if he cannot prove that, unfairness is established. In cases where that is intended to be the case, legislation has said so clearly. In respect of item 2(1)(b) matters, the Act does not say so because it was not intended to be so …'

[35] The second respondent was correct in articulating that one of the core questions he was called on to decide is whether the third respondent was promoted or not. Answering this question determines the manner in which the various regulatory measures as summarized above would find application. It is the application of these provisions that determine whether the third respondent is entitled to pay progression and a performance bonus in terms of his 2018/2019 performance agreement.

[36] However, and even if the third respondent was not promoted, there are two other provisions in the PSR that need to be considered in deciding whether the third respondent would be disqualified from receiving a pay progression and performance bonus, considering the common cause facts that he was given a retention offer, which he accepted, thereby affording him a higher salary level and substantially higher salary in December 2018.

[37] Unfortunately, it is my view that the second respondent, in deciding this matter, committed a number of material factual errors. These factual errors have the

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(Association Incorporated Under Section 21) and Another v General Public Sector Bargaining Council and Others (2005) 26 ILJ 550 (LC) at para 17.

[13] (2004) 25 ILJ 248 (LAC) at para 73.

consequence of having an material impact on the outcome he arrived at, to the extent of rendering it unreasonable. From the outset, the second respondent records in his award that he had to decide whether the third respondent was entitled to a '*grade progression*'. This is not correct. A grade progression concerns progression to a higher salary level. The issue was whether the third respondent was entitled to a '*pay progression*'. A pay progression, as is clearly defined in the 2017 Framework, is a salary notch progression within the same salary level. This fundamental error in approach made by the second respondent unfortunately directly impacted on his determination of the facts relating to the question of whether the third respondent had been promoted.

[38] The second respondent seems to completely discount the fact that before receiving and accepting the retention offer, the third respondent was employed as a Control Engineering Technician Grade A, which was a grade 10 position. The position he was offered and accepted of was Control Engineering Technician Grade B, which was a grade 12 post. This is undoubtedly a higher salary grade. The second respondent, if one considers his award as discussed above, seems to think the third respondent was always employed as Control Engineering Technician Grade B, which is clearly wrong. In addition, the salary notch scale band applicable to the grade 10 position is lower than the salary notch scale band applicable to the grade 12 position. This in itself affords the third respondent the opportunity to have a far greater pay progression, with the upper echelon being R1 036 557.00. But not only that, the third respondent received a substantial increase in salary when accepting this retention offer. His salary package increased from R475 545.00 to R866 967.00. In short, what the second respondent appeared to completely discount was that as a result of the retention offer, the third respondent occupied a higher post level, a higher salary level, and earned a higher salary. As stated above, this is likely influenced by his approach that he had to decide whether there was an entitlement to a grade progression and not a pay progression. What the second respondent did get right was that the third respondent's duties, projects and responsibilities remained unchanged.

[39] The second respondent's conclusion to the effect that nothing really changed when the retention offer was made and accepted is unsustainable. It is a conclusion

at odds with the facts before him. The facts indicate that at the very least, the third respondent moved to a higher post level, a higher salary level and earned a higher salary. But does this mean that the third respondent was promoted?

[40] In *Jele v Premier of the Province of KwaZulu-Natal and Others*[14] the Court considered the meaning of promotion in the context of an unfair labour practice, and held that: '*… The ordinarily accepted meaning of 'promotion' is 'advance, raise to a higher rank or position, advancement in position or preferment' …*'. A similar approach was adopted in *National Commissioner of the SA Police Service v Potterill NO and Others*[15] where the Court said: '*… Where the incumbent employee is permitted to continue to occupy the regraded post and is afforded the appropriate higher salary, the employee is, in my view, "promoted". In my view such a situation falls within the first meaning given for the word "promote" in the Concise Oxford Dictionary (9 ed), namely: "Advance or raise (a person) to a higher office, rank, etc".' …*'.

[41] In *Minister of Labour v Mathibeli and Others*[16] the Court specifically considered a case where the employee received increased benefits in the context of a retention, and had the following to say:

'What is clear from the decisions referred to above is that the retention, with increased benefits, of an incumbent on a newly upgraded post, has as its consequence the same substantive outcome as a promotion. Put differently, where the incumbent employee is permitted to continue to occupy the regraded post and is afforded the appropriate higher salary, the employee is promoted.

