



ARBITRATION AWARD

Panellist/s: Ananthan Sanjivi Dorasamy
Case No.: PSHS195-11/12
Date of Award: 16-Nov-2011

In the ARBITRATION between:

PSA O B O MAPHUMULO T M

(Union / Applicant)

and

DEPARTMENT OF HEALTH: KZN

(Respondent)

Union/Applicant's representative

: MR L NAIDU

Union/Applicant's address

: P.O.BOX 4011

DURBAN

4000

Telephone

: 031 310 3600

Telefax

: 031 310 3615

Respondent's representative

: MR M G MDUNGE

Respondent's address

: PRIVATE BAG X 9051

PIETERMARITZBURG

3200

Telephone

: 033 395 3212

Telefax

: 033 395 3220

Details of hearing and representation:

1. The arbitration proceedings commenced at 10H00 on the 20 October 2011 at the King Edward Hospital, V I P Lounge Doctor's Quarters, Durban. Mr L Naidu of PSA represented the applicant and Mr M G Mdunge represented the respondent. After reverting to section 138 (3) of the Labour Relations Act the parties agreed on the following:

The parties confirmed that oral evidence would not be tendered and that submissions would be made in the form of Heads of Arguments to be forwarded to the arbitrator on or before the 31 October 2011. The applicant submitted its arguments on the 3 November 2011.

Issues to be decided:

2. I am to decide whether the employer/ respondent interpreted and applied resolution 3 of 2007 viz whether the applicant was eligible for OSD translation to Professional Nurse Grade 1 (Speciality Nursing) with effect from 1 July 2007 or not.

Background to the issue:

3. The applicant alleges that she should be considered for the Occupational Specific Dispensation as she met the criteria stipulated.

The applicant was employed permanently at the casualty unit and was subsequently transferred and in the period under focus was placed at Infection Control (06/2005 – 11/2008).

The respondent contends that the applicant lodged an unfair labour practice relating to benefits. It raised a point in limine that the Council lacked jurisdiction to entertain this matter because it relates to salary. The introduction of the Occupational Specific Dispensation (OSD) was aimed at increasing the remuneration of nurses. Alternatively the respondent believes that the applicant is excluded from the OSD offer because she was not working in casualty as she did not satisfy the qualifying criteria that were explicit in the policy.

Summary of evidence and arguments:

4. APPLICANT'S HEADS OF ARGUMENTS (EMPLOYEE):

The salient aspects of the applicant's submission are recorded below:

1. This dispute relates to the interpretation and application of resolution 3 of 2007 in the PHSDSBC which was effective from the 01 July 2007.
2. The applicant is employed with the respondent as a registered nurse at Prince Mtsheni Hospital.
3. The applicant was employed permanently at the casualty unit but was subsequently transferred at the instance of the respondent's request to the following departments:

Trauma / Casualty unit from 07/2004 – 06/2006

Infection control 06/2005-11/2008

Trauma /casualty 11/2008-02/2009

Infection control 02/2009-11/2009

Medical ward

11/2009 - present

4. On the 7 August 2009 a settlement agreement was reached at arbitration in the PHSDSBC in which the trauma/casualty unit was declared a speciality unit which allowed nurses working at the casualty unit to be transferred to the Speciality stream.
5. The applicant as at 30 June 2007 when the OSD came into effect was translated to the general stream of the OSD due to the fact that casualty was a general stream and not a speciality unit and was told that her translation into the general stream was due to her still belonging to the casualty unit despite her working at the Infection control unit.
6. However on the 07 August 2009 as per the agreement referred to at paragraph 4 supra was signed it translated nurses working at casualty to the specialty stream. The respondent refused to translate the applicant to the specialty stream of casualty due to her working at the Infection control unit and not at casualty unit despite being told that she would be regarded as a nurse working in the casualty department. This is reinforced by the admission made by the respondent in the resolution of her grievance. Annexure "A".
7. The applicant while working at the infection control department was working together with another registered nurse Mrs Stainbank who was also temporary at the infection control clinic since 2007. Upon implementation of the OSD for specialist on 7 August 2009 which was retrospective to 1 July 2007 she received the OSD for paediatrics despite her working at infection control on 30 June 2007.
8. During 2009 casualty was approved as specialty. Management included the applicant's name in the costing exercise and undertook to recognise the period she spent at the infection control unit under casualty for the purpose of her qualifying for the specialty OSD at casualty hence this was endorsed on the grievance as the resolution of the applicant's dispute which the respondent now seeks to resile from. Annexure "A".
9. The respondent has refused to translate the applicant as case manager casualty since she was working at infection control at the time the OSD came into effect.
10. It is submitted that if the respondent is refusing to translate the applicant under the casualty stream then she should be translated under the infection control unit as a case manager since at the inception of the OSD as at 1 July 2007 she worked at the Infection control unit.
11. It must be noted that prior to the implementation of the OSD there was no general or specialty as all registered nurses were treated the same. The OSD then differentiated these nurses into two groups namely Professional nurses General and Specialty nurses.

