ARBIRTATION AWARD

PHSDSBC
PUBLIC HEALTH AND SOCIAL DEVELOPMENT SECTORAL BARGAINING COUNCIL

COMMISSIONER: **ARNE SJOLUND**
CASE NO: **PSHS1113-16/17**
DATE OF AWARD: **26 JULY 2018**

In the matter between:

HOSPERSA OBO HALVEY APPLICANT

and

DEPARTMENT OF HEALTH- NORTHERN CAPE RESPONDENT

DETAILS OF HEARING AND REPRESENTATION

1. This matter was set down for an arbitration hearing by the Public Health and Social Development Bargaining Council ("PHSDSBC") and was held over three days. The hearing took place at the Department of Health's offices situated in the Kimberley Hospital Complex.

2. Mr Halvey (hereinafter referred to as "the applicant") was represented by Mr Olivier ("Olivier") an official from the applicant's union, HOSPERSA. The Department of Health- Northern Cape (hereinafter referred to as "the respondent") was represented by Mr Pape ("Pape") employed as Labour Relations Officer by the respondent.

3. On 26 October 2017 the matter was set down for arbitration. At the start of the arbitration hearing the respondent raised a point *in-limine*. After hearing the

submissions from both parties, a written ruling was issued. The matter was again set down on 22 June 2018 but could not be finalized due to time constrains where the parties agreed for the matter to be re-scheduled on 16 July 2018. The matter proceeded and was finalized on 16 July 2018. At the conclusion of the arbitration hearing the parties agreed to submit their closing arguments in writing by 23 July 2018. The applicant's closing arguments were well recived as agreed and considered in my award. The respondent failed to submit their closing arguments as agreed and the award is concluded in the absence of same, as was explained to the parties on 16 July 2018.

4. Three bundles of documents were handed up and utilized during the arbitration hearing.

5. The hearings were conducted in English and were digitally recorded.

ISSUE TO BE DECIDED

6. This matter is brought in terms of section 64(4) of the Labour Relations Act 66 of 1995, as amended ("LRA") and relates to the alleged unilateral change of the terms and conditions of the applicant by the respondent.

7. I am tasked to consider whether the respondent by reducing the applicant's salary, unilaterally changed his terms and conditions of employment. Should I find in favor of the applicant, order the appropriate relief.

BACKGROUND TO THE ISSUE

8. The applicant was employed by the respondent on 1 July 2010 as a Deputy Director – Clinical Engineer with a salary of R498 303-00 per annum (all inclusive). On 01 February 2017 the applicant's salary was reduced to R650 433-00.

9. The respondent's strategic goals are the provision of strategic leadership and creation of a social compact for effective health service delivery; improved quality management and patient care across the system through, *inter alia*, developing the Department's human resources; improved health outcomes in managing both communicable and non-communicable diseases; reduction of maternal, infant and child mortality; an efficient health management information system; attainment of

a positive audit outcome for both financial and non-financial management; and an improved and accelerated infrastructure development programme.

SURVEY OF EVIDENCE AND ARGUMENT

10. It is not the purpose or the intention of this award to provide a detailed transcription of all the evidence that was placed before me even though all evidence and arguments were considered. I have summarised the evidence that I found to be the most relevant to decide in this dispute.

Applicant's case:

11. The applicant testified that he applied for the position of Deputy Director - Clinical Engineering (A: 9). In the same advert the position of Deputy Director- Plant Engineering was advertised for which a certain Mr Moncho ("Moncho") was interviewed and appointed on level 12. The applicant testified that he received an offer of employment (A: 46 – 49) which he accepted. The offer of employment stipulated that his salary would be R489 303-00. After a meeting the applicant had with Mr Montingoe ("Montingoe") the Acting Chief Director where he was questioned as to how he came to receive the salary he was receiving, Montingoe sent him a memo (A: 50) on 20 September 2016. The memo related to the temporary re-allocation of the applicant and a request by Montingoe for the applicant to explain how he was remunerated at the level of a Chief Engineer whilst he was employed as a Deputy Director. On 21 September 2016 the applicant responded to the memo stating that he was not aware why he was remunerated at the level he was as this was a Human Recourses ("HR") function. On 21 September 2016 the applicant submitted a grievance (A: 56) submitting that he has been doing the work as a Chief Engineer as per his job description (A: 52) and that his salary should not be reduced until an evaluation of his responsibilities was done. The applicant testfied that when he was appointed he left another position and he could not have been appointed on the lowest level of the salary rage for Deputy Director. During cross-exzmaination the applicant was asked at what level he was appointed, he testfied that he accepted the salary as per the job offer and not the level.