It must follow necessarily then, that the retention, without increased benefits, of an incumbent on a newly upgraded post, does not have, as its consequence, the same substantive outcome as a promotion. Where, therefore, the incumbent employee is permitted to continue to occupy the regraded post and is not afforded the appropriate higher salary, the employee is not promoted. …'

[14] (2003) 24 ILJ 1392 (LC) at para 28.
[15] (2003) 24 ILJ 1984 (LC) at para 16.
[16] (2013) 34 ILJ 1548 (LC) at paras 20 – 21. See also *National Commissioner of the South African Police Services and Another v Cohen NO and Others* [2009] 3 BLLR 239 (LC) at para 15.

The Labour Appeal Court in *Mathibeli v Minister of Labour*[17] upheld the decision of the Labour Court as quoted above, and specifically endorsed the reasoning in *Potterill supra* also quoted above

[42] One further example bears mention. The Court in *KwaZulu-Natal Department of Transport v Hoosen and Others*[18] considered whether a post upgrade with a commensurate increase in salary constituted a promotion, and the Court then came to the following conclusion:[19]

'The applicant's argument that Mr Makabela was not promoted in 2003 but simply benefited from his special protection officer post being upgraded from level 8 to 9 cannot be sustained. The department promoted Mr Makabela the moment they permitted him to remain in the upgraded post and afforded him the appropriate higher salary.

The argument that, after Mr Makabela's transfer back to the PTEU, the decision to change his designation from a PPI to CPI was not a promotion is also unsustainable. *The Concise Oxford Dictionary* (9 ed), defines 'promote' as to advance or raise (a person) to a higher office, rank. When Makabela was transferred back to the PTEU, it was initially at the rank of PPI, albeit with his grade 9 salary level intact. The department may well have thought they were merely correcting an error in assigning (or 'translating') him the rank commensurate with the grade he held in the special operations unit. However, by definition, this act was a promotion …'

[43] In presenting argument, the third respondent's attorney contended that *in casu*, there was no promotion because there was no change in the third respondent's duties and responsibilities. In my view, this argument, considering all the authorities discussed above, simply does not have substance. In my view, the existence of a promotion can be found in a number of individual considerations. All of these involve the elevation of the employee in one form or another.[20] The most

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[17] (2015) 36 ILJ 1215 (LAC) at para 18.

[18] (2016) 37 ILJ 156 (LC).

[19] Id at paras 17 – 18. See also *Mokoena v General Public Service Sectoral Bargaining Council and Others* (JR 1121/18) [2021] ZALCJHB 239 (17 August 2021) at para 12, where it was said that: '*… It is trite that a promotion for the purpose of section 186(2)(a) involved a move by the existing employee to a higher rank or position which carries a greater status and responsibility …*

[20] In *Koma and Others v Member of the Executive Council (MEC): Gauteng Department of Agriculture and Rural Development and Others* [2024] 2 BLLR 170 (LC) at para 42, the Court described a promotion as enhancement of the employee relating to status, level, salary, employment conditions,

obvious instance of a promotion is where an employee is moved to a higher level position in the organizational structure in the employer, which would more often than not involve an increase in salary and responsibility. Another instance would be the upgrading of the employee's existing position. This upgrading must however be distinguished from a dispute where the issue is whether an employee has been correctly (wrongly) graded, which is not an issue relating to promotion, but is instead an issue of a benefit.[21] The upgrading of a position as a promotion must involve an actual regrading of the position to a higher level, into which the employee is then placed. A further instance of promotion would be a change to a higher post level which involves an enhancement in benefits and / or salary associated with the change. And finally, a salary increase is not *a quid pro quo* for a promotion to exist, and an increase in status and responsibility would also suffice to establish a promotion.

[44] Applying the above to the case *in casu*, there is my view little doubt that the third respondent was promoted. The obvious question, on the facts, that the second respondent never answered, is why would the third respondent give up his offer of a management position at Sarah Bartman Municipality for nothing, which is what the second respondent's finding actually implies. One does not retain a scarce skill by offering the employee nothing better. The '*better*' in this case is a higher grade, a higher post level, coupled with quite a significant salary increase, and the prospect to earn a much higher salary going forward if the third respondent performed. It does not matter that the third respondent's work, duties and projects remained the same. And finally, it must be remembered that what happened in this case was an offer by the applicant to the third respondent of a higher level, more money and better salary prospects, which was accepted by the third respondent, and was thus not a unilateral decision by the applicant. All this surely brings what happened to the third respondent squarely within the ambit of a promotion. I am therefore satisfied that in

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responsibilities, or the like of an employee.

