



ARBITRATION AWARD

Case No: **PSHS141-17/18**

Commissioner: **QUEENDY GUNGUBELE**

Date of award: **23 April 2018**

In the matter between:

LESIBA MOSHIGA

(Applicant)

and

DEPARMENT OF HEALTH- NATIONAL

(Respondent)

DETAILS OF HEARING AND REPRESENTATION

1. This matter was heard on 30 January 2018 and it was concluded on 07 March 2018 at the Department of Health-National, CIVITAS Building, Pretoria. The parties have agreed to submit their closing arguments in writing within 7 days.
2. The applicant appeared on his own, whilst the respondent was represented by Mr Thathi Tau, the Labour Relations Director

BACKGROUND TO THE DISPUTE

3. The applicant is employed as the Medicines Control Officer since 02 June 2014 and he is remunerated at R682 683.00 per annum. He referred his alleged "***Unfair Labour Practice-benefits***" dispute to the Bargaining Council on 08 May 2017.

APPLICANT'S CASE

The applicant submitted 2 bundles of documents marked X and X1.

4. The applicant testified that he was employed by the Department of Health in Limpopo as a Pharmacist in 2005. His persal number was 80725503. He said that the National Department of Health advertised the position of Medicines Control Officer-Law Enforcement and his application was successful.
5. When he joined the National Department of Health he was required to write an affidavit, as his old persal number, 17698618 which he used as a temporary employee in 1996 at STATS SA reflected in the system and made it impossible for his persal number 80725503, which was allocated to him as a Pharmacist to be used. He said that he was informed by the Director HR, Mr K Mokgohlo, that the latter persal number as a Pharmacist could not be used due to “different buros”, which explanation he could not understand.
6. The applicant based his dispute on the interpretation of section 199 of the LRA on pages 13 to 14 and the relevant case law on page 1 to 7 of bundle X1, paragraph 30. He argued, further, that when the occupational Specific Dispensation “the OSD” for Pharmacists’ Duties decisions were determined, Resolution 3 on 2009 was already translated in Limpopo. See copy of the Resolution on page 34 of bundle X. However, Director Mokgohlo countered that by virtue of his appointment as a Medicines Control Officer, he would be translated in terms of Regulation 2 of 2003 as per page 98 of bundle X, which entitled Categories of Professionals and related Allied Health Professionals, which were defined in detail on pages 106 to 107 of bundle X.
7. He argued that in all the above, there were specific “Instructions” offering either a Diploma/Degree except for Medical Control Officer. He argued, further, that his Medicines Control Officer position waived his inclusion in the binding Collective Agreement as per the provisions of **section 199 of the LRA, Clause 1(c)**, therefore, the contest of being translated from Resolution 2 of 2009 into Resolution 3 of 2010 was inappropriate because of the objectives of the OSD on page 35 of bundle X paragraph 2.

8. He stated that Clause 1.4 referred to Non Clinical Employees in terms of the PSA, who occupied a post whereas, as a Pharmacist, it was inherently required of him to be registered with the SA Pharmacy Council, while he did not do non-clinical work.
9. The applicant also referred to the Objectives on the following clauses:
 - 2.2 to introduce an OSD
 - 2.2.2 Pharmacists
 - 2.3 Career pathing
 - 2.3.1 Career Opportunities
 - 2.3.3 Grade Progression
 - 2.3.4 Recognition
10. The applicant added that in terms of the objectives, his translation would not be a problem until Resolution 2 of 2010 kicked in. He was a Grade 2 Medical Controls Officer and offered the last notch of Grade 2, therefore, he could not get the Pay Progression, whilst his Grade Progression was also put on ice because he was in the OSD that did not cover his profession. (He referred to page 108 of bundle X, Post 21/18 and argued that he suffered more prejudice, as some of his colleagues in the same departments were graded differently from his). He submitted that the Medicines Control Officers' qualifications varied whilst he still performed his duties as a Pharmacist.
11. He said the letter from the Director Thathi Tau on page 110 of bundle X was addressed to Adv Maebane sought to inform him that the OSD for Medical Officers and Pharmacists was concluded and signed on 02 October 2017. It further stated that he could not be translated and should continue to register with the Council. Furthermore, he could not be translated into the PHSDSBC Resolution 2 of 2010, he said that he was a registered Pharmacist doing non-clinical work. However, Adv Maebane's situation was not treated the same way as his.
12. He contested his retranslation, as the response stated above was not given to his colleague, Adv Maebane, who was qualified in the legal field. The applicant said that

the respondent argued that he was no longer a Pharmacist but a Medicines Control Officer.

