



PHSDSBC

PUBLIC HEALTH AND SOCIAL DEVELOPMENT
SECTORAL BARGAINING COUNCIL

ARBITRATION AWARD

Case No: PSHS1019-16/17

Commissioner: Jerald Vedan

Date of hearing: 3 May 2017

In the matter between:

NEHAWU obo M.C. MADELA and 29 others

Applicants

and

Department of Health – KwaZulu-Natal

Respondent

DETAILS OF HEARING, REPRESENTATION AND BACKGROUND

1. The hearing took place at Natalia Building, Pietermaritzburg on 23 March 2017 at 10:00 am.
2. The Applicants were represented by T. Gabela, an official of NEHAWU.
3. The Respondent was represented by T. Ntshangase.

4. The parties agreed to submit arguments in writing by 30 March 2017, with the award being due on 13 April 2016.

ISSUES TO BE DECIDED

5. Whether the Respondent has committed an unfair labour practice with regards to benefits in denying the Applicants their Occupational Specific Dispensation (OSD) once off translation benefits at present and retrospectively?

OVERVIEW OF EVIDENCE AND ARGUMENT

6. The Applicants were first employed as Health Clinical Engineering Technicians with the Department in 2011. Their occupation consisted of repairing and the servicing of clinical equipment in the hospitals, and other facilities of the Department of Health. They were initially employed on salaries, and did not receive the OSD.

7. In 2013, the employer converted their job description to Technician Candidates with OSD. However this impacted negatively on them, as they did not receive any grade progression on their salary scales.

8. The Applicants are contending that they should be receiving OSD benefits. They referred to DPSA Circular No. 2 of 2011, which in conjunction with PHSDSBC Resolution 2 of 2010 makes allowance for OSD once off benefits to be paid to employees, who are in possession of scarce skills. This makes provision for a salary structure, which is apposite to particular occupations, and addresses their distinctive characteristics. The Applicants argued that despite the Circular and the Resolution, the Respondent did not move from its stance of paying the Applicants on the scales which existed before the Circular and Resolution.

9. The Respondent produced a GPSSBC Resolution No. 5 of 2009, which the Respondent argued excludes the Applicants.

10. However the Applicants argument was that this particular Resolution did not pertain to the Applicants.

11. The Respondent further argued that because the Applicant are not registered with the Engineering Council of South Africa, they will not be entitled to OSD benefits, as this is one of the requirements of the Resolution that they must be registered with a professional body.

APPLICANT'S EVIDENCE AND ARGUMENT

12. The Applicant led the evidence of two witnesses, who gave more or less the same evidence. They corroborated each other in every material respect.

13. The first witness was Sifiso Mhlongo, employed as a Clinical Engineering Technician by the Department of Health, and based at Prince Mshiyeni Hospital. The second witness was Lindokuhle Harilall, who is employed as a Clinical Technician by the Respondent at Wentworth Hospital. Both Applicants have their National Diplomas in electronics, and both claimed that they have scarce skills. The job is listed as a scarce skill.

14. They submitted that the Respondent resorted to camouflaging their true vocation by calling them Candidate Technicians in order to obviate paying them the allowance. They were demoted to work under supervision. They submitted that they did not fall into the category that necessitated them to be registered with the Engineering Council of South Africa, and that they were registered with the Clinical Engineering Council of South Africa. They stated that Senior Technicians are getting the OSD and Control Technicians, and they are not registered with the Council.

RESPONDENT'S EVIDENCE AND ARGUMENT

15. The Respondent on the other hand appeared to dispute the jurisdiction of the Council, on the basis that the Applicants fall under the General Public Service Sector Bargaining Council (GPSSBC), and that Resolution 5 of 2009 of the GPSSBC is applicable.

16. However after careful consideration of all the relevant factors, and after perusing the necessary documents, I am of the view that indeed DPSA Circular No. 2 of 2011 and PHSDSBC Resolution 2 of 2010 are applicable to the present matter, and that the Council does indeed have jurisdiction in this matter.

17. The Respondent also argued that the Applicants were employed as Medical Technicians and not Clinical Engineering Technicians, and that they merely repaired medical equipment, and cannot call themselves Technicians.

18. They argued that the Applicants should have applied with the ECSA, and normally they are given a grace period of twelve months, and they failed to register with the body. The Respondent said that they knew they were non-OSD when they were employed. The Respondent did try and facilitate the registration of the Applicants with the ECSA, however the Respondent agreed that the scope of practice of Technicians did not make them eligible with the ECSA. The Respondent alleged that they did not know of a Supervisor of Technician that was benefiting from the OSD. They also stated that they had no proof that the other provinces had advertised the same post that the Applicants held, as being with OSD, and that this was hearsay evidence.