[21] See *National Union of Mineworkers on Behalf of Coetzee and Others v Eskom Holdings SOC Ltd* (2020) 41 ILJ 391 (LAC) at para 66, where it was said: '*… an employee who complains that his or her job is wrongly graded does not seek promotion to a new, higher or different job. Any re-grade of the job to coincide with the actual work done does not change the job contents. A re-grade does not promote an employee into a new position — it merely recognises the correct value to be attached to what the employee, in fact, is already doing. A promotion gives an employee a different or revised task. A dispute about an unfair incorrect grading is thus an unfair labour practice dispute relating to the provision of benefits …*'.

finding that there was no promotion in this case, the second respondent committed a gross and reviewable irregularity, as this finding is completely at odds with the facts and the relevant principles of law.

[45] But this is not the end of it. It is undeniable that what happened in this case was because the applicant wanted to retain the third respondent's services. The question is whether this act of '*retention*' makes a difference where it comes to the third respondent's entitlement to a pay progression and performance bonus for the 2018/2019 performance assessment year, irrespective of the salary level and accompanying salary increase that happened. The third respondent certainly thought so, and in this regard, relied on clause 44(4) of the PSR.

[46] In my view, Clause 44(4) of the PSR cannot assist the third respondent's cause. This is simply because the clause does not find application. The reason why it cannot apply is that most of the requirements that have to be met for it to apply have not been met. First and foremost, the clause is unrelated to the issue of performance management. The clause is found in part 1 of the PSR, which is the part dealing with creation of posts, job descriptions, job evaluation and job grading. Clause 44 must be read in the context of this part. The starting point is clause 41, which provides that the Minister shall *inter alia* determine a range of job weights for each salary level in a salary scale (clause 41(1)(b)). Clause 42 then applies to OSD positions, and provides that the Minister may determine an occupational specific dispensation for a specific occupational category or categories that includes a unique salary scale and centrally determined grades and job descriptions. In this context, clause 44 makes sense. Clause 44(1) allows for the salary of an individual employee to be set above the minimum notch of the salary level determined by the job weight in particular circumstances. This can only mean movement within a particular salary level. Ordinarily, an OSD employee would start at a particular salary level at the minimum salary notch in the salary level (band) attached to a particular position in terms of clause 42. However, and in terms of clause 44(1), the employee can be placed at a higher salary notch within the same salary level for the purposes of *inter alia* retention. This is not what happened *in casu*. In fact, the third respondent was not placed at a higher salary notch within the same salary level. The third respondent was placed at a higher salary level. That in itself takes clause 44 out of the equation.

[47] Further, and in order for a placement at a higher salary notch in terms of clause 44(1) to be competent, the job needed to have been evaluated, an employee with the necessary competencies needed to be recruited or retained, and there must be a recorded reason why the higher salary was awarded. However, and in this case, there was never a job evaluation, as the third respondent was placed in a higher salary level existing job, following a process of offer and acceptance.

[48] In terms of clause 44(2), the setting of a higher salary notch by way of a counter offer in order to retain an employee can only take place if the employee has received an external employment offer, the Department has determined the validity and content of the external offer, the counter offer must be limited to the salary notch closest to the external offer and the counter offer most not exceed the salary level of the post offered. *In casu*, most of these requirements were not satisfied. Whilst it is true that the third respondent did receive an external employment offer, there was no evidence that this offer had been validated by the Department, and the counter offer to the third respondent was made at the salary notch closest to the external offer. But more importantly, it is clear that counter offer was in excess of the salary level of the post occupied by third respondent at the time, being that of Control Engineering Technician Grade A, which was at a grade 10 salary level. In simple terms, the offer substantially exceeded the maximum salary notch at that salary level. It meant the offer had to entail a new and higher salary level, which is not what is contemplated by clause 44(2),

[49] For all the reasons summarized above, clause 44(4) cannot come into play, as it can only apply if the higher salary notch is awarded in terms of clauses 44(1) and (2), which clauses, as said, cannot find application because the requirements of those clauses have not been fulfilled. Consequently, the third respondent's unfair labour practice case brought on this basis had to fail.

[50] This then leaves the issue of the absence of a performance agreement, specifically raised by the applicant in the arbitration. The applicant relied on clause 72(2) of the PSR in this regard. It must be pointed out that this clause is found in part 5 of the PSR, being the part that specifically deals with performance evaluation. In

terms of clause 72(2), where an employee is '*appointed*' during a performance cycle, a new performance agreement must be concluded. It is however provided that the performance assessment relating to the previous performance agreement shall still be considered, provided the new performance agreement is signed. Clause 72(7) makes it clear that no employee shall qualify for performance rewards, including pay progression, if the employee has not signed a performance agreement as prescribed.

