



PHSDSBC

PUBLIC HEALTH AND SOCIAL DEVELOPMENT
SECTORAL BARGAINING COUNCIL

ARBITRATION AWARD

CASE NO: PSHS277-17/18

PANELIST: W R PRETORIUS

DATE OF AWARD: 11 DECEMBER 2017

In the matter between:

PAWUSA obo MOLO, E N

APPLICANT

and

DEPARTMENT OF HEALTH- EASTERN CAPE

RESPONDENT

DETAILS OF THE HEARING AND REPRESENTATION

1. The arbitration of the dispute between the Applicant, Ms Elda Nombulelo Molo and the Respondent, Department of Health- Eastern Cape, was scheduled at the Respondent's clinic in Venterstad, Eastern Cape on 23 August, 4 October and finalised on 1 December 2017.
2. The Applicant was represented by Mr Kleinhans, an official from the Public Allied Workers Union (PAWUSA). Mr. Busakwe from the Labour Relations section represented the Respondent.

3. After the conclusion of the arbitration the parties requested, and were afforded the opportunity to submit written closing arguments by close of business on 8 December 2017. The said arguments were duly received.
4. These proceedings were digitally recorded.

ISSUE IN DISPUTE

5. The Applicant claims that the Respondent has committed an unfair labour practice (ULP) when it upgraded her post of Community Liaison Officer (CLO) from salary level 6 to 7 in April 2015 but failed to pay her arrear salaries retrospectively to her date of appointment. She seeks an order that the Respondent has committed an ULP and payment of R218 370,09 as per memorandum dated 4 July 2016.

BACKGROUND

6. The Applicant was appointed as a CLO on salary level 6 on or about January 2008. She complained about inconsistencies regarding the grading of the posts of CLO's, i.e. new appointees that were appointed in terms of the January 2008 organogram were appointed at salary level 7 whereas she was appointed at salary level 6. The duties and responsibilities of these posts are the same.
7. On 1 April 2015 her post was upgraded to salary level 7, bringing her on par with the rest of the CLO's. However, the Respondent did not approve the payment of her arrear monies as requested by a departmental memorandum dated 4 July 2016.

SURVEY OF EVIDENCE AND ARGUMENT

8. Both parties submitted documents of which the parties agreed that the contents appear what it purport to be.

9. The Applicant was the only witness and her evidence was supported by way of written argument including the Respondent's case.

Applicant's version

10. The Applicant testified that it came to her attention during 2011 that the Community Liaison Officers (CLO's) were supposed to be paid on salary level 7 as reflected by the organogram dated January 2008. She stated that her other colleagues appointed as CLO's are being paid at salary level 7. Ever since this period, she continuously engaged the Respondent regarding the alleged disparities.
11. She submitted that she was put on the correct salary level (salary level 7) with effect from 1 April 2015 and the Respondent told her that the arrear monies would be paid retrospectively to her date of appointment. She waited until the end of December 2015 for her arrear monies to be paid but to no avail.
12. On or about April 2016 her documents for the payment of the arrear monies were returned from the PCC indicating that the submission for payment was approved but with a comment that it must be sent to Bhisho for verification. After another delay the documents were finally taken to Bhisho on 28 July 2016. On 13 December 2016 the submission was returned to the District indicating that the submission for the payment the arrear monies of her and other colleagues was not approved by the Superintendent General for Health.
13. The Respondent's failure to act and respond to the Applicant's query was tantamount to ignorance and gross negligence and as a result deprived the Applicant of earnings that she was rightfully entitled to as she has performed her duties on salary level 7.
14. New appointees have been appointed on salary level 7 and remunerated accordingly while the Applicant was willfully omitted. By paying new appointees

on salary level 7, the Respondent has set a precedence and committed gross inconsistencies by only paying the new appointees on salary level 7.

