



ARBITRATION AWARD

Case Number: PSHS221-11/12
Commissioner: Abraham Nthako
Date of Award: 30-August-2012

In the matter between

PSA obo T.J. Talane

(Union/Applicant)

and

Department of health – Free State

(Respondent)

Union/Applicant's representative: Mr. A. J. L. Greef

Union/Applicant's address: C/o PSA

P O Box 7673

Bloemfontein

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Respondent's representative: Mr. J. B. Mncube

Respondent's address: Department of Health Free State

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DETAILS OF REPRESENTATION

1. This is an award in the arbitration between Mr. T. J. Talane, the Employee and Department of Health – Free State, the Employer.
2. The arbitration was held under the auspice of PHSDSBC in terms of the Collective Agreement.
3. The conciliation process was dealt with and the matter could not be resolved.
4. The Employee requested that the matter be resolved through arbitration process.
5. The matter was set down for arbitration on the 30th of July 2012 and it was finalized.
6. Employees were represented by Mr. J. Greef and the Employer, Department of Health was represented by Mr. J. B. Mncube.
7. The matter was mechanically recorded and one bundle of documents was submitted marked A.
8. The parties agreed that they will make submissions in writing and their arguments will be submitted on the 07th of August 2012, the Employee will then submit their response on or before the 15th of August 2012. Any necessary response will be send seven days there after but there was none.

ISSUE TO BE DECIDED

9. The issue to be decided on relates to Interpretation and application of GPSSBC 01 of 2002 in relation to entitlement to acting allowance for the period 01 May 2010 to 22 September 2010.

BACKGROUND TO THE ISSUE

10. The Employee is in the employment of the Employer and he alleged that he was entitled to acting allowance for the period of the 01st of May 2010 to 22nd of September 2010 Chief Executive Officer.
11. They referred the matter to the Council and as it could not be resolved a certificate of non resolution was issued.
12. The matter was set down for arbitration at Bophelo House, Department of Health in Bloemfontein on the 30th of July 2012 and it was finalized.
13. The matter relates to application and interpretation the Council Resolution 01 of 2002.

SURVEY OF EVIDENCE

EMPLOYEE'S SUBMISSIONS

14. Employee made submissions without calling any witnesses.

EMPLOYEE

15. Employees submitted as follows:

16. That he was appointed to act as Chief Executive Officer as per document on page 26 of bundle A and that was at Bongani Regional Hospital. He acted from the 01st of May 2010 to 22nd of September 2010. He was acting at a higher level for uninterrupted longer than six weeks. The letter of appointment was signed by the duly authorized person to sign the document, by Ms. N. C. Sondiyazi, General Manager. Ms. Sondiyazi had the authority being the person in control of the budget. In case of the Employee the post was vacant and funded. That was the Employee's submission in brief.

EMPLOYER'S SUBMISSION

17. Employer made submissions without calling any witnesses.
18. The Employer submitted as follows:
19. That the letter on page 26 of bundle A clearly indicated that there shall be no additional remuneration attached to the acting position and for the duration of the acting period. He referred to Section 32 of Public Service Act of 1994 and submitted that the section allows an authority like the General Manager to assign extra duties to employees in the department to perform temporarily. The Employer alleges that the appointment was only for the purpose of asking an Employee to perform certain duties temporarily without any implication.
20. The Employer submitted that the Employee had to provide that he was appointed in writing to act in a higher post by a person duly authorized and the post was vacant and funded at the time of appointment. The period of appointment was for uninterrupted and longer than six weeks and the Employee accepted in writing that he will act in that position. The requirement of appointment in writing was met and the post was vacant and funded. Employee acted in the position for more than six weeks. The Employer submitted that the Ms. Sodiyaazi was not duly authorized to appoint the Employee to act in the position but the MEC was the one who could appoint level 13 posts. The Employer in his submission was not certain as to whether the Employee accepted to act in position in writing or not. That was the Employer's evidence in brief.

ANALYSIS OF EVIDENCE AND ARGUMENT

21. **Section 185 of The Labour Relations Act 66 of 1995 provides that every employee has the right not to be unfairly dismissed and subjected to unfair labour practice.**
22. The issue that should be decided on is the interpretation and application of Resolution 1 of 2002 of the GPSSBC. The Employee argued that he is entitled to acting allowance in terms of Resolution 1 of 2002. It was the Employee's duty to prove that he was entitled to payment of acting allowance for the period 01 May 2010 to 22 September 2010. The Employer argued that the Employee is not entitled to acting allowance as the person who appointed him to act in the position acted *ultra vires* and the acting letter clearly stated that there was no additional remuneration was attached to acting.
23. Resolution 1 of 2002 provides that acting allowance will be paid under the following circumstances; (a) The post must be vacant and funded; (b) The acting period must be for a period in excess of 6 weeks; (c) The appointment must be made by appointing authority that is higher level than the acting appointee and (d) The Employee must accept the appointment. It is common cause that the Employee acted in the position from 01 May 2010 to 22 September 2010, from this piece of evidence it could be inferred that the Employee accepted to act in the position of Chief Executive Officer.
24. It is not in dispute that the Employee was appointed in writing and that the post that he appointed to act in was vacant and funded. He also acted for a period exciding 6 weeks. In terms of the Resolution, appointment should be done by appointing authority that is higher than the acting appointee. It is not in dispute that Ms. Sondiyazi was at a higher level than the Employee but the Employer's argument was that the appointing authority acted *ultra vires* as such did not have the power or authority to appoint the Employee to the post of Chief Executive Officer. The Council does not have the powers to

adjudicate on quasi judicial acts nor does it have powers to decide whether an act was *ultra vires* or not.

25. From the document on page 26 of bundle A, it is clear that the Employee was appointed to act by a person who is higher than the Employee in level. In terms of the letter, it is stated that there is no additional remunerating attached to the appointment. In terms of Section 23 of Act 66 of 1995 collective agreement binds the parties to the collective agreement; each party to the collective agreement and the members of every other party to the collective agreement in so far as the provisions are applicable between them.
26. There is no evidence submitted that shows that the parties are not part of the Resolution 01 of 2002 that was taken. Therefore the resolution binds the parties and I do not see any reason why the Employee was not paid as he acted for more than 6 weeks. If he did not act for more than six weeks, then the position would have been different. I am of the view that the Employee is entitled to acting allowance as contained in resolution 01 of 2002. It is my view that the Employee has proven on a balance of probabilities that he is entitled to payment of acting allowance.

FINDING

27. Based on the above, it is my finding that the Employee has proven that he is entitled to payment of acting allowance as per Resolution 01 of 2002.

AWARD

28. The Employee, **Mr. T.J. Talane** was entitled to acting allowance for the period 01 May 2010 to 22 September 2010
29. The Employer, **Department of Health - Free State** is ordered to pay the Employee, Mr. T. J. Talane acting allowance for the period of 01 May 2010 to 22 September 2010.
30. The pay should be done on or before the 28th of September 2012.
31. The Employer must note that interest will accrue on the amount payable from 28th of September 2012 should payment not be done as per clause 30 above.
32. I make no other as to costs.

Signature: _____

Commissioner: *Abraham Nthako*
Sector: *Health*