13. The applicant argued that the fact that the OSD of the advertised post was not reflected did not bother him, because he knew that his own OSD as a Pharmacist was in accordance with Resolution 3 of 2009. The applicant prayed that his persal number, 17698618, for when he was a Pharmacist in Limpopo be reinstated retrospectively to 01 June 2014 and that the respondent should comply with section 199 of the LRA as per page 33 of bundle X.
14. He added that he could not apply for his relocation allowance because his salary was cut and it took a while to adjust it. He said that he tried to present his case regarding his inability to claim the relocation costs within 2 calendar months, owing to the change in his persal number, which was detrimental to his financial situation. Furthermore, the applicant argued that failure to transfer his monthly deductions to his persal number 17698618 prejudiced him in that his policies lapsed due to non payment.
15. He said that his wife was still employed in Limpopo, while he was looking for suitable accommodation until 2015. He stated that his situation was not considered as *per* the Director's response on page 16 of bundle X. when he was in a position to apply.
16. Under cross-examination, the applicant conceded that he was not forced to apply for the position of Medicines Control Officer- Law Enforcement Officer. He averred that he only became aware that the said position he had applied for fell under Resolution 2 of 2010 because the advert only indicated that stated that it fell under "the OSD", without specifying which one. As far as he was concerned, the only OSD covering Pharmacists was Resolution 3 of 2009, and not Resolution 2 of 2010, which covered Medicines Control Officers.
17. However, the applicant conceded that the objectives encapsulated in Resolution 2 of 2010, paragraph 2.3.2 were no different from the wording in paragraph 2.3.1 of Resolution 3 of 2009, which catered for Pharmacists who were doing both Clinical and Non-Clinical work. Furthermore, it also included Officials like Birhan and other Law Enforcers who were not necessarily qualified as Pharmacists under Resolution 3 of 2009.

18. He also conceded that he was doing Non Clinical work and Investigations, Monitoring of Post Office, Ports of Entry and Court as per page 1 of bundle X. He also conceded that he went to work in Pretoria *via* the transfer from Limpopo and that his service was not broken.

RESPONDENT'S CASE

The respondent submitted 1 bundle of documents marked Y.

19. Mr Khanyile, the Director Workforce Management testified that he was responsible for the placement of employees in the whole country. He was also one of the architects of the OSD in the health sector. He said that the error explained by the applicant herein above was system generated and that the persal number could only be issued by the system. He argued that the allocation of a different persal number could not make any difference to an employee's status or ranking at the work place. He added that the applicant was correctly translated in terms of Resolution 2 of 2010 because he voluntarily opted to apply for the position of Medicines Control Officer-Law Enforcement Officer.
20. He also argued that even if the position required an incumbent to be a registered Pharmacist like the applicant, he would still not be eligible to be appointed under Resolution 3 of 2009. He added that even other candidates who were qualified Pharmacists but not registered, they could still be appointed in terms of Resolution 2 of 2010. Furthermore, the position did not only invite candidates who were qualified Pharmacists, as the advert provided various qualifications.
21. He argued, furthermore, that it was not possible to appoint the applicant with a different Resolution because the Post Classification, Job Weight and Job Descriptions were different from the Resolution in terms of which the applicant was appointed as a Pharmacist. See the advert on page 1 of bundle X
22. He argued, therefore, that any deviation from the provisions of a Collective Agreement could only be done in writing through the consent of both parties in the Bargaining Council.