19. The Respondent stated that CEASA is not a relevant and appropriate professional council, and the Applicants do not have the necessary certificates. The only way they can be registered with the ECSA is to follow internal process, including the organizational efficiency structure, which evaluates the posts of the employees.

ANALYSIS OF EVIDENCE AND ARGUMENT

20. The matter was referred to as a unfair labour practice with regard to benefits in terms of Section 186 (2)(a) of the LRA. However the Applicants claim is more allied to the interpretation and implementation of collective agreements. The parties are bound by the collective agreement.

21. The Applicants were initially employed as Medical Technicians, and not employed as Clinical Engineering Technicians. It is common cause that they do not attend to patients directly. Their duties entail repairing medical equipment, and therefore it would seem inappropriate for them to be referred to as clinicians, as clinician is a medical term. "Clinical" in the Oxford English Dictionary, used as an adjective, is referred to as a medical term, and in the context of the Applicants they are doing mechanical and related work, and not clinical work.

22. From evidence it would appear that they were translated to the OSD for Engineering Technicians on the understanding that they would be registered with the Engineering Council of South Africa (ECSA), which is the professional body prescribed in the OSD for the appointment of Engineering Technicians. Their job descriptions also refer to them as Engineering Technicians. It would seem that in terms of the OSD, they had to be registered with ECSA, and they are given a twelve month period to register with the ECSA, and they have not been able to do so.

23. The ECSA is a specific professional body relevant to Engineering Technicians. The Respondent employed them to deal with the repair of medical equipment, which were newly created posts, and were on the non-OSD level when they were newly appointed. The Applicants were qualified as Electrical Engineers, and were recruited by the Department of Health from Universities of Technology, and were trained on how to repair the machinery and equipment.

24. It is common cause that the Respondent did endeavor to assist the Applicant to register with the ECSA, however it was made clear that the scope of practice of the technicians employed by the Respondent did not make them eligible for registration with that body. It would seem that they cannot be translated to the OSD for Engineering Technicians until their scope of practice is changed and is broadened to meet the required standards.

25. It is clear that Resolution No. 5 of 2009 under the auspices of the GPSSBC is relevant to the dispute. The heading of Resolution No. 5 of 2009 is headed "AGREEMENT ON THE IMPLEMENTATION OF AN OCCUPATION SPECIFIC DISPENSATION FOR ENGINEERING TECHNICIANS, SURVEY TECHNICIANS, ARCHITECTURAL TECHNICIANS, DRAUGHTSPERSONS, GIS TECHNICIANS AND SCIENTIFIC TECHNICIANS".

26. Paragraph 4.1.3. of Resolution No. 5 of 2009 sets out the different career streams, and clearly states the requirements for technicians to qualify for the OSD. Paragraph 5.1.1. states that "an employee meeting the appointment requirements, inclusive of but not limited to, possessing the relevant qualification (s), prescribed years of experience, registration with an appropriate professional council". It is evident that what is required is registration with the Engineering Council of South Africa. There was insufficient evidence provided by the Applicants regarding practices in other provinces, and there are variables attached to this.

27. Furthermore the Applicants have not proved that any Supervisor or Engineering Technician in the Department have benefited from the OSD, nor has any witness been called to directly attest to this. Such an Engineering Technician or Supervisor thus benefitting from the OSD would be doing so unlawfully.

28. The Applicants have stated that they are registered with the Clinical Engineering Association of South Africa (CESA), however CESA is not recognised as an appropriate professional council by the Respondent. Furthermore no proof of registration was provided.

29. It would seem that the recourse for the Applicants is to change their scope of practice so they can be accommodated by the ECSA. The only reason why the matter was submitted by the Applicants to the National Department of Health, for deliberation by the National Human Resources Committee, was because of the allegations raised that the other Departments of Health had advertised for the post of Engineering Technicians as OSD. However as stated earlier, no proof has been placed in this regard, except for copies of advertisements for posts, which could have had further requirements, for example registering with the ECSA.

FINDINGS

30. It is for the above reasons that I find that the Applicants' case falls to be dismissed.

AWARD

I make the following award:

31. The application is dismissed.

32. There is no order as to costs.

JERALD VEDAN

Commissioner