



ARBITRATION AWARD

Panellist/s: Ananthan Sanjivi Dorasamy
Case No.: PSHS178-11/12
Date of Award: 3-Oct-2011

In the ARBITRATION between:

SAMA O B O GOVENDER C.

(Union / Applicant)

and

DEPARTMENT OF HEALTH: KZN

(Respondent)

Union/Applicant's representative

: MR S BUTHELEZI

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DETAILS OF HEARING AND REPRESENTATION

1. The arbitration proceedings commenced at 11H00 on the 15 September 2011 at Natalia Building Pietermaritzburg. Mr S Buthelezi of SAMA represented the applicant and Ms N A Gumede represented the respondent. After reverting to section 138 (3) of the Labour Relations Act the parties agreed on the following:
 - (a) The matter will be dealt with on Heads of Arguments to be submitted on the 22 September 2011 and no oral evidence would be tendered.

ISSUE TO BE DECIDED

I am to decide whether the respondent (employer) had interpreted and applied sub clause 4.1.12.2 of Resolution 3 of 2009, read together with personnel Circular Minute 61 of 2010 correctly and determine whether or not the respondent has placed the applicant in the correct salary scale.

BACKGROUND

2. The applicant was a Chief Medical Officer (CMO) when the OSD was first implemented in 2009. He then took up a registrar post in January 2010 and retained his salary notch that was higher than that of registrars.

Thereafter in April 2010 further adjustments to the OSD took place and thereafter with the salary negotiations in July 2010 the applicant's salary remained the same. However in May 2011 the CMO's salary was increased and in this case his salary went up.

The applicant contends that his salary should have been adjusted and for two years he was underpaid both in terms of salary and allowances.

The applicant seeks that he be upgraded to the current CMO salary scale and the two years difference be paid to him and all the allowances be adjusted with back pay.

The respondent challenges the relief sought by the applicant and contend that he is not entitled to the relief claimed.

3. **APPLICANT'S (EMPLOYEE) SUBMISSION (copied below)**

Introduction and background

Dr Govender is currently a registrar at Greys Hospital in Pietermaritzburg doing his second and final year of registrar-ship.

A registrar is a qualified Medical doctor who joins the registrar programme for the sake of becoming a specialist in a certain field of study.

When the OSD was first implemented in 2009, Dr Govender was already the Chief Medical Officer (CMO), as a result he was accordingly adjusted to CMO grade 1.

He then took a registrar post in January 2010 and his salary notch was higher than that of other registrars, he therefore retained his salary scale that he was in prior to becoming a registrar in accordance with section 4.1.12 clause 4.1.12.2 of Resolution 3 of 2009 which states that where a Medical Practitioner, Clinical Manager(Medical),Dentist or Clinical Manager(Dental) Is already on a package higher than the maximum of the scale attached to Registrars, he/she will retain the scale attached to his/her existing post for the duration of study.

In April 2010, further adjustments to OSD took place the CMOs salary scales were adjusted to R570858.00 yet Dr Govender remained on R522072.00, with the negotiated salaries in July 2010, the CMO s salaries went up to 613671.00 and Dr Govender’s salary remained on R522072.00, and with the negotiated salary in May 2011, the CMOs salary went up to R655401.00 and Dr Govender’s salary only went up to R599 391.00

To illustrate salary movement in accordance with what I explained above, I will use a table for the sake of simplicity

Type of adjustment	Year	CMOs salary Scale	Dr Govender	Diff
Salary adjustment before OSD	2009/07/01	R461 985.00	R461 985.00	----
Salary adjustment after OSD	2009/07/01	R522 072.00	R522 072.00	----
OSD Phase 2	2010/04/01	R554 109.00	R522 072.00	R32 037.00
OSD Revision	2010/04/01	R570 858.00	R522 072.00	R48 786.00
Salary increment	2010/07/01	R613 671.00	R561 228.00	R52 443.00
Salary increment	2011/05/01	R655 401.00	R599 391.00	R56 010.00

Issues in dispute

It is our argument that whatever happens to the salary scale to which Dr Govender is attached should also happen to him, whenever the department adjusts the CMOs salaries, Dr Govender’s salary should be adjusted as well, for two years Dr Govender has been neglected in that way underpaid, as a result his allowances such as

inhospitable allowance which is paid at 18 % is negatively affected as he is paid at the percentage of the wrong scale.

Applicable Resolution and Interpretation

Resolution 3 Of 2009 clearly clarifies the issues, firstly section 1 clause 1.3 defines salary scale(grade) as the set of salary notches attached to a particular salary grade scale, further to that section 4.1.12 clause 4.1.12.2 states that where a Medical Practitioner, Clinical Manager(Medical), Dentist or Clinical Manager(Dental) Is already on a package higher than the maximum of the scale attached to Register, he/she will retain the scale attached to his/her existing post for the duration of study. It is my submission that the department erred by failing to understand that as scales are not stagnant for ordinary CMOs, therefore they cannot be stagnant for the registrar who is attached to the same CMOs' scale.