12. Ms Shushu ("Shushu") testified that she was employed as an Assitant Director by the respondent. She testfied that she prepared the offer of appointment for the applicant where the Head of Department signed. Shushu testfied that the applicant

was placed on level 12, the same as Moncho and that the applicant due to the recommendation of the interviewing panel could not be placed at the entry level notch as per the advertisement. He was therefore placed on the highest notch of the salary rage and that after the post was advertised an increase was affected. She testfied that employees do not see the motivations and submission for appointment and only receives the offer of employment. During cross-exzmaination Shushu was questioned as to how the applicant was placed at the salary he was receiving, she testified that they considered his experience and could not place him at the entry notch, he was therefore translated to level 12. She testfied that the salary of Deputy Director could range between level 11 to level 12.

Respondent's case:

13. Ntsiko ("Ntsiko") testified that she was employed as a Director in the respondent's HR department. She testified that the positions for Deputy Director – Clinical Engineering and Deputy Director – Plant Engineering was advertised (A: 9), both at level 11. She testified that the offer of appointment that was made to the applicant was incorrect as the offer was on an OSD level and the advert on a non-OSD level. She testfied that the respondent was entitled and had to correct the mistake they made and requisted the applicant to provide them with proof that he was register with a statutory body as an Engineer. When the applicant was unable to provide any proof that he was registered with a statutory body his salary was reduced. She refered to the motivation for appointment of the applicant (A: 6 – 8) and testified that the salary that was approved by the MEC and was offered to the applicant was not the same. During cross-exzmaination Ntsiko confirmed that the applicant was appointed with the salary scale of R438 687-00 per annum. She testfied that they never picked up that his salary was incorrect until Montigoe did an investigation and found that the applicant was being paid on a Chief Engineer scale. When questioned whether the applicant received the submissions for him to be appointed, she testified that he only receives the offer of appointment. When Ntsiko was questioned about the Division of Revenue Act ("DORA"), she testified that she did not know when it was implemented. Ntsiko was also questioned why Moncho was at appointed at the same salary the applicant was appointed on whilst also being a Deputy Director she testified that she was unaware but would investigate and revert to HOSPERSA.

14. Montigoe testified that he was employed as the Head of the Medical Legal Unit and during 2016 he was the Acting Chief Director. At the time the applicant was working

under him but reported to no one. Due to the requirements of DORA he investigated to ensure that all positions complied with DORA. During his investigation he found that the applicant had to be a "provisional" to earn the salary he was earning. This would mean that he had to be an Engineer registered with the Engineering Council to qualify for the salary he was receiving. He testified that he checked all the appointments in the department and found that they had no professionals working in the department. Due to the fact that there was no proof on the applicant's file that he was an Engineer or the he was registered with a professional body, he requested the applicant to provide proof that he was indeed registered with a statutory body. Motingoe then called the applicant to a meeting and asked him whether he was an Engineer or was registered with a statutory body, the applicant stated that he was not. He also asked the applicant why he was receiving the salary he was receiving. Montigoe testified that he sent the applicant a memo stating that he must explain why he was receiving the salary he was receiving. When the applicant failed to provide a reason, the respondent had a right and did reduce his salary. During cross-exzmaination Montigoe was questioned why Moncho who was not a professional and appointed as Deputy Director was appointed on level 12 with the same salary as the applicant, and still received the same salary, Montigoe testfied that he was not aware. When questioned when DORA came into effect Montigoe testified that every year a new Act came into effect. Montigoe was questioned why he wanted to know from the applicant how he got to earn the salary he was earning, he testfied that HR did not know. He was also questioned why the applicant was re-deployed as per the memo, he testfied that when he arrived in the department the applicant was not reporting to anyone and that he came and went as he wished, this had to stop.

ANALYSIS OF EVIDENCE AND HEADS OF ARGUMENT

15. I am faced with mutually destructive versions in this matter. The respondent produced two witnesses, Ntsiko and Montigoe who testified that the applicant was appointed on the incorrect salary scale and it was the respondent's right to correct the mistake. The applicant submitted that he was unaware on how his salary scale was considered. The applicant produced one witness, Shushu who testfied that the applicant was indeed appointed on the correct salary scale. In the matter of *Cooper and another v Merchant Trade Finance Ltd 2000* (3) SA 1009 (SCA) the Court found that the approach to be adopted when inference is sought to be drawn from other facts was summarized. The Court in drawing inferences from the proved facts, acts on a preponderance of probability. The inference of an intention to

prefer is one in which is on a balance of probabilities the most probable although not necessary the only inference to be drawn. If the fact permits of more than one inference the Court must select the most plausible or probable inference. If it favors the party on whom the onus rests, he is entitled to relief. If on the other hand an inference in favor of both parties is equally possible, the party who bears the onus will not be entitled to relief.

