



ARBITRATION AWARD

Panellist/s: Joseph Mphaphuli
Case No.: PSHS105-10/11
Date of Award: 6-Aug-2012

In the ARBITRATION between:

PSA obo Smit, F.T
(Union/ Applicant)

And

Department of Health – National
(Respondent)

Applicant's Representative: Mr. Tau

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DETAILS OF HEARING AND REPRESENTATIONS

The award follows an arbitration hearing held in terms of Section 191 of the Labour Relations Act 66/1995 as amended.

The hearing took place at the Respondent's premises in Tshwane on 21 May 2011 and 26 July 2012.

Present were Mr. Tau an official in the service of the Respondent and on behalf of the Respondent. Mr. Bruyns an Attorney appeared on behalf of the Applicant.

The proceedings were digitally recorded.

ISSUE IN DISPUTE

Interpretation and application of a collective agreement.

BACKGROUND TO THE DISPUTE

The Applicant was appointed on 01 January 1983. The Applicant served in the capacity of Director Oral Health – National office.

The Applicant Party applied for the implementation of Resolution 3/2009 in favour of the Applicant with effect from 01 June 2009.

SURVEY OF EVIDENCE AND ARGUMENT

Dr Smith took oath and gave evidence. He was initially employed as a deputy director and rose through the ranks to his current position. He was qualified as a dentist.

Registration as a dentist is a requirement in terms of the Health Professionals Act and one could not practice the profession without registration. The international equivalent of his position was referred to as a Chief Dental Officer.

A dentist in his position would not be competent to give advise to the ministry of health on oral health in the country unless he or she has been registered as such in terms of the Health Professional Act.

The health services transformed after the new government took over in 1994. Following the transformation his position of Chief Director was renamed Director. To the best of his knowledge the requirement for registration as a dentist still holds.

He also has personal knowledge of colleagues who were at SMS level 13 and enjoying the benefits of OSD at both provincial and national levels. .It was his view that the position obtaining at the provincial level where it concerned OSD should reflect at the national level

Dr Nematandani also testified in the Applicant's case. He was employed as a Provincial Oral Health Co-ordinator in Limpopo and at level 13.He was qualified as a dentist and was registered with the HPCSA as a dentist.

He sat in the negotiations leading to the conclusion of the Collective Agreement forming the subject of the enquiry.

He was familiar with the Applicant. He has known the Applicant for some years and has known the Applicant as a dentist.

He was the beneficiary of OSD and had enjoyed the benefits as contemplated in the dispensation. To the best of his knowledge it was a requirement to be registered with the HPCSA in order to fulfill duties of a Provincial Health Co-ordinator.

Among others the benefits of registration were continued updates in the discipline

Professor Yusuf Chikte, University of Stellenbosch testified in the Applicant's case. He has been in practice over thirty years – specialist in Community Dentistry and has served on numerous boards including the Health Professional Council of South Africa.

He was qualified to give an opinion on the matter. He had known the Applicant since his student days and had worked with the Applicant.

It has always been a requirement that a person in the position of the Applicant had to be a dentist. In the second place a license by the HPCSA is necessary.

The Chief Dental Officer occupies a pivotal position in the Health Department and part of his activities entails engagement with communities, nationally and internationally and academic institutions as well as writing articles for publication.

To the best of his experience registration with the HPCSA is a definite requirement for a person holding the position held by the Applicant. Non registration would be frowned upon by practitioners and academics in the dental profession.

His experience in the profession was that a person holding a position as a Chief Dental Officer or Director, Oral Health must be registered with the HPCSA. Registration with the Council give impetus to the position, inspire confidence in the public as well as assist the position holder to keep abreast of developments in the discipline.

Mr. Hennie Groenewald, director, workforce management testified in the Respondent's case. His duties entailed the development of the remuneration policy for health professionals among others. He took part in the drafting of the current OSD in the health department.

Resolution 3/2009 specifically makes provision in respect of who qualify to benefit from the Resolution. To the best of his knowledge registration with a professional body was restricted to personnel whose positions required registration to qualify to hold the position. Registration with the HPCSA is not a requirement to hold the position currently held by the Applicant. In the circumstances the Applicant was not qualified to benefit from the provision of the resolution.

As far as he knew the Applicant's job specification made no reference to registration with the HPCSA as a requirement for the office he occupied.

It was his understanding that the Applicant occupied a senior management position. Senior Management Services appointees were not eligible to benefit from the provisions of Resolution 3/2009.