Furthermore in the award on **SAMA OBO Akinsanya O and the Department of Health and Social Development**, the commissioner addresses the principle espoused by Resolution 3 Of 2009, on page 5 of the award paragraph 5 bullet 4, he states that The respondent is obliged to retain the applicant on salary scale attached to the post of a Medical Officer and further emphasises that whenever there is a change in that salary of that category of employees, the employee will also be entitled to such change in salary.

Required remedy

Dr Govender should be upgraded to the current CMOs salary scale and two year differences paid to him and all the allowances such as the inhospitable allowance adjusted with back pay. This will be achieved by implementation of April 2010 adjustments as it was done to other CMOs and subsequent adjustments to date.

4. RESPONDENT'S (EMPLOYER) SUBMISSION

The applicant lodged a dispute relating to interpretation or application of a collective agreement.

The applicant was employed as Chief Medical Officer at Grey's Hospital. On 1 January 2010 he was appointed as a Registrar.

PHSDSBC Resolution 3 of 2009 clause 2.3.1 states that the OSD provide for career pathing opportunities based on competencies, experience and performance. Clause

2.3.2. states one of the objectives of the agreement is to provide pay progression within the limits of the relevant grades based on performance.

The applicant applied for the Registrar post, which have its own salary grade.

Clause 4.1.12.2 states that where a Medical Practitioner, Clinical Manager (Medical), Dentist or Clinical Manager (Dental) is already on a package higher than the maximum of the scale attached to a Registrar, he/she will retain the scale attached to his/her existing post for the duration of study.

The applicant retained his Chief Medical Officer salary of as provided in Clause 4.1.12.2. He will retain it until completion of his study. The registrar is a four year programme course. This clause was applied correctly. The salary of the applicant was higher than that of the Registrar's salary grade.

The applicant cannot enjoy the benefits of a Medical Officer and of a Registrar simultaneously. As his salary was retained he is on a higher personal notch. The applicant will retain his salary until completion of study. After he has completed his study he will then enjoy the benefits of specialist.

The fact that he is on a registrar post clearly dictates that he vacated his medical officer post but he only retained his salary until completion of study. If the Medical Officers commencing registrar-ship were to be treated as if they were still the Medical Officers they would not be translated to Registrars posts.

The applicant is currently a registrar and not a Medical Officer. Therefore as a registrar he retains such a job title until he qualifies to be a specialist. He retained his salary, he was not prejudiced in any way.

The applicant's bundle B is not relevant and not binding. The commissioner should not consider the arbitration award as awards do not create precedent.

The respondent prays for the applicant's case to be dismissed.

ANALYSIS OF EVIDENCE AND ARGUMENT

5. The applicant took up a registrar's post at Grey's hospital in January 2010 and retained his salary notch that was higher than the registrar's. This is in accordance with section 4.1.12 clause 4.1.12.2 of Resolution 3 of 2009 that provides that "where a Medical Practitioner, Clinical Manager (Medical) , Dentist or Clinical Manager (Dental) is already on a package higher than the maximum of the scale attached to the Registrar, he/ she will retain the scale attached to his/her existing post for the duration

of study. The question that arises is whether the applicant is entitled to the subsequent change in the salary if and when those changes take place. The further question arise is at what salary would the applicant be entitled to obtain the change in salary. The respondent believes that the applicant is not entitled to benefit from the changes.

6. This is the applicant's case that after being placed in training at a higher salary than that of the registrar should not he also benefit from the subsequent changes as they are negotiated.
7. Clause 1.3 of Resolution 3 of 2009 defines salary grade (scale) as the set of salary notches attached to a particular salary grade (scale). Therefore the applicant is entitled to benefit from the subsequent adjustments and in the respondent not adjusting his salary accordingly it had not interpreted the provisions of the Resolution correctly and had applied it incorrectly.
8. As a consequence of the above I determine that the respondent's interpretation and application of sub clause 4.1.12.2 of Resolution 3 of 2009 read with clause 3 of Personnel circular Minute 61 of 2010 is incorrect.
9. The applicant's guidance in the incorrect application of the adjustment is detailed in his closing argument. Should it be necessary the underpayment from the date of occurrence to the date of rectification may be set down for verification or computation.
10. The award under case number PSH 721-10/11 by commissioner James Matshekga is acknowledged and has a bearing in this matter. Both the matters deal with the interpretation and application of the same Resolutions and Minute. Although the award is not binding on my determination there is no reason for me not to be persuaded by it. The respondent has not challenged the said award.

AWARD

11. I make the following award:
 - 11.1. The respondent interpreted or applied sub clause 4.1.12.2 of Resolution 3 of 2009 read with clause 3 of Personnel Circular Minute 61 of 2010 incorrectly in that it did not adjust the applicant's salary including his allowances correctly;
 - 11.2. I order the respondent to retrospectively adjust the applicant's salary as provided for in the guidance provided in the section of the applicant's arguments. Should it be necessary the underpayment from the date of occurrence to the date of rectification may be set down for verification or computation. The adjustments going forward must be implemented immediately but not later than the 30 November 2011.

DONE AND SIGNED IN DURBAN ON THIS 2 DAY OF OCTOBER 2011.

Arbitrator: Anand Dorasamy

a S Dorasamy