16. The first issue I will consider is whether a contract of employment was concluded or not. In law the legal relationship between an employer and an employee may be gathered from the construction of the contract, should such contract have been concluded. (See: *Smit v Workmen's Compensation Commissioner 1979 (1) SA 51 (A) at 64B; Liberty Life Association of Africa Ltd v Niselow (1996) 17 ILJ 673 (LAC) at 683D-E; SA Broadcasting Corporation v McKenzie (1999) 20 ILJ 585 (LAC) at 591E).* One must also consider the realities of the relationship and not what the parties have chosen to call the contract (See *Dempsey v Home & Property (1995) 16 ILJ 378 (LAC); Brassey 'The nature of Employment' (1990) 11 ILJ 889 at 921*). It is common cause that the applicant applied and was appointed in the position Deputy Director – Clinical Engineering and therefore a valid contract of employment was entered into. In considering the realities of the relationship, I am of the view that the applicant was employed as a Deputy Director and performed the functions of a Chief Engineer as per his job description (A: 52 -55) confirmed by his Supervisor, Mr Maziduko on 25 April 2016. This is however not the issue to be determined as the applicant was not employed as a Chief Engineer and therefore cannot claim an automatic entitlement to the salary of a Chief Engineer. The issue in dispute is whether the applicant was entitled to receive the salary he was appointed on, and whether the reduction of his salary would constitute a unilateral change in his terms and conditions of employment. And whether it was unilateral. It is common cause that the applicant's salary was reduced. As mentioned above, the applicant accepted a job offer and was appointed on 01 July 2010 where the salary he would be remunerated at would be R489 303-00, this is not in dispute.

17. Under the common law, an employer is not permitted unilaterally to change the terms of an employment contract with an employee, and if it does so *without agreement* the employee would have the right to either abandon the contract or to sue for damages in terms of the contract. In other words, an employee in a contract of employment commits a breach thereof he reneges on his duty of placing his personal service at the disposal of the employer. The employer on the other hand

breaches the contract of employment if he reneges on his undertaking to pay the salary or wages agreed in consideration for services rendered. As this principle is not codified in any South African statute, or elsewhere, it is a nearly impossible task to determine the exact extent of what an employment condition is and to what extent it may be varied. In *RAM Transport (Sa) Pty Ltd v SATAWU* 2011 3 ZALC (LC*)* the Court investigated the difference between an employment condition and a work practice. In *Van Greunen v Johannesburg Fresh Produce Market (Pty) Ltd* 2010 7 BLLR 785 (LC) it was suggested that a mere reduction in the status of an employee could be interpreted as a unilateral change of employment conditions. Similarly, in *Magnum Security v PTWU* 2004 7 BLLR 693 (LAC*)* the Labour Appeal Court held that a reduction in working hours constituted a unilateral change of employment conditions. In *CEPPWAWU obo Konstable & others v Safcol* 2003 3 BLLR 250 (LC) the Court found that a long-standing practice and yearly custom did not form an employment condition. From the above examples it quickly becomes evident that numerous factors will be considered by the Courts in order to determine what constitutes an employment condition, and when it cannot be reasonably altered without the employee's consent. In this matter it is the applicant's case that the respondent unilaterally reduced his salary, this is not a practice or custom but right enshrined in the contract of employment. I will further in this award deal with the issue of the unilateral act of changing the term and conditions of employment as well as the element if fairness.

18. In the matter of *A Mauchle (Pty) Ltd t/a Precision Tools v NUMSA & others* 1995 4 BLLR (LAC) the labour Court by word of Judge Myburgh stated:

"An important general principle the courts have made is that of true intentions. The labour court has shown that it is not restricted by any means and may take into account the true intentions of parties. In light of cases which reflect on aspects such as unilateral change in employment conditions due to a status change of the employee; and the concept of unilateral variation in employment conditions not only being confined to the life of the employment relationship; it is important to note that the courts will not easily be fooled but will always discover the true intent of parties".