12. JURISDICTION

It is submitted that in disputes relating to the interpretation and application of a collective agreement the prescription period is not applicable. If the legislature intended that disputes be subject to a prescriptive period then it ought to have explicitly stated as is in the case of the 90 days in unfair labour practice disputes and 30 days in dismissal disputes.

Alternatively

The distinction in regards to paragraph 11 supra had only come into being on the 07 August as per the settlement agreement in the PHSDSBC which gave the applicant the right to the OSD with retrospective effect to 1 July 2007.

13. RELIEF

13.1 That the respondent has failed to interpret and apply the collective agreement, resolution 3 of 2007 correctly in the circumstance that was applicable to the applicant.

13.2. That the applicant be translated under trauma/ casualty as per the resolution of the grievance procedure.

Alternatively

13.3. That the applicant be translated to case manager in the infection control unit where she was working as at 30 June 2007.

5. RESPONDENT'S HEADS OF ARGUMENTS (EMPLOYERS)

ISSUE IN DISPUTE

Whether the applicant was eligible for OSD translation to Professional Nurse Grade 1(Specialty Nursing) with effect from 1/07/2007 or not.

1.

This is application to have the applicant's application dismissed; the reasons for this application are going to be set out hereunder. It is in the same vein submitted that Section 186 (2) of Labour Relations Act 66 of 1995 stipulates situations or instances in which Unfair Labour Practice may arise. It is submitted that this instant case is covered in terms of this Section hence, it is submitted that this Council lacks requisite jurisdiction to arbitrate this matter.

2.

It is submitted that the dispute lodged by the applicant on behalf of its member is about the matter arising out of a collective agreement, Resolution 1 of 2007, which is a Public Service Co-ordinating Bargaining Council (PSCBC) resolution (herein after referred to as the "agreement")

3.

Disputes arising out of the agreement are arbitrated by the PSCBC. It is submitted that it is glaringly obvious that the dispute lodged by the applicant falls outside the Public Health and Social Development Sectoral Bargaining Council (PHSDSBC). In the instant case the applicant seeks the PHSDSBC to arbitrate a dispute which it has no jurisdiction to arbitrate. It is submitted that in light of the above the PHSDSBC lacks necessary jurisdiction to deal with this matter.

4.

It is also clear that this dispute is about salary. There is nothing suggesting that this dispute is about anything else other than salary. The PHSDSBC lacks jurisdiction in matters relating to salary. It is on this basis that this application is made. Furthermore it is submitted that the settlement agreement signed in the Labour court in Johannesburg sets out as its preamble the fact that Occupation Specific Dispensation (OSD) is aimed at improving the salary scales of Health Professionals, it envisages logically therefore that by improving salary scales of Health Professionals, professionals will be retained in the service which has seen multitudes of them

leaving for greener pastures. The OSD agreement was an effort of trying to green the pastures by improving salary scales.

5.

It is submitted that in light of the above arguments, the applicant's application should be dismissed.

6.

In the alternative if the panelist finds that the Council has requisite jurisdiction. The arguments submitted hereunder should hold sway in favour of the respondent.

7.

