



PHSDSBC

PUBLIC HEALTH AND SOCIAL DEVELOPMENT
SECTORAL BARGAINING COUNCIL

ARBITRATION AWARD

COMMISSIONER: KHEHLA KHANYILE

CASE NO: PSHS382-17/18

DATE OF AWARD: 19 OCTOBER 2017

IN THE MATTER BETWEEN:

PSA OBO PHILANI ENOCK MTHETHWA

APPLICANT

and

DEPARTMENT OF HEALTH- KWAZULU NATAL

RESPONDENT

DETAILS OF HEARING AND REPRESENTATION

1. The matter was held at Sundumbili Clinic, on 04 October 2017 at 10h00. The applicant was present and was represented by the union official, Miss Cynthia Mbali from PSA and the respondent, Department of Health was represented by the Human Resources manager, Mrs Nompilo Sithole. The proceedings were digitally recorded and I also took notes by hand. The parties submitted their closing arguments on 11 October 2017.

ISSUES TO BE DECIDED

2. I am required to determine whether or not the respondent committed unfair labour practice relating to promotion as defined in section 186(2) (a) of the LRA of 1995 as amended.

BACKGROUND TO THE DISPUTE

3. The Applicant, Philani Mthethwa is employed by Department of Health as operational manager with effect from 04 May 2016. The post of operational manager was advertised at Church of Scotland which the Applicant was appointed for it. He received the appointment letter with the annexure A which he signed and forwarded it back to the Respondent. He also indicated the commencement date to be 01 June 2016.

SURVEY OF EVIDENCE AND ARGUMENT

Applicant's case

4. The Applicant stated that he was employed as Clinical Nursing Practitioner. He applied for an advertised post of operational manager in 2016. He presented as evidence a letter of appointment from the Respondent with the annexure A received on 04 May 2016 which reads" I have pleasure in offering you employment in the Department of Health. Your employment is of a permanent nature and is in terms of the Public Service Act, 1994. The date of effect will be on assumption of duty". The annexure A reads" I Philani Ernest Mthethwa hereby accept your offer of employment and the conditions attached to the post of operational manager at Church of Scotland Hospital. I will be assuming duty on the 01st of June 2016".
5. On 27 May 2016, the applicant received a call from the human resource manager, Mrs Sithole of Church of Scotland Hospital and informing him that he could not assume duties on the said date as they were experiencing some challenges. As a result, he did not report for duties on the aforesaid date. The Applicant wants to be paid on higher scale salaries with effect from 01 June 2017 to 01 September 2017.

The Respondent's case

6. Mrs Nompilo Sithole stated that the Department of Health advertised the post of operational manager in 2016. The applicant was found suitable for that the position. He was issued with the appointment letter where the Applicant replied with the acceptance letter that he would start on 01st June 2016. Unfortunately, it did not happen because the clinic was not ready to operate the Applicant was then informed telephonically that it would not be possible for him to commence on the aforesaid date. The other information through email was sent to Sundumbili C.H.C about the challenges regarding the clinic.

7. There was a communication between Mr Mthethwa and the Respondent. The Applicant has commenced his duties at Umkhuphula Clinic with effect from 01st September 2017. The Applicant has requested a back pay from 01st June 2016 to end of August 2017. It is impossible to happen because the clinic was not up and running. There would not be any expenditure for the clinic not operation. A letter of appointment was formulated and signed by the CEO. During the formulation of the letter it had been decided not to specify the date of commencement of duties due to the management uncertainty about the timing of the clinic handover by the Department of Works. The letter was handed over to Mr Mthethwa and annexure "A" was attached for him to confirm his acceptance of his appointment. On receipt of the letter of appointment Mr Mthethwa used Annexured "A" and confirmed his acceptance of the appointment and specified his preferred date of commencement as 01st June 2016 and returned it to church of Scotland Hospital Human Resources Management. On receipt of the Annexure "A" from Mr Mthethwa whereby he was confirming his acceptance of the Appointment and his preferred date of commencement of duties, on 27th May 2016, Mrs Sithole, the Human Resources Manager called Mr Mthethwa whereby she explained to him that due to the challenges with the delayed handover of the clinic he would not be able to commence his duties on 01st June 2016 as he stated on Annexure "A". Mrs Sithole also testified that she further informed via e-mail correspondence Mr Mthethwa's management about employment offer to Mr Mthethwa and the challenges they were having regarding the delayed handover by the Department of Public Works of the Mkhuphula Clinic for which Mr Mthethwa had been offered employment as an Operation Manager. Mrs Sithole testified that the challenges regarding the handover

process of the Mkhuphula Clinic persisted until August 2017 and Mr Mthethwa commenced his duties as an Operational Manager of Mkhuphula Clinic as at 01st September 2017.

ANALYSIS OF EVIDENCE AND ARGUMENT

8. In terms of section 23 of the Constitution of 1996 every employee has a right to fair labour practice.
9. Section 186(2) (a) of the Labour Relations Act: 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 or training of an employee or relating to the provision of benefits to an employee.
10. It is common cause that the applicant was appointed on promotion by Church of Scotland Hospital as Operation Manager for the Mkhuphula Clinic. It also appeared as common cause that the letter of appointment (job offer) was sent by the Respondent to the applicant on 04 May 2016. It further appeared as common cause that on receipt of the letter of appointment with Annexure A Mr Mthethwa confirmed his acceptance of the offer on the said date and specified the commencement date to be 01 June 2017. It further appeared as common cause that the Applicant had placed a notice to leave from Sundumbili CHC in order to take up a higher position in the same department. It further appeared as common cause that Mrs Sithole called the applicant on the 27th of May 2016 to inform him that he would not be able to start on 01 June 2016 as per his indication in the acceptance letter due to challenges with the clinic for which he had been appointed to. It is further common cause that the Applicant ultimately resumed duties as operational manager on 01 September 2017.
11. The Applicant argued that he was appointed by the Respondent when he accepted the written offer of employment on 04 May 2016. He submitted that he wanted to be paid the arrear salaries effective from 01 June 2016 to 01 September 2017. I reject the applicant's argument to be less probable than that of the respondent. It is evident that the applicant's employment was subject to a suspensive condition in that the date of

effect will be on assumption of duty. He accepted the offer of employment by signing annexure A and the conditions attached to the post. Five days before he was due to commence working on 01 June 2017, Mrs Sithole called him that the Respondent had challenges. The applicant agreed to amend a contract of employment if not so, he would have reported for duty at Church of Scotland Hospital on the said date. Unfortunately, the Department of Works delayed to hand over the Mkhuphula clinic.

12. I preferred the respondent's version. It is evident on a letter of appointment that a contract of employment was entered into between the Applicant and the Respondent 04 May 2016. However, the letter of appointment invoked a suspensive condition in that the date of effect would be on assumption of duty. In this case, the fulfilment of a suspensive condition was on 01 September 2017 and from there the Respondent had to increase or adjust his salary scale accordingly. I find that the Respondent did not commit an unfair labour practice against the Applicant as defined by section 186(2) (a).

AWARD

13. In the circumstances I make the following award:

14. I find that the Respondent did not commit an unfair labour practice against the Applicant.

15. The application is dismissed.

16. I make no order as costs.

COMMISSIONER: KHEHLA KHANYILE

SIGNATURE