[51] As stated above, the PSR is a general empowering regulation, and the '*nuts and bolts*', for a want of a better description, determining the qualifying and participating terms and conditions of performance assessments and accompanying rewards, are still determined within the various Departments themselves. It follows that measures like the PMDP, the 2017 Framework, and the 2018 Directive must all be taken into account. All of these regulatory measures have a central principle relating to pay progression as a performance reward, and that is that the progression can only take place on the basis of a notch increase within a particular salary level, with performance being assessed within that position over the period of a year from 1 April to 31 March, with quarterly assessments being done during this period. It is also clear from all these measures that without a signed performance agreement, there can be no performance assessment rewards accruing to an employee. The 2017 Framework introduced the concept of a 1st time participant, which is new appointee in a production or supervisory / managerial OSD role. It is important to consider this, because it in essence says that for a 1st time participant, the annual assessment cycle for pay progression can only start on 1 April of the following year. A 1st time participant would include an appointment of an existing employee to a new post. The 2017 Framework also provided that pay progression is based upon actual service on a particular salary level for the assessment cycle, and that an OSD employee is excluded from pay progression if that employee is awarded a personal salary above the minimum of the scale attached to his or her OSD post, or the scale attached to a grade of his or her OSD post.

[52] Where is comes to a performance bonus, the only provision dealing with it is found in the PMDP, which provides that the employee must complete a continuous

period of 12 months (1 April to 31 March) on the employee's salary level and receive an assessment that indicates the employee's performance was above average.

[53] What one can take away from all of the above are the following fundamentals in order for the third respondent to be eligible for rewards in the form of a pay progression and / or a performance bonus: (1) the third respondent must fulfil his functions within the same post at the same salary level, for the assessment period from 1 April to 31 March; (2) the third respondent must actually be assessed in that salary level over the entire period from 1 April to 31 March; and (3) there must be a signed performance agreement relating to that particular post and salary level. This being the case, the third respondent's entitlement to a pay progression and / or a performance bonus faces significant difficulties. Firstly, he did not remain at the same salary level for the assessment period. He changed, by agreement, to a higher salary level as from 1 December 2018, being a move from salary level 10 to salary level 12. He also moved to a higher graded post, being from grade A to grade B. He therefore did not complete a 12 month assessment period at in the same post within the same salary level. Taking guidance from the 2017 Framework, his eligibility for assessment would only start as from the next date of 1 April following his appointment to the higher graded post and salary level. Secondly, he never signed a performance agreement relating to this his higher graded post and higher salary level. He continued to be assessed (evaluated) in terms of the performance agreement relating to his previous graded post and salary level, which could have been considered, in terms of clause 72(2) of the PSR, had he signed a new performance agreement. The above is effectively what the Department was saying all along, and in my view justifiably so.

[54] The second respondent in reality got it all wrong where it came to his application, or for that matter non-application, of all the regularity measures at stake in this case. He had no regard the 2017 Framework or the 2018 Directive, which flowed directly from the PSR, and needed to be considered. He only referred to clause 72(2) of the PSR, and decided that the clause did not include '*retention*' and only applied to transfer and secondment. This is obviously materially in error, as the clause also refers to '*appointment*' and it is clear that '*appointment*' would include making an offer of a higher salary scale and salary increase to an employee in order

to prevent that employee from leaving. Applying the second respondent's own reasoning, it may well be necessary to determine different KRAs and GAFs for the higher job grade the third respondent was offered and accepted, even if his duties remained the same. That is why a new performance agreement is essential, in order to determine this. In short, proper performance assessment of the third respondent cannot happen in the absence of a new performance agreement relating to his appointment at a higher graded post and higher salary level. The second respondent's finding that clause 72(2) did not assist the applicant, is simply not a reasonable finding.

[55] The applicant, as part of its grounds of review, has raised another cause of complaint. This cause of complaint is that the second respondent appeared to have arbitrarily granted relief to the third respondent, in circumstances where there existing no evidence to substantiate this. I must confess that I find substance in this cause of complaint. As the third respondent had the onus to provide evidence to substantiate the relief he sought, he needed to prove that if his performance assessment was considered, what the rewards would be that would be attributed to him. He presented no such evidence. In short, he failed to establish any case that would substantiate the relief he wanted.