23. The respondent argued, in conclusion, that the applicant became aware of his alleged amounts that could not be met by his reduced salary but elected not to make the necessary arrangements with relevant institutions to have his financial dues attended to. The respondent added that the applicant's claim/s against the respondent had no legal basis because HR advised him to make such payments to his Service Providers, whilst he was busy sorting out his issues but he chose not to.
24. The amount claimed by the applicant was far more than what the actual salary difference was, because his salary package was R545 178.00 per annum, whilst his new package was R544 449.00 per annum, which translated into the difference of R60.76 per month and not over R2 700.00 per month as per the applicant's allegations.
25. He denied that the respondent contravened the provisions of section 199 of the LRA and averred that each resolution should be applied in terms the Collective Agreement.
26. Mr Thabo Masokwameng, the Chief Human Resource Officer also testified that he knew the applicant since his appointment in the department. He said that he was booked in a hotel in terms of the Relocation Policy and that he could not immediately claim for the Relocation Allowance, as he indicated that he had a problem with his persal number. He said that the reason why his request for his claim was not processed was that he did not request same. However, his claim was finalized as soon as his persal problems were resolved.

ANALYSIS OF EVIDENCE AND ARGUMENT

27. It is the duty of the applicant to prove, on the balance of probabilities, that the respondent's conduct was unfair.
28. The applicant's argument was also based on the provisions of section 199 LRA, which provides as follows:
 - (1) *"A contract of employment, whether concluded before or after the coming into operation of any applicable collective agreement or arbitration award, may not-*

(a) *permit an employee to be paid remuneration that is less than that prescribed by that collective agreement or arbitration award”;*

29. It is common cause that the applicant elected to become the Medicines Control Officer-Law Enforcement Officer. The advert on page 1 of bundle X clearly stated **“the salary grade will be determined in accordance with the above requirements as per the OSD”**. Although it is common cause that the advert did not specify the OSD translation of the new post, it is unclear whether such an omission justified the applicant’s assumption to the effect that it would be the same as that of his position of a Pharmacist. I also did not find any evidence that suggested his assumption was correct. Furthermore, there was also no evidence to the effect that he was somewhat misinformed by the respondent into believing so. The fact that each post had its own dedicated Resolution should not come as a surprise.
30. The provisions of section 199 of the LRA were not relevant in the applicant’s case because his OSD translation as a Pharmacist, which was in accordance with Resolution 3 of 2009 had nothing to do with what governed him as a Medicines Control Officer-Law Enforcement Officer, which was governed by Resolution 2 of 2010. The applicant elected to abandon his position as a Pharmacist to that of the Medicines Control Officer-Law Enforcement Officer, which had its own characteristics applicable in that area of operation. He could not have both.
31. It is also worrisome that someone of the applicant’s caliber willingly accepted the new appointment and even moved from Polokwane to Pretoria without ascertaining whether the terms, conditions and benefits of his new post augured well with his expectations and duties and responsibilities.
32. With regards to his different persal number, there was no evidence that the respondent had mechanically manipulated same or that there was any malicious intent on the latter’s part. I found the respondent’s version to be credible in that the “system” could have “automatically” picked up the persal number that he had once used as an erstwhile government employee, *albeit* not the one that was allocated when he was a Pharmacist.

33. I would be reluctant to speculate on what the circumstances of Adv Maebane were, because it is trite law that each case should be treated according to its own merits.
34. Furthermore, I am not persuaded to believe that it was beyond the applicant's capability to make the necessary arrangements with his Policyholders as soon as he realized that his deductions were not sufficient at the time.
35. It is also common cause that whatever shortfall he may have experienced in the new position were duly rectified by the respondent and, therefore, the validity of the claim/s became obsolete.
36. The applicant decided not to claim his Relocation Allowance at the time because he stated that his wife was still employed on Polokwane. The respondent booked him in a hotel where he stayed until he was in a position to move. I could not find any prejudice that he could have suffered under that arrangement. In fact, the respondent became very sympathetic and accommodating, under the circumstances.

AWARD

37. The applicant failed to prove that the respondent's act or omission constituted an Unfair Labour Practice-Benefits, as contemplated by **section 186 (2) (a) of the LRA, 66 of 1995.**
38. This matter is dismissed.
39. I make no order as to costs.

