



**PHSDSBC**

PUBLIC HEALTH AND SOCIAL DEVELOPMENT  
SECTORAL BARGAINING COUNCIL

# ARBITRATION AWARD

Case No: **PSHS280-16/17**

Commissioner: **Nozibusiso Faith Gumede**

Date of award: **13 September 2017**

In the matter between:

***NUPSAW obo MILDRED SELEPE***

(Applicant / Employee)

and

***DEPARTMENT OF HEALTH- MPUMALANGA***

(Respondent / Employer)

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## **DETAILS OF HEARING AND REPRESENTATION**

1. The arbitration was held under the auspices of the Public Health and Social Development Sectoral Bargaining Council (hereunder referred as “PHSDSBC”) terms of section 191(5) (a) of the Labour Relations Act, 1995 as amended (“hereunder referred as the LRA”) and the award is issued in terms of section 138(7) of the LRA. The hearing took place at Barberton Hospital on 30 August 2017 at 10h00 however heads of arguments were submitted on 8 September 2017.
2. The applicant, Mildred Selepe was represented by Manqoba Skosana from National Union of Public Service and Allied Workers (NUPSAW) whilst the respondent,

Department of Health- Mpumalanga was represented by Lerato Mola, the Labour Relations Officer.

3. The service of the interpreter was not required. The hearing was digitally and manually recorded.

### **PRELIMINARY ISSUES**

4. The respondent requested postponement to sought mandate on issues in disputes, and applicant did not oppose this application. In the *ex-tempo* ruling, I considered the following factors. Firstly, that parties had numerous engagements however no amicable resolution was reached in the past. Secondly, that there was no intention to call any witnesses. Then, parties agreed to extend the process until 8 September 2017 for submission of head of arguments. In essence, there was no need to grant postponement without compelling reasons, as setdown notices were issued to both parties on 27 July 2017 and had ample time to seek any mandate.

### **ISSUE TO BE DECIDED**

5. I must decide whether the respondent's conduct is fair or not.

### **BACKGROUND OF THE DISPUTE**

6. The applicant is a Diagnostic Radiographer - Grade 1, who earns R321 462.00 per annum and work at the respondent's establishment at Barberton Hospital. In May 2009, she was offered a position of a Chief Radiographer by Matibidi Hospital which was subsequently counter offered by Barberton Hospital. She sought retrospective promotion to the Chief Radiographer as a relief.

## **SURVEY OF EVIDANCE AND ARGUMENTS**

7. I do not intend to deal with every aspect of the evidence as it is recorded and will only record the part of the evidence that I deem necessary for the purpose of this determination. I will deal with the evidence of all the witnesses in the same manner. The parties submitted a bundle of documents and heads of arguments to support their evidence.

## **APPLICANT'S CASE**

8. The applicant's submissions were as follows:

9. On 27 May 2009, Acting Head of Department (Dr SM Zungu) at Barberton Hospital approved the applicant's counter offer as Chief Radiographer at the rate of R145 920.00 per annum, and it became effective on 1 June 2009.

10. On 1 July 2010, the respondent translated the applicant to a Diagnostic Radiographer – Grade 1 position which was not in accordance with the provisions of **Resolution 2 of 2010 of Occupational Specific Dispensation** (hereunder referred as a Resolution 2 of 2010) for therapeutic, diagnostic and related allied health professionals was introduced to the public service. She was moved to Diagnostic Radiographer Grade 1 which was R193 062.00 per annum instead of Chief Radiographer Grade 1 with a salary of R238 000.00 per annum. Subsequently, demoted from a supervisory into a production level position; and this is clearly demonstrated by differences in salaries. She was not consulted nor was she given a justifiable reason in advance.

11. In **Van Niekerk v Medicross Health Care Group (Pty) Ltd [1998] 8 BALR 1038**, the CCMA found that *“since demotion is a disciplinary action, ‘consultation and counselling should take place before the demotion is implemented. In the absence of a fair reason and fair procedure the demotion was held to amount to an unfair unilateral alteration of term and conditions of employment”* and in **Van Der Riet v**

*Leisurenet t/a Health and Rackuet Club (1997) 6 BLLR at 721, the Labour Appeal Court held that failure by the employer to consult with an employee prior to his demotion constituted an unfair labour practice. In **NUPSAW obo G Takadi and 14 others v Department of Health Gauteng Province**, it was found that incorrect translation and should be translated to Chief Diagnostic Radiographer.*

12. The applicant suffered a huge financial loss as a result of the respondent's unfair conduct which she has been deprived since 2010.

### **RESPONDENT'S CASE**

13. The respondent's submissions were as follows:

14. She conceded that applicant was promoted to a supervisory position but her duties and reporting procedure did not change. She benefited when Resolution 2 of 2010 were implemented in 2010, as she moved from level 7 to 8. It was accordingly and correctly implemented based on the duties, she was performing as from the 1<sup>st</sup> of July 2010 however erroneously as per Health Professional Council of South Africa (HPCSA). This require a person to be registered as such with the relevant professional council for him/her to benefit accordingly. It was discovered that she has been practicing as a Community Service Radiographer until 2015 when she fulfil the requirements to practice independently and could update her registration with HPCSA. This means that her HPCSA registration category was not relevant for her to be placed as a Chief Radiographer at the time.

