



ARBITRATION AWARD

Panellist/s: Joseph Mphaphuli
Case No.: PSHS341-11/12
Date of Award: 1-May-2012

In the ARBITRATION between:

SAMA obo Hoque, A.M

(Union/ Applicant)

And

Department of Health – Kwazulu Natal

(Respondent)

Applicant's Representative: Mr. Buthelezi

Applicant's Address: Block F Castle Walk
Lynnwood Ridge
0040

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Respondent's Representative: Mr. Khumalo

Respondent's Address: PO Box 371
Clernaville
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DETAILS OF HEARING AND REPRESENTATIONS

The arbitration hearing was scheduled in terms of Section 191 of the Labour Relations Act 66/1995 ("The Act") as amended. The hearing was conducted at the Respondent's premises in Durban on 28 March 2012.

Mr. Khumalo an official in the Respondent's services appeared on behalf of the Respondent. Mr. Buthelezi, an official of SAMA represented the Applicant.

ISSUE IN DISPUTE

Interpretation and application of a Collective Agreement.

BACKGROUND TO THE DISPUTE

The Applicant was employed by the Department of Health and was posted at a Community Health Centre. The Applicant occupied the position of Medical Manager at the establishment.

The Applicant Party filed for compliance with a Collective Agreement by the Respondent whereby the Applicant would be appropriately graded at level 2 in terms the said Collective Agreement and with arrear compensation.

There was no evidence led at the scheduled hearing. Parties preferred to submit written heads of argument. Parties agreed to file their heads of argument by 05 April 2012.

PRELIMINARY ISSUE

The Respondent elected to raise a preliminary point in respect of jurisdiction on the part of the Council to hear the dispute. This aspect was not at all raised at the scheduled arbitration hearing.

BASIS FOR THE ARGUMENT AGAINST JURISDICTION

The Respondent relied on the Labour Appeal Judgement of the Honourable Judge President Zondo in the matter of Minister of Safety and Security and Safety and Security Sectorial Bargaining Council referenced PA2/09.

The Court made a pronouncement on whether the refusal by the employer to grant a transfer constituted an unfair act or a contravention of the terms of a collective agreement. The Collective Agreement in question had a bearing on the disputed transfer.

The Court arrived at the conclusion that the Applicant in fact questioned the fairness of the Respondent's act and not the interpretation or application of the relevant Collective Agreement.

It was on this basis that the Court found that the Collective Agreement was not the subject of the dispute. In the event the Court found that the Council had no jurisdiction to arbitrate the dispute.

The relevance of this decision according to the Respondent arises from the Applicant's challenge of the Respondent's decision. The actual text of the Respondent's argument in this regard reads:

"In the circumstances it is submitted that in the light of the aforesaid judgement, this Council does not have jurisdiction to arbitrate this matter, as this is not necessarily a dispute about the application or interpretation of the Collective Agreement but the Applicant's challenging the decision of the employer to deduct leave without pay for her salary".

The Applicant Party opposed the application. In its opposition the Applicant Party pointed out that the issue cited by the Respondent as the issue forming the subject of the dispute misrepresented the Applicant's case.

Indeed the Applicant Party's heads of argument refers not to salary deduction but to grading as contemplated by the affected Resolution.

It is in this context that I find that the decision referred to by the Respondent does not address the Applicant's case. The dispute is specifically about the terms of the Collective Agreement and for this reason the dispute is arbitrable.

RULING

The Council has jurisdiction to arbitrate the dispute.

SUBMISSIONS BY THE APPLICANT PARTY

The Applicant Party noted that the Applicant was qualified for an upgrade to salary grade level 2 as contemplated by the affected Resolution namely Resolution 1 of 2007.

The said Resolution has binding force between the parties and its terms should be implemented where the prescribed requirements are met.

The Applicant Party's submissions were to the effect that the Applicant had met all the requirements in terms of training, qualifications, skills and experience to be translated to salary grade 2 as contemplated by the Resolution.

It appears from the Applicant Party's supporting documents that the Applicant's grievance stems from the implementation of the second phase of the Resolution in 2010. The Applicant stated in the supporting document in this regard that:

"During the implementation of second phase of OSD (Occupation Specific Dispensation), being reference to Resolution 1/2007) during 2010, I was not accorded the appropriate translation into salary level and my other colleagues.... (names were provided) were translated to salary grade 2 clinical/ medical managers".

It therefore appears that the dispute is limited to the second phase of the implementation being 2010.

The case of the Applicant was not that the Respondent had taken a decision against his translation but that the Respondent had failed to effect the translation. There was an obligation on the part of the Respondent to implement the terms of the Resolution.

In the instance it is my conclusion that the Respondent acted in contravention of the Collective Agreement by failing to translate the Applicant to salary grade 2.

AWARD

1. I order the Respondent being the Department of Health – Kwazulu Natal to translate Dr Hogue, A.M to salary grade 2 from the second phase implementation date in 2010.
2. The translation must be effected within twenty one days from the date of receipt of the award.



Joseph Mphaphuli
Signed
PHSDSBC Panelist
22 April 2012