



# ARBITRATION AWARD

Panellist/s: Ananthan Sanjivi Dorasamy  
Case No.: PSHS436-11/12  
Date of Award: 17-Feb-2012

In the ARBITRATION between:

In the ARBITRATION between:

**PSA O B O MALLOY A**

(Union / Applicant)

and

**DEPARTMENT OF HEALTH: KZN**

(Respondent)

<b>Union/Applicant's representative</b>	: MR M DINGANA
Union/Applicant's address	: P.O.BOX 2056 PIETERMARITZBURG 3200
Telephone	: 033 392 7600
Telefax	: 033 392 7615
<b>Respondent's representative</b>	: MRS N A GUMEDE
Respondent's address	: P O BOX 370 PIETERMARITZBURG 3200
Telephone	: 033 345 4221
Telefax	: 033 345 5730

### **Details of hearing and representation:**

1. The arbitration proceedings commenced at 10H00 on the 30 January 2012 at the Labour Relations Boardroom, Natalia Building, Pietermaritzburg. Mr M Dingana of PSA represented the applicant and Mrs N A Gumede represented the respondent. After reverting to section 138 (3) of the Labour Relations Act the parties agreed on the following:

The parties confirmed that oral evidence would not be tendered and that submissions would be made in the form of Heads of Arguments to be forwarded to the arbitrator as follows:

- i. The applicant will submit its Arguments on or before the 6 February 2012.
- ii. The respondent will submit its Arguments on the 13 February 2012.

### **Issues to be decided:**

2. I am to decide whether the employer/ respondent interpreted and applied resolution 3 of 2007 viz whether the applicant was eligible for OSD translation in terms of Resolution 3 of 2007 under clause 3.2.5.3 to Professional Nurse Grade 1 (registered Nurse) to speciality post with effect from 1 July 2007 or not.

### **Background to the issue:**

3. The applicant alleges that she should be considered for the Occupational Specific Dispensation as she met the criteria stipulated.

The respondent contends that the applicant lodged an unfair labour practice relating to benefits. It raised a point in limine that the Council lacked jurisdiction to entertain this matter because it relates to salary. The introduction of the Occupational Specific Dispensation (OSD) was aimed at increasing the remuneration of nurses. Alternatively the respondent believes that the applicant is excluded from the OSD offer because she not satisfy the qualifying criteria that were explicit in the policy.

### **Summary of evidence and arguments:**

4. **APPLICANT'S HEADS OF ARGUMENTS (EMPLOYEE):**

The salient aspects of the applicant's submission are recorded below:

1.

NON – COMPLIANCE WITH THE PRE-EMPTORY PROCEDURES IN THE COLLECTIVE AGREEMENT (Resolution 1 of 2003)

The Applicant works at the Howick Community Psychiatric Clinic and has been there since 2007 and until today. In 2007 the employer has translated all chief professional nurses under the auspices of the OSD, Resolution 3 of 2007. On 30 June 2007, the employer also confirmed that all chief professional nurses who were in charge of wards and or stands alone residential clinic and still performing the duties therein should be translated as Operational Manager.

The applicant has been running the Howick Psychiatric and Bruntville Psychiatric Clinic on her own since 01 August 1999.

On numerous she has took the issue with the employer and without success, the matter was referred for conciliation and arbitration under the auspices of Resolution 3 of 2007.

The said resolution states that under the clause 3.2.5.3, Translation of Professional Nurse (registered nurse) to speciality posts.

1. A professional nurse (registered nurse) who occupies a post in a nursing speciality and who-
  - a) Is in possession of a post-basic clinical nursing qualification listed in the Government Notice R212, as amended, shall translate to the appropriate speciality post; and
  - b) Is not in possession of post-basic clinical nursing qualification listed in Government Notice R212, as amended, but who has been permanently appointed in a post in a speciality unit and has been performing these duties of the speciality post satisfactorily on 30 June 2007, shall be translated as a once-off provision to the first salary scale attached to the production level.

- (iii) A professional nurse (registered nurse) who is managing a nursing speciality unit, and who is not in possession of post-basic clinic nursing qualification listed in Government Notice R212, as amended, but who has been performing these duties of managing the speciality unit satisfactorily on 30 June 2007, shall be translated as a once-off provision to the appropriate salary scale attached to the corresponding management level.

The applicant prays is on the fact that she was and she still performing the duties as per the afore said clauses. The provisions in terms of this clause is also made for those nurses who do not possess post-basic qualification, but who are being utilised in the relevant nursing speciality and has satisfactorily performed in the post.

The non compliance of the respondent to accept her on grounds of her experience and the fact that she has function in the post effectively since her been there, is prejudicial against her and the quoted resolution spoke of experience and regard such as pre-emptory, given a satisfactorily performance by the incumbent of the post.

Therefore, in respect of Resolution 3 of 2007 post basic and experience is recognised and the failure from the respondent not to deal as such with this matter prejudicial to the applicant. We once again believe the applicant did render the comprehensive service according to the requirements of the post (without the post basic qualification) the respondent should have translated her according to the tables contained in the relevant bargaining agreement specifically for the applicant Unit Manager level.