[56] In his closing argument in the arbitration proceedings, the third respondent in essence baldly stated that he would be entitled to a 1.5% pay progression. Where he gets this figure from is unclear, but I can only assume it is an assumption drawn from the fact that the Department must allocate a sum of not more than 1.5% of its wage budget to the rewarding of employees in the form of pay progression. But where it comes to the actual pay progression, it is determined on the basis of notch increases, not percentage increases. The third respondent needed to present evidence as to what his next salary notch would be, as the basis for the pay progression he would be entitled to. He never provided such evidence. He never established what salary notch he was on at the time of assessment, and what the next salary notch would be. Where it concerns his performance bonus, the third respondent equally did not establish any basis for determining the quantum of such bonus.

[57] How the second respondent came up with the relief quantum set out in his arbitration award is unclear. He provides no basis for it. He seems to have plucked it out of the air. That is not rational or reasonable behaviour. The second respondent needed to refer to the evidence he considered in establishing the quantum of the award he made in favour of the third respondent, and provide at least basic reasons for how he arrived at the amounts he awarded. Not having done any of this, his determination is unsustainable on review.

[58] In summary, it is my view that the second respondent misconstrued material evidence and failed to have proper regard to all the regulatory provisions in place in this case. On the evidence, properly considered, and applying the relevant principles of law, it is clear that the third respondent was indeed promoted, in pursuit of the strategy to retain his services. Having been promoted, it was necessary for the third respondent to have concluded a new performance agreement, which the second respondent also failed to appreciate. The second respondent also did not appreciate that having moved to a higher grade and a higher salary level, it was necessary for the third respondent to have completed an annual performance cycle at that grade and salary level, which did not happen. In the end, and having been promoted and having received a substantial salary increase in December 2018, the third respondent was only eligible for pay progression and / or a performance bonus as a performance reward, for the 2019 / 2020 assessment period, starting 1 April 2019. The aforesaid is the only outcome the second respondent could reasonably have come to. But to compound matters, the actual consequential relief the third respondent would be entitled to was never proven by him, yet the second respondent arbitrarily made an award in this regard, without any evidence to substantiate it. All these failures by the second respondent constitute gross irregularities, to the extent that it renders the outcome he arrived at to be unreasonable. The arbitration award of the second respondent thus falls to be reviewed and set aside.

Conclusion

[59] Therefore, and for all the reasons set out above, the arbitration award of the second respondent in favour of the third respondent cannot stand, as it resorts well

outside the bands of what may be considered to be a reasonable outcome. This arbitration award falls to be reviewed and set aside, which I hereby do.

[60] Having reviewed and set aside the arbitration award of the second respondent, where to now? It is essential that this matter must now be finally brought to an ultimate conclusion, as it dates back more than three years. In terms of 145(4) of the LRA, this Court has the power to make any order it considers to be appropriate, having reviewed and set aside an award of an arbitrator. In my view, it is appropriate to substitute the award of the second respondent, as all the evidence necessary to do so is properly before me, and there is no need, for a second time, to have arbitration all over again. Fairness necessitates certainty in this entire matter going forward, especially considering the continued employment relationship between the parties. I shall therefore substitute the arbitration award of the second respondent with an award that the applicant did not commit an unfair labour practice towards the third respondent.

Costs

[61] This only leaves the issue of costs. In terms of section 162(1) of the LRA, I have a wide discretion where it comes to the issue of costs. Even though the third respondent was not successful, he at least had an arguable case. I do not think that the third respondent acted improperly by defending this matter, even though the failures of the second respondent were in my view quite apparent. I do not think any of the parties acted unreasonably in seeking to pursue this matter to finality, and in any event, it is an issue that called for final determination by this Court. I also consider the *dictum* of the Constitutional Court in *Zungu v Premier of the Province of Kwa-Zulu Natal and Others*[22] where it comes to costs awards in employment disputes before this Court, and in this case there certainly exists no reason to depart from the principle set out therein. Therefore, I consider it to be in the interest of fairness that no costs order should be made.

[62] In the premises, I make the following order:

[22] (2018) 39 ILJ 523 (CC) at para 25. See also *Union for Police Security and Corrections Organisation v SA Custodial Management (Pty) Ltd and Others* (2021) 42 ILJ 2371 (CC) at para 35.

Order

1. The applicant's review application is granted.

2. The arbitration award of the second respondent, being arbitrator W Blundin, under case number GPBC 19/2020 and dated 30 October 2019, as supplemented by the variation ruling dated 6 July 2021, is reviewed and set aside.

3. The arbitration award is substituted with a determination that the applicant did not commit an unfair labour practice towards the third respondent.

4. There is no order as to costs.

S Snyman
Acting Judge of the Labour Court of South Africa

Appearances:
For the Applicant: Advocate N Deeplal
Instructed by: The State Attorney
For the Third Respondent: Mr C Unwin of Kaplan Blumberg Attorneys