19. On 01 July 2010 the applicant resumed his duties as Deputy Director with the respondent after accepting the offer of employment. The offer of employment deals with the applicant's remuneration which states that the applicant will be remunerated with R489 303-00 per annum. The same document also deals with service bonus, medical aid, home owners assistance, leave, sick leave, hours of

work, and pension fund. The applicant submitted that he accepted the offer of employment and considered the salary when accepting the offer of employment. In the matter of the *National Union of Metalworkers of South Africa and Another v Transalloys (Pty) Ltd (JS237/15) [2017] ZALCJHB 364 (21 September 2017)* the Court found that the applicant's applied for the position of Lab Analyst level 5C but was appointed on level 5A which had a higher salary. Judge Prinsloo stated that the applicants did not have a contractual right to the salaries they had received due to the knowing that when they applied, were interviewed and appointed to the positions they knew that the level they applied and was interviewed for was not the same they were remunerated at. When they realized they were remunerated at the incorrect level they should have informed the employer. The *Transallous* matter would suggest that an employer, under certain circumstances may reduce an employee's salary and considers the true intentions of the parties, as dealt with paras 16 – 18 *supra*. What makes this case different from the *Transallous* case is that I am of the view that the applicant in this matter accepted that the salary he was offered was correct. Shushu and Ntsiko testified that employees are not privy to the motivations and submission for appointment and the applicant therefore did not or could not have known that the salary he was offered may or may not have been incorrect. The advert the applicant applied for had a salary range and after the annual increase, that took place after the post was advertised, the salary the applicant was offered did fall within the salary range the applicant was appointed on. Shushu testified that a Deputy Director can earn the salary between level 11 and 12, should such employee be placed at the highest scale of the band. It is also noted that the level the applicant was appointed on did not appear on the advert. I therefore find that the when the parties concluded the contract of employment the understating was that he would earn the salary as per the job offer and that there was no ambiguity.

20. In dealing with the fairness of the respondent's decision to reduce the applicant's salary I will consider the credibility of the witnesses and the true intention of the parties. Here I will also deal with the issue of the unilateral act by the respondent in reducing the applicant's salary. On 22 June 2018 Ntsiko testified that she was unaware why Moncho who was employed as Deputy Director was still remunerated at the higher level and his salary was not reduced. She testified that she was unaware and would conduct an investigation and revert to HOSPERSA. She also made a note to remind herself of the issue. On 16 July 2018 when Ntsiko was cross-examined (more than three weeks later) and question what her investigation revealed she appear to be irritated with the question and testified that she had not

conducted the investigation. Montigoe testified that when he arrived in the department he had to comply with DORA, this meant he had to investigate who was professionals within the department and whether their salaries were in line with their qualifications. He investigated *all appointments* and found that the applicant was earning a salary equivalent to that of a Chief Engineer. When questioned whether he considered the salary of Moncho he testfied that he was unaware of Moncho's salary. The issue of Moncho who was appointed as Deputy Director on the same salary as the applicant and his salary not being reduced, without him (Moncho) providing proof or requesting to provide proof of registration with a provisional body was not disputed during the arbitration hearing. Therefore; this would suggest that Montigoe was dishonest when he testified the he investigated *all employees* as he would have been able to establish that Moncho was earning the same salary as the applicant without being a professional. This would further suggest that there was some other sinister or ulterior motive behind Montigoe's investigation, against the applicant. During cross-exzmaination Montigoe, who was at all times well composed, appeared to become upset when he testified that the applicant reported to no-one and he came and went as he wished, this had to stop. Montigoe also wrote a memo to the applicant requisted him to explain why he was receiving the salary he was receiving. The same question was posed to the applicant when he met with Montigoe. This is an unreasonable question to pose to any employee as the employer should know how and why employees are remunerated at the level they are. When Montigoe was questioned why he wanted to know from the applicant why he was receiving the salary he was receiving, he testified that HR could not explain. From the above it can also be established that although Montigoe met with the applicant and sent him correspondence regarding his salary, no agreement was reached on whether the applicants salary could be reduced, the conduct of the respondent is thefore unilateral and unfair. The applicant in their closing argument also provided proof that DORA was only introduced during 2013, three years after the appointment of the applicant. Montigoe could therefore not have considered DORA to reduce the applicant salary as he was appointed prior to DORA being signed into law.

21. In considering the totally of the evidence placed before me I am of the opinion that the respondent unilaterally changed the terms and conditions of employment of the applicant and the applicant is thefore entitled to relief. The relief the applicant seeks is that for his salary to be retrospectively reinstated as prior to the reduction. This will require the respondent approaching the Treasury department for

assistance to correct the applicant's salary on the *persal* system, I will therefore extend the date the respondent is ordered to comply with this award.

AWARD

22. The respondent is hereby ordered to restore the applicant's terms and conditions of employment as it was prior to his salary being reduced on 1 February 2017.

23. The respondent is ordered to comply with clause 22 of this award not later than 01 September 2018 and provide the applicant with proof of same.

24. The respondent is ordered to pay to the applicant the difference in remuneration that the applicant would have received after his salary was received on 1 February 2017 and the date of this award not later than 01 September 2018.

Arne Sjolund

Commissioner