15. The principle of equal pay for work of equal value should apply and the Respondent's failure is therefore grossly unfair.
16. The Applicant has rendered and performed services on salary level 7 and is therefore entitled to remuneration on this level retrospectively as referred to above. The Respondent's failure to move all employees to salary level 7 can therefore not prejudice the Applicant.
17. The alleged memorandum by one Ms Vena was never produced and if such was in fact in existence, it was arbitrary and thus unlawful.
18. The Applicant is praying that the Respondent's conduct amounts to an ULP and that she is entitled to be paid retrospectively all monies due to her.

Respondent's version

19. In ***South African Post Office Ltd vs CCMA (2012) ZALCCT 23***, the Court held that the CCMA does not have a general unfairness jurisdiction. An employee referring an unfair labour practice dispute (ULP) in terms of section 186 of the LRA must demonstrate that it falls within that section. Any claim of an ULP must be covered by the definition in section 186(2), failing which it will not be an ULP and will not fall within the jurisdiction of the bargaining council.
20. Based on the above, the Applicant's dispute does not fall under the ambit of section 186(2)(a) and the council lacks jurisdiction to deal with the dispute.
21. The Applicant responded to an advert that advertised the posts of CLO's at salary level 6. She was shortlisted, interviewed and appointed according to the requirements of the advert. The post was advertised correctly. For the post to be at a higher salary level, job evaluation had to be done in order for the post to be upgraded.

22. The Applicant did not request the Respondent to do job evaluation for her post in order for the same to be upgraded.
23. In 2015 the Applicant was wrongly upgraded to salary level 7 after the Sub-District Manager had written a memo requesting for the upgrade of Applicant's post. On 1 April 2015 the upgrade was effected with no supporting documents. Thus, the upgrade was unlawful and unprocedural and it should not have been effected without any departmental resolution or a directive from the Department of Public Service and Administration (DPSA). For this reason, the back-pay of the Applicant could not be effected.
24. As much as the organogram of 2008 places the CLO's on salary level 7, there should have been a recommendation from her supervisor requesting her post to be upgraded to salary level 7 in accordance with the said organogram. Also her performance in terms of the Performance Management and Development System (PMDS) should have been taken into consideration when a recommendation was to be made. No such was done, thus the Applicant's post was never upgraded, until the wrong upgrade with no supporting documents was effected on 1 April 2015.
25. As much as the error was done to upgrade the Applicant, the Respondent does not intend to reverse the error made and move her back to salary level 6.
26. The Applicant is not owed anything by the Respondent as the upgrade was erroneously done.

ANALYSIS OF EVIDENCE AND ARGUMENT

27. Section 186(2)(a) of the LRA provides that "Unfair labour practice" means any unfair act or omission that arises between an employer and an employee involving –
 - (a) unfair conduct by the employer relating to the promotion, demotion, probation (excluding disputes about dismissals for a reason relating to

probation) or training of an employee or relating to the provision of benefits to an employee...”

28. An applicant who alleges that an employer has been guilty of an unfair labour practice (ULP) bears the burden of proving on a balance of probabilities that the employer is guilty of “unfair conduct relating to the provision of benefits”. The burden of proof in an ULP is different from a claim relating to alleged unfair dismissal. In an unfair dismissal dispute the burden of proof is on an employer to show it had a fair reason relating to the conduct or capacity of the employee or relating to the operational requirements of the business.
29. The Respondent raised the issue of jurisdiction, i.e. the PHSDSBC does not have jurisdiction to hear the Applicant’s dispute because it does not fall within the ambit of section 186(2) of the LRA.
30. Having regard for the above, it is trite law that commissioners have an obligation to determine the true nature of the dispute referred by the applicant in order to ensure that the dispute has been referred to the forum with the requisite jurisdiction.
31. In ***National Union of Metalworkers of SA and Others v Bader Bop (Pty) Ltd and Another (2003) 24 ILJ 305 (CC)*** the Constitutional Court said the following: “It is the duty of a court to ascertain the true nature of the dispute between the parties. In ascertaining the real dispute a court must look at the substance of the dispute and not at the form in which it is presented. The label given to a dispute by a party is not necessarily conclusive. The true nature of the dispute must be distilled from the history of the dispute, as reflected in the communications between the parties and between the parties and the Commission for Conciliation, Mediation and Arbitration (CCMA), before and after referral of such dispute. These would include referral documents, the certificate of outcome and all relevant communications. It is also important to bear in mind that parties may modify their demands in the course of discussing the dispute or during the conciliation process. All of this must be taken into consideration in ascertaining the true nature of the dispute.”