RELIEF

The above establishes a reasonable apprehension for applicant to be translated in terms of Resolution 3 of 2007, and base on the above quoted clauses. There has further been fatal non-compliance with the Collective Agreement. Therefore:

1. Further alternatively, the matter should be set down before the Commissioner to properly consider the relief sought.

5. RESPONDENT'S HEADS OF ARGUMENTS (EMPLOYERS)

1.

The applicant lodged a dispute relating to interpretation or application of a collective agreement. The matter was set down for arbitration on 30 January 2012.

2.

The applicant was employed as a Professional Nurse before the implementation of OSD. She was then translated to Clinical Nurse Practitioner.

3.

PHSDSBC Resolution 3 of 2009 Clause 3.2.5.3 states that Translation of Professional Nurse (Registered Nurse) to specialty post

(i) A professional Nurse (Registered Nurse) who occupies a post in a nursing specialty and who

(a) is in possession of a post basic clinical nursing qualification listed in Government Notice R212, as amended shall translate to the appropriate specialty post and

(b) is not in possession of a post basic clinical nursing qualification listed in Government Notice R212 as amended, but who has been permanently appointed in a post in a specialty unit and has been performing these duties of the specialty post satisfactorily on 30 June 2007, shall be translated as a once off provision to the first salary scale attached to the production level.

(ii) A professional Nurse (Registered Nurse) referred to in (i)(b) shall not progress by means of grade progression to the higher salary scale attached to a post in the clinical specialty without first having obtained the required educational qualification in the clinical specialty listed in Government Notice R212.

(iii) A professional Nurse (Registered Nurse) who is managing a nursing specialty unit, and who is not in possession of a post basic clinical nursing qualification listed in Government R212, as amended, but who has been performing these duties of managing the specialty unit satisfactorily on 30 June 2007, shall be translated as a once off provision to the appropriate salary scale attached to the corresponding management level.

4.

The applicant could not be translated to operational manager under psychiatric specialty because she does not possess post basic clinical qualification as provided in the collective agreement

5.

Clause 3.25.3( i ) b states that those employees who were not in possession of post basic clinical nursing qualification but who has been permanently appointed in a post in specialty unit and has been performing these duties satisfactory as 30 June 2007 shall be translated as a once off provision.

6.

It is my submission that the translation of once off was done and the applicant was paid accordingly.

7.

The applicant cannot be translated to operational manager because she does not possess post basic qualification which is a requirement for translation. She must first obtain relevant qualification.

8.

The applicant admits that she does not possess post basic qualification, which is a requirement for translation.

9.

It is therefore my submission that the applicant was correctly translated in terms of her qualification and experience. The respondent correctly interpreted and applied resolution 03 of 2007 in the case of the applicant.

10.

Wherefore it is respondent's prayer that the applicant's case be dismissed.

#### Analysis of evidence and arguments:

6. The applicant declared a dispute and according to the referral form the Nature of the Dispute is recorded as the matter was referred for conciliation and arbitration under the auspices of Resolution 3 of 2007 viz clause 3.2.5.3.

The said resolution states that under the clause 3.2.5.3, Translation of Professional Nurse (registered nurse) to speciality posts.

1. A professional nurse (registered nurse) who occupies a post in a nursing speciality and who-
  - a) Is in possession of a post-basic clinical nursing qualification listed in the Government Notice R212, as amended, shall translate to the appropriate speciality post; and
  - b) Is not in possession of post-basic clinical nursing qualification listed in Government Notice R212, as amended, but who has been permanently appointed in a post in a speciality unit and has been performing these duties of the speciality post satisfactorily on 30 June 2007, shall be translated as a once-off provision to the first salary scale attached to the production level.

(iii)A professional nurse (registered nurse) who is managing a nursing speciality unit, and who is not in

possession of post-basic clinic nursing qualification listed in Government Notice R212, as amended, but who has been performing these duties of managing the speciality unit satisfactorily on 30 June 2007, shall be translated as a once-off provision to the appropriate salary scale attached to the corresponding management level.

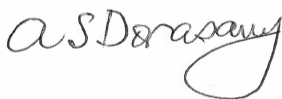
7. The respondent's contention that that the translation of once off was done and the applicant was paid accordingly was not challenged. As such the employer had not breached the resolution and the applicant had benefitted from the exercise. She now wants to access a further benefit but to do so she needs to qualify in terms of the resolution.
8. In respect of the above the applicant has not made any submissions that she possesses the additional qualifications in terms of the employer's succeeding circulars eg a Post Basic qualification.
9. As a consequence of the above I determine that the applicant has failed to discharge the onus that the employer had failed or incorrectly interpreted and applied resolution 3 of 2007 and further determine that the applicant was not eligible for OSD translation to Professional Nurse Grade 1 (Speciality Nursing) with effect from 1 July 2007.

Award:

10. The applicant has failed to discharge the onus that the employer had failed or incorrectly interpreted and applied clause 3.2.5.3, of resolution 3 of 2007.
11. The application is dismissed and the applicant is not entitled to any relief.
12. No order for costs is made.
13. This file should be closed.

DONE AND SIGNED IN DURBAN ON THIS 17 DAY OF FEBRUARY 2012.

*Signature*



Arbitrator: Anand Dorasamy