BACK-GROUND TO THE DISPUTE

The applicant was allocated from Casualty to Infection Control unit from 2005, prior the inception of Occupational Specific Dispensation for nurses. She worked in that unit until 2009, when institutions were requested to do OSD (Specialty nursing stream) costing for Professional nurses working in dedicated Emergency and Trauma Units.

It was during that period when the applicant wanted to be categorized as casualty staff in order to benefit from OSD, subsequent to that HRM Circular no.11/2010, was issued in 02/02/2010, with specific conditions to be adhered-to when translating staff in those Emergency and Trauma Units. I' quote point 2.5 stipulates that "Professional Nurses at the production level working in dedicated Emergency and Trauma Units which separated the General Out Patient Department on 30/6/2007 and continued in these areas should be translated under the Specialty Nursing Stream instead of the General Nursing Stream".

The applicant was excluded from OSD benefiting on the grounds that on the 30/06/2007, she was not working in Casualty as the qualifying criterion was explicit in the policy as stated above. The applicant resolved in declaring a dispute on the matter hence the arbitration process.

8.

The employer is of the view that the dispute by the applicant should be considered illegitimate and the relief sought should be put aside. The employer has interpreted& implemented the OSD policy correctly and the exclusion of Ms Maphumulo from benefiting in Emergency and Trauma OSD cannot be regarded as an omission by the employer.

The applicant in question does not have a Post-Basic qualification and as such she can be allocated anywhere as a General Nurse Practitioner. During the introduction of **Emergency and Trauma** OSD she was working in the **Infection Control Unit** which is not classified under OSD and she does not meet the criterion as encapsulated in the **HRM Circular no.11/2010, point 2.5**.

9.

The argument by the applicant's representative is inaccurate and misleading in saying that the applicant should fall within the **PSHS 492-08/09, Arbitration Agreement** and Clause **3.7.2. "Those that elect to return to Clinical Nursing will translate to OSD and those that do not return to Clinical Nursing will not translate to OSD"**.

The employee in question left Emergency and Trauma two years before the inception of OSD and that disqualified her from benefiting if we look at the stipulations of the very same **Arbitration agreement** in dealing with displaced employees 'clause 3.10' "**Translation of Nurses who were in the Specialty units as at 30 June 2007 then allocated out to General stream afterwards, parties agree that all Nurses that meet the requirements of the OSD must translate to the OSD based on the duties they were performing as at 30 June 2007"**.

It is submitted that cognizance should be given to the criterion used in determining the eligibility of Ms. Maphumulo to OSD, which has been applied consistently, just and in an equitable manner, furthermore there are employees who joined specialty areas on the **1st of July 2007**, who did not benefit from OSD due to the fact that on the **30th of June 2007** they were not working in these areas and continued working there as specified by the policy.

Wherefore it is respondent's prayer that the applicant's case be dismissed.

Analysis of evidence and arguments:

6. The applicant declared a dispute and according to the referral form the Nature of the Dispute is recorded as an Unfair Labour Practice dispute in respect of Benefits. In the referral form the disputes about salary issues/leave pay/transfers are excluded.
7. The employer contends that the Council lacks jurisdiction to entertain this matter because it relates to salary.
8. This dispute is referred in terms of section 186 (2)(a) of the Labour Relations Act and specifically in terms of benefits. In order to fully explore this matter as there are many cases to follow and related to the same issue whether the OSD falls under the definition of benefits. Therefore I am to deal with whether the OSD specifically falls within the definition of benefits. At the outset I intend to record the decided case that give direction in this regard before making a finding on the issue.
9. According to *Schoeman & Another v Samsung Electronics SA (Pty) Ltd* [1997] 10 BLLR 1364 (LC) the following was determined:

"An unfair labour practice means an unfair act or omission that arises between an employer and an employee, involving.....

The unfair conduct of the employer relating to the promotion, demotion or training of an employee or relating to the provision of benefits to an employee.

According to The Concise Oxford Dictionary the meaning of the word "benefit" is defined as "Advantage or an allowance to which a person is entitled under insurance or social security (sickness, unemployment, supplementary, benefit) or as a member of benefit club or society."

Remuneration is different from “benefits”. A benefit is something extra, apart from remuneration. Remuneration is always a term and condition of the employment contract.