32. The same Court in ***CUSA v Tao Ying Metal Industries and Others (CCT 40/07) [2008] ZACC 15*** held as follows:

“A commissioner must, as the LRA requires, 'deal with the substantial merits of the dispute'. This can only be done by ascertaining the real dispute between the parties. In deciding what the real dispute between the parties is, a commissioner is not necessarily bound by what the legal representatives say the dispute is. The labels that parties attach to a dispute cannot change its underlying nature. A commissioner is required to take all the facts into consideration including the description of the nature of the dispute, the outcome requested by the union and the evidence presented during the arbitration. What must be borne in mind is that there is no provision for pleadings in the arbitration process which helps to define disputes in civil litigation. Indeed, the material that a commissioner will have prior to a hearing will consist of standard forms which record the nature of the dispute and the desired outcome. The informal nature of the arbitration process permits a commissioner to determine what the real dispute between the parties is on a consideration of all the facts. The dispute between the parties may only emerge once all the evidence is in.”

33. The Court in ***Johannesburg City Parks v Mphahlani NO and Others (2010) 6 BLLR 585 (LAC)*** drew a distinction between a dispute and an issue in a dispute. There are situations where the decider of facts may be called upon to interpret a collective agreement in order to arrive at a resolution of the main dispute. What finds jurisdiction is not an issue in a dispute but a real dispute. This decision was confirmed by the Labour Appeal Court (LAC) in the matter of ***Minister of Safety and Security v SSBC and Others [2010] 6 BLLR 594 (LAC)***. I am bound by those two instructive judgments. The ***Mphahlani*** judgment has since been overturned on appeal however I believe that the judgment was overturned on a different basis and that the Court's decision with regard to the distinction remains the same.
34. The Applicant in her written heads of argument stated that the principle of equal pay for work of equal value should apply and the Respondent's failure is therefore grossly unfair. I agree with the Applicant.

35. The Respondent maintains that the upgrade of the post of the Applicant was done erroneously and as a result she does not qualify to be paid the arrear salary. The Respondent also stated that it does not intend reversing the “erroneous” upgrade of the Applicant’s post from salary level 6 to 7 although in the same breath refuse to pay the arrear salary/monies claimed by the Applicant. I am not sure what informs the intention of the Respondent, one can only speculate that it’s done on “humanitarian grounds”.
36. Having regard for the above, I find that the real dispute between the parties is one of unfair discrimination pertaining to a difference in terms and conditions of employment between employees of the same employer performing the same or substantially the same work or work of equal value that is directly based on any one or more of the grounds listed in the Employment Equity Act 55 of 1998 (the EEA). The resolve of the real dispute will also deal with the issue in dispute, i.e. the Applicant's claim of arrears salaries.
37. Now that I have determined the real dispute between the parties, I turn to the issue of jurisdiction. Disputes about unfair discrimination is dealt with the by Commission for Conciliation, Mediation and Arbitration (CCMA). Therefore, the PHSDSBC lacks jurisdiction to determine the dispute.
38. I therefore deem it appropriate to make the following award:

AWARD

39. The PHSDSBC does not have jurisdiction to hear the dispute under case number PSHS277-17/18.

40. There is no order as to costs.

A handwritten signature in black ink, appearing to read 'W. Pretorius', with a long horizontal flourish extending to the right.

WILLIAM RICHARD PRETORIUS
PHSDSBC PANELIST