15. It is a legal requirement that professionals should be properly register with relevant professional body and/or Council for ethical reasons. The applicant has since failed to meet her legal obligation, which has a serious prejudicial ground in cases obligation against the Department.

16. The applicant had no right of practice on the professional category which she is seeking a relief from 2006 until March 2015. He averred that applicant was only legible to practice under supervision, and she was never a supervisor but counter offered.

### **ANALYSIS OF EVIDENCE AND ARGUMENTS**

17. Section 186 (2) (a) of the LRA stipulate that “unfair labour practice” *means any unfair act or omission that arises between an employer and an employee involving 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*”. The applicant bear onus to prove that the respondent’s conduct was not fair.

18. The records show that the applicant was translated, when Resolution 2 of 2010 was implemented on 1 July 2010. She contended that it was not properly done because she was demoted to a Diagnostic Radiographer - Grade 1 instead of being retained in her position as a Chief Radiographer – Grade 1.

19. In term of supra Resolution, clause 4.1.12. “*All serving employees who are covered by this agreement, and who advances to higher post or grade, shall gain at least one (1) notch on such appointment (promotion rule)*”. It is not in dispute that the applicant’s profession fall within the scope of this agreement/resolution and also that she was a Chief Radiographer – Grade 1 before this Resolution was implemented. However, the respondent’s argument is that she was not eligible to advance to the highest position. It evidential that they approved her counter offer as Chief Radiographer and effected on 1 June 2009, at the annual salary notch of R145 920.00 per annum, subsequently, advanced from level 7 to 8.

20. It is also evident that she remains in the same rank (level 8) despite being translated on 1 July 2010. However, her salary notch elevated from R174 117.00 to R193 062.00 per annum but her job title changed from a Chief Radiographer – Grade 1 to a

Diagnostic Radiographer – Grade 1. The alleged demotion is defined in simple terms, as a *reduction in rank or status* whilst in law, “*it could also mean a reduction or diminution of dignity, importance, responsibility, power or status even if salary, attendant benefits and rank are retained*”. In ***Van Wyk v Albany Bakeries Limited and Others (JR 1658/01 [2003] ZALC***, the Labour Court held that a demotion of an employee from a position of Regional Manager to that of a Branch Manager amounted to a demotion, even though the salary and benefit remained unchanged. However, it was uncontested that applicant’s duties remained the same and continued to report to her supervisor. Therefore, it will be improper to presume that there was a diminution in her dignity, importance, responsibility, power or status, as it is probable that these were not featured from the onset.

21. The respondent further argued that the applicant’s HPCSA registration category was not relevant for her to be placed as a Chief Radiographer at the time. I noted a letter proffered from HPCSA which stated that “*although she (the applicant) completed her Community Service on 31 December 2006, she only applied for registration in the category Independent Practice on 13 March 2015, when her name was registered in the category Independent Practice – Diagnosis*”. It probable that the respondent failed to verify applicant’s registration however, it still remains a legal obligation for her, as a health professional to adhere to HPCSA regulations.

22. Section 59 of Health Professions Act 56 of 1974 place **limitations in respects of unregistered person** as follows:

- I. “*No remuneration shall be recovered in respect of any act specially pertaining to the profession of a registered person when performed by a person who is not registered under this Act to perform such act*”.
- II. “*No person other than a registered person holding the necessary qualifications shall be eligible for or entitled to hold any appointment to any establishment, institution, body, organisation or association, whether public or private, if such*

*appointment involves the performance of any act which an unregistered person in terms of the provisions of this Act, may not perform: provided that nothing in this subsection shall be construed as prohibiting the education and training of health professionals under the supervision of a health professional, or the employment in any hospital or similar institution of any person undergoing education and training with a view to registration in terms of this Act in respect of any health profession, under the supervision of a health professional.*

23. Therefore, even if she was entitled to be elevated to the highest position, the respondent would not have obliged to effect it, retrospectively. Moreover, clause 4.1.5 of the aforementioned Resolution state that, *“the introduction of appointment requirement, grade, and career progression requirement for these categories as determined by the employer, **subject to any statutory requirements** (my emphasis) determined by relevant health professional council where applicable”*. This further placed an obligation to the respondent to ensure that statutory requirements are met upon translation. It is apparent that it was improper to counter-offer of a Chief Radiographer – Grade 1 position without proper verification however any act or omission can be corrected to ensure compliance with relevant regulations. This resolution was a mere emphasis to already promulgated legislations.

24. The applicant further argued that a proper procedure was not followed before she was demoted, as there was no consultation or counselling sessions. It would have been proper to have these engagements however, it would not have changed the legal obligational prerequisites.

25. On the balance of probability, it is my findings that the respondent's conduct was fair. Therefore, the relief sought will not be granted because applicant failed to discharge the burden of proof in this matter.

## **AWARD**

26. I make the following order:

27. The respondent conduct was fair and application is dismissed.

28. I make no order as to costs.



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NOZIBUSISO FAITH GUMEDE