According to *Sithole v Nogwaza NO & Others* [1999] 12 BLLR 1348 (LC) benefit means material benefit such as pension, medical aid, housing and insurance subsidies, i.e must have monetary value for the employee and be a cost for the employer.

It is further recorded in this case that there can be no better exposition on the question of what constitutes a “benefit” that the one by Commissioner Hutchinson in *SA Chemical Workers Union v Longmile/ United* (1999) 20 ILJ 244 (CCMA) which has been cited with approval by the Court in *Northern Cape Provincial Administration v Hambidge NO & Others*.

Although opinions as to what constitutes a benefit (as opposed to remuneration) differ, the common thread running through all the decisions and the academic writings is that a “benefit” constitutes a material benefit such as pensions, medical aid, housing subsidies, insurance, social security or membership of a club or society. In other words, the benefit must have some monetary value for the recipient and be a cost to the employer. It is also something which arises out of a contract of employment.

According to *Northern Cape Provincial Administration v Hambidge NO & Others* [1999] 7 BLLR 696 (LC) benefit is supplementary advantage conferred on an employee for which no work is required. Employee’s claim to higher salary not amounting to claim for benefits, as defined. Claim for higher salary is a matter of mutual interest.

10. There is much confusion about the interpretation of remuneration and benefits. This should not be the case because remuneration/ salary are often misinterpreted. At the commencement of employment and over a period of time the employee becomes aware of the salary initially and thereafter the subsequent increments. This is clear from the salary advice that records salary as the basic component. This is allocated to that specific employee and is determinable. Thereafter other “benefits” are available to the employee for example, if he/she wants to access medical aid he/she contributes a portion and the employer contributes a portion and this is the same in housing subsidies, pension/ provident fund contributions. These benefits are available to all employees on application and for which no extra work is required.
11. The salary of an employee is determined by the hours worked and other factors determined by the employer. The access to benefits by an employee flows from the contract of employment and is available to all employees.
12. In respect of the matter at hand the granting of OSD is not available to all employees. It is subject to certain requirements and those meeting the requirements are granted the OSD in effect an increase in their salary. The difference is that benefits are available to all employees but the OSD is only available to employees that qualify or meet the minimum requirements. Common sense guides that all employee would like to be awarded the OSD but the regulating factor is that this “right” is budget driven and controlled by minimum requirements that separate those who qualify from those that do not meet the minimum requirements.
13. In any event the granting of the OSD has the result that the employee’s salary being increased and this process is regulated by a collective agreement. In this case the collective agreement has been settled by

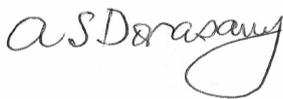
Resolution 3 of 2007 titled Occupation Specific Dispensation for Nurses in terms of the agreement being made an arbitration award signed by the parties in Boksburg dated 7 August 2009.

14. In summary the applicant was aware that in terms of the referral form benefits exclude salary issues and the inference that OSD does not fall under the definition of benefits has been explained above, therefore the Council does not have the jurisdiction to hear the matter.
15. As a consequence thereof the application succeeds in that the respondent has shown that the dispute does not fall within the definition of benefits but salary which is a matter of mutual interest and therefore the Council does not have the requisite jurisdiction to entertain the matter.
16. The following is recorded for completeness in the matter.
17. The applicant has not made any submissions that she possesses the additional qualifications in terms of the employer's succeeding circulars eg a Post Basic qualification and further she was disqualified as she was not performing the requisite duties to allow the employer to translate her as at 30 June 2007.
18. As a consequence of the above I determine that the applicant has failed to discharge the onus that the employer had failed or incorrectly interpreted and applied resolution 3 of 2007 and further determine that the applicant was not eligible for OSD translation to Professional Nurse Grade 1 (Speciality Nursing) with effect from 1 July 2007.

Award:

19. The Council does not have the requisite jurisdiction to entertain the matter.
20. The application is dismissed and the applicant is not entitled to any relief.
21. No order for costs is made.
22. This file should be closed.

DONE AND SIGNED IN DURBAN ON THIS 14 DAY OF NOVEMBER 2011.



Signature

Arbitrator: Anand Dorasamy