ANALYSIS OF EVIDENCE AND ARGUMENT

The dispute under consideration referred to interpretation and application of a collective agreement. The Collective Agreement under examination was Resolution 3 of 2009.

The referred dispute turned on the provision of Clause 1. and 3 of Resolution 3 of 2009.

Clause 3 entitled "scope", makes the following provision, that:

"This agreement binds:

3.1 The Employer;

3.2. The employees of the Employer employed in terms of the Public Service Act, 1994, as amended, either in a part time or full time capacity, who are members of the trade union parties to this agreement and who occupy a post in a clinical and non-clinical field were continuous registration with one of the following health professional councils is an inherent requirement of the post.

3.2.1 The Medical and Dental Board of the Health Professions Council of South Africa (HPCSA) as Medical or Dental Practitioners, or Medical or Dental specialists;

3.2.2 The South African Pharmacy Council (SAPC) as Pharmacists or Pharmacists Assistant.

3.2.3 The Professional Board for Emergency Care Practitioners of the HPCSA as Basic Ambulance Assistants, Ambulance Emergency Assistants, Paramedics, Emergency Care Technicians or Emergency Care Practitioners...

It was not in dispute that the Applicant was employed at salary level 13. To this end the provisions of Clause 1.4 of the Resolution finds application.

Clause 1.4 entitled Non-Clinical makes the following provision:

- the employees of the employer employed in terms of the Public Service Act, 1994, as amended, in a full time capacity as managers on salary levels 11, 12, 13 SMS grade A and SMS grade B, who occupy a post on the establishment of a public health facility where it is an inherent requirement of the post to maintain continuous registration with the relevant Health Professional Councils as set out in paragraph 3.2.1, 3.2.2 and 3.2.3.

The Applicant's job activities were regulated in terms of an employment agreement and a job description. Not any of these instruments made reference to the requirement of registration as a dentist or continued registration for eligibility to occupy the office occupied by the Applicant.

One should not lose sight of the fact that the dispute referred for determination refers to interpretation and application of a collective agreement, and no more.

The Applicant's evidence and that of his witnesses served to indicate the apparent desirability of registering with the HPCSA. The reason being that there were benefits to be derived from such registration as in attending courses or participating in programs under the auspices of the Council.

The Applicant's version as supported by Doctor Nematandani's evidence showed that indeed there were other employees appointed at salary level 11 and above at both provisional and national level who were beneficiaries of Resolution 3 of 2009.

The Respondent's only witness, Mr. Groenewald was emphatic that registration or continued registration with the HPCSA was not a requirement for the Applicant to practice his profession in his current capacity as a director. Mr Groenewald firmly believed that it was not the intention of Resolution 3 of 2009 to benefit employees above salary level 11 where continuous registration with the HPCSA was not an inherent requirement Mr. Groenewald spoke with authority as he participated in the discussions leading to the introduction of the Resolution.

The upshot of the Applicant Party's evidence, particularly professor Yusuf Chikte showed no more than that it was highly desirable for a person employed in the capacity of the

Applicant to be registered with the HPCSA in view of the benefits associated with registration. This may well be the case

Mr.Groenewald stated in his testimony that the HPCSA was not the only institution offering continued professional development programs in the profession, that there were a host of other institutions offering similar programs. Further that no registration of any description was a requirement.

The Applicant Party could not direct me to any provision in the Resolution supporting its contention that registration was an inherent requirement of the post save to say that registration was for all practical purposes desirable.

Regrettably, desirability does not equal requirement – desirability denotes good to do whereas requirement denotes must do, it is not optional as in the case of desirability.

What is desirable is an added advantage but not essential, essential as in the case of registration as an inherent requirement would mean condition of employment. Had this been the case the Respondent would have indicated this in the Applicant's employment contract and his job description.

The onus to establish that the Respondent's interpretation and application of the Collective Agreement was incorrect lied with the Applicant Party.

The Applicant Party did not succeed in establishing this as a fact and I could find no evidence in the Collective Agreement to suggest that the Respondent's conduct in not rewarding the Applicant was a contravention of the Collective Agreement.

The fact that other employees in a situation similar to the Applicant's situation benefited from the Collective .Agreement may constitute irregular conduct but has no effect on the Collective .Agreement. To this extent the Respondent's irregular conduct has no bearing on the interpretation or application of the Collective Agreement

AWARD

1. There was nothing untoward about the Respondent's interpretation and application of the Collective Agreement.
2. I dismiss the application.

A handwritten signature in black ink, appearing to read 'Mphaphuli', is written over a light grey rectangular background.

Joseph Mphaphuli
Signed
PHSDSBC Panelist
08 August 2012