

# Should good performance be rewarded despite bad behaviour?

By [Lauren Salt](#) and [Thandoluhe Dladla](#)

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The Labour Court (LC) in *Solidarity obo Oelofse v Armscor (SOC) Ltd and Others* (21 February 2018) was tasked with reviewing a decision that the non-payment of a performance bonus was not an unfair labour practice, even though the employee exceeded the qualifying rating.



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Oelofse is employed by Armscor as a chief contract officer, soldier support. Armscor has a bonus policy called Remuneration Practice, which was adopted on 14 June 2010. The policy requires employees to obtain a score of at least 90% on the last day of the financial year in order to qualify for a bonus. The policy was specifically amended to incorporate the Performance Management Practice which was adopted on 13 November 2013. The Performance Management Practice states that: 'Performance is defined as the attainment of specific results/outputs through specific actions, while being consistent with the Armscor values and objectives'.

On 3 July 2014, Oelofse was subject to disciplinary proceedings relating to her failure to declare gifts received from suppliers and her unauthorised use of company resources. Oelofse was found to have committed the misconduct. The chairperson's recommendation was that Oelofse be given a final written warning, which Armscor issued on 23 February 2015.

During the performance assessment for the 2013/2014 period, Oelofse obtained a performance rating of 107.7% exceeding the qualifying rating of 90%. However, Oelofse was not paid a bonus notwithstanding this.

Oelofse lodged an internal grievance with Armscor and also referred an unfair labour practice dispute to the CCMA. The CCMA arbitrator found that Armscor did not commit an unfair labour practice. Oelofse then lodged an application to review and set aside the arbitrator's award.

In her founding papers, Oelofse contended that:

- The arbitrator failed to properly consider the remuneration and performance policies because Armscor had no discretion to refuse to pay a performance bonus where the qualifying criteria was met.
- The arbitrator misconstrued the evidence by failing to consider double jeopardy because she had already been given a final written warning and now her bonus was not paid.
- Armscor was inconsistent when dealing with matters relating to paying out bonuses to employees who were found to have committed acts of misconduct. She referred to three managers who were dismissed before, but still received their bonus.

The LC held that the wording in the policy, as a whole, contemplates that the performance remuneration and rewards are not only based on individual performance, but they also take into consideration the broader organisational objectives and values. The purpose is to reward the individual's overall performance, which includes aspiring to the organisational values. Put differently, the employer has the discretion to decide whether an employee has adhered to organisational objectives and values.

When dealing with discretion, the employer must act fairly and exercise their discretion in a manner which is not arbitrary mala fide or grossly unreasonable. These considerations can be applied in the context of promotions and benefits as well.

Dealing with double jeopardy, the LC found that Oelofse was not subjected to two separate disciplinary proceedings on the same allegations. The performance bonus issue was not a disciplinary matter. Armscor's refusal to pay out the bonus was not punishment of Oelofse. The issue of a performance bonus is a case of an employee being rewarded for being exceptional. Therefore, the LC found that double jeopardy did not exist.

Looking at the inconsistency of Armscor, the LC held that Oelofse failed to lead evidence that showed that Armscor was inconsistent in dealing with employees found to have committed acts of misconduct and paying out bonuses to those employees. Oelofse failed to provide evidence that she conducted a proper like-for-like comparison to prove this.

In light of the above, the LC dismissed the review application.

Employers should ensure that the wording of their bonus policy gives them latitude to deal with situations such as this - where an employee's financial performance might be exceptional but the manner in which they conduct themselves is not in line with the company's cultural aspirations.

## ABOUT THE AUTHOR

Lauren Salt is a senior associate and Thandoluhe Dladla, a candidate attorney, in the Employment and Compensation Practice at Baker McKenzie Johannesburg.