



# ARBITRATION AWARD

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Case Number: PSHS50-13/14  
Commissioner: Faith Gumede  
Date of Award: 13 August 2014

In the matter between

NEHAWU obo DIPUO SHILAKWE

(Applicant / Employee)

and

DEPARTMENT OF HEATH - MPUMALANGA

(Respondent / Employer)

**Applicant's representative:** Daniel Dithlake – Union Official

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## **DETAILS OF HEARING AND REPRESENTATION**

[1]. This arbitration was held at Lydenburg Hospital, Burg Street, Lydenburg, at 10h00, on the 4 August 2014. The applicant was represented by Mr Daniel Dithake, a union official from National Education, Health and Allied Workers' Union (NEHAWU) whilst the respondent was represented by Mr Jerry Mnisi, a Deputy Director.

[2]. The service of the interpreter was not required. The hearing was digitally and manually recorded.

## **PRELIMINARY ISSUES**

[3]. None.

## **ISSUES TO BE DECIDED**

[4]. I must decide whether the respondent's conduct was fair or not.

## **BACKGROUND TO THE DISPUTE**

[5]. The applicant was transferred from the Department of Social Development to the respondent's Lydenburg Hospital on 11 September 2009 as a Social Worker. She is currently earning R17 735.00 per month. She sought retrospective reinstatement to a Senior Medical Social Worker's position as a relief.

## **SURVEY OF EVIDENCE AND ARGUMENTS**

[6]. 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 to support their evidence.

## **APPLICANT'S CASE**

### **1<sup>st</sup> WITNESS**

[7]. Ms Dipuo Shilakwe, the applicant led her own evidence under oath as follows:

[7.1]. She accordingly replied to the City Press newspaper advertisement of a Senior Medical Social Worker post, thereafter all processes has unfolded, her application was successful and the appointment was confirmed.

[7.2]. Page 4 of bundle A, is a letter of appointment from the respondent and it reads as follows **“Kindly be informed that the Head of Department has approved your appointment as a Senior Medical Social Worker at Lydenburg Hospital with effect from 1 May 2010. The annual salary notch will be R161 970.00”**. She accepted the appointment and resumed her duties.

[7.3]. Page 11 of bundle A, is another letter from the respondent, dated the 10 April 2013 and its reads as follows **“You are hereby informed that you are indebted to the department at the value of R71 794.02 for the salary overpayment on the implementation of OSD on the 1 April 2010”**. On the 1 October 2013, she was demoted and the reason furnished was that she did not meet the requirements in terms of the Resolution 1 of 2009 of the Public Health and Social Development Sectorial Bargaining Council, Agreement on implementation of an Occupational Specific Dispensation (“OSD”) for Social Services Professions and Occupations.

[7.4]. On the 13 March 2013, the Acting Chief Executive Officer, Dr KN Kayembe requested their Provincial Office to correct her Notch. She indicated that they responded by saying, she does not have enough experience to be placed in high OSD level. She maintained that she would not have been appointed, if she did not meet the minimum requirement of the position. She also indicated that she was appointed before implementation OSD.

[7.5]. On the 28 February 2014, she lodged a complaint regarding her demotion to the Acting Allied Manager however it was disregarded by the respondent (page 1 of bundle A).

[7.6]. She further testified that it was only her salary that was lessen due to her demotion but unsure of the exact amount.

[7.7]. Under cross examination, she stated that the power to appoint employees is bestowed with the Head of the Department (HOD). She admitted that her letter of appointment was not signed by the HOD but instead by a person appointed to acting on his behalf. She indicated that she is unable to tender any evidence to show post advertisement because she did not keep it.

## **RESPONDENT'S CASE**

### **1<sup>ST</sup> WITNESS**

[8]. Ms Olivier Maphutha testified on behalf of the respondent under oath as follows:

[8.1]. She is employed by the respondent as Human Resources Practitioner.

[8.2]. She conceded that the only person vested with the power to appoint is the HOD. She also conceded that the letter of the appointment was not signed by the HOD, Dr Joseph Jerry Mahlangu however someone else signed a letter on his behalf. She argued that it is common practice to appoint someone else to act HOD in his absence.

[8.3]. Page 1 to 3 of bundle B is a Resolution 1 of 2009 and it shows Social Worker's career path *inter alia*, for an employee to be considered for Grade 2, he/she must have a minimum of 10 years of appropriate experience as a Social Worker.

[8.4]. Under cross examination, she admitted that the post of a Senior Medical Social Worker was advertised, the applicant applied, interviewed and appointed accordingly before OSD were implemented. She also conceded that she has to be remunerated and reinstated as her appointment.

## **ANALYSIS OF EVIDENCE AND ARGUMENT**

[9]. In terms of section 138(7) of the LRA, I am required to issue an award with brief reasons, and what follows is the summary of the evidence and argument that I regard as necessary to substantiate my findings and determination of the dispute.

[10]. 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's dispute referral relates to the demotion. It is the applicant who bears the onus to prove the unfair act or omission of the respondent.

- [11]. The applicant proffered a letter of her appointment as a Senior Medical Social Worker. The respondent argued that it was illegitimate because it was not signed by HOD. The respondent's version would have been probable if disciplinary actions were taken against the applicant misrepresentation. More importantly, the respondent's witness did not refute the post advertisement, applicant's application nor the success thereof.
- [12]. The applicant further argued that her appointment was prior to the implementation of Resolution 1 of 2009. In terms of clause 4.1 of the Resolution 1 of 2009, it was signed on the 4 June 2009. The letter of demotion shows that the implementation of the OSD was 1 April 2010. The inference that can be drawn is that the appointment was after the implementation of OSD.
- [13]. It is proper to determine whether the applicant's demotion was appropriate under the circumstances. According to the response to Dr KN Kayembe letter, it was appropriate because she does not have enough experience to be placed on higher rank. On cross examination, the respondent's witness conceded that it will be proper if the applicant can be reinstated back in her position and remunerated accordingly.
- [14]. Moreover, if indeed the appointment was illegitimate, it would have been proper to follow a fair procedure, for instance to afford the applicant an opportunity to state her case. There is also no evidence to show that any investigation whatsoever was instituted.
- [15]. On the balance on probability, it is my findings that the respondent's conduct was unfair. This is so because a proper procedure was not followed. As far as substantive reasons are concern, they would have fair, if the respondent's had considered other alternatives measures before demotion. The Resolution 1 of 2009, clause 3.3 does make provision for exceptional circumstances, whereby an employee performance standard is satisfactory.
- [16]. The reinstatement will not be retrospectively. She was asked how much her salary was lessen, she was unsure of the figures and no indication as well as to how much had been deducted by the respondent. Thus, it will not be just and equitable to "thumb suck" the figures.

## **AWARD**

[1] I make the following order:

[1.1]. The respondent, Department of Health- Mpumalanga is ordered to reinstate the applicant, Dipuo Shilakwe, to the position of the Senior Medical Social Worker. The terms and conditions will not be less favourable than they were prior to her demotion on the 1 October 2013.

[1.2]. The reinstatement will be effective from the 1 September 2014.

[1.3]. I make no order as to costs.

**DATED AND SIGNED IN PRETORIA ON THE 13<sup>TH</sup> AUGUST 2014.**



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FAITH GUMEDE - PENALIST