



ARBITRATION AWARD

Panellist/s: Ananthan Sanjivi Dorasamy
Case No.: PSHS509-11/12
Date of Award: 9-Feb-2012

In the ARBITRATION between:

In the ARBITRATION between:

PSA O B O KHUMALO A.C.T.

(Union / Applicant)

and

DEPARTMENT OF HEALTH: KZN

(Respondent)

Union/Applicant's representative	: MR M DINGANA
Union/Applicant's address	: P.O.BOX 2056 PIETERMARITZBURG 3200
Telephone	: 033 392 7600
Telefax	: 033 392 7615
Respondent's representative	: MR T D NTSHANGASE
Respondent's address	: PRIVATE BAG X 9051 PIETERMARITZBURG 3200
Telephone	: 033 395 3212
Telefax	: 033 395 3220

DETAILS OF THE HEARING AND REPRESENTATION

1. The arbitration proceedings commenced at 10H00 on the 17 January 2012 at Natalia Building, 7th Floor, North Tower, and Pietermaritzburg. Mr M Dingana of PSA represented the applicant and Mr T D Ntshangase 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:

The applicant will file its Heads of Arguments on or before the 24 January 2012. The respondent will answer on the 31 January 2012. The applicant submitted its arguments on the 3 February 2012 and the respondent on the 7 February 2012.

Issues to be decided:

2. I am to decide the following: whether
 - 2.1. The acting allowance claimed by the applicant constituted a benefit in terms of Section 186(2)(a) of the LRA;
 - 2.2. The Bargaining Council had the requisite jurisdiction to arbitrate the dispute;
 - 2.3. Employer / respondent committed an unfair labour practice relating to the provision of benefits, in respect of an acting allowance to Ms Khumalo.

Background to the issue:

3. The applicant was appointed as acting Nurse Manager for the East Boom CHC from the 1st October 2007 until 30 October 2008 and was paid an acting allowance. The post was thereafter frozen. She was then appointed as acting CEO from the 1st June 2010 and was offered an acting allowance of R67.00 and she was advised by her not to claim the allowance.
4. She is seeking to be remunerated for acting in the higher post. .

Summary of evidence and arguments:

5. APPLICANT HEAD OF ARGUMENT

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

1.

NON – COMPLIANCE WITH THE PRE - EMPORY PROCEDURES IN THE COLLECTIVE AGREEMENT
(Resolution 1 of 2002)

The Applicant works at the East Boom Community Clinic and has been there since 2007 and until today. In 2007 the employer has appointed her to act on a higher position and in terms of Resolution 1 of 2002, an employee appointed to act shall be paid an acting allowance in the following respect:

1. The post is a vacant and funded post
2. The acting period is longer than six weeks
3. The appointing authority is a level higher than the acting appointee
4. The employee must have accepted the acting appointing

In respect of the applicant in this matter, Mrs Khumalo she was appointed to act by her supervisor for the period of 01 October 2007 to 31 October 2008, which was longer than six weeks at the time of her appointment and was a level 9 acting in the post which is level 10. However, she is still acting even today and the employer is benefiting of her giving service to the employer without the employer paying her the acting allowance which they are more aware of the fact that they should be paying her until the post has be advertised and filled.

The applicant is owed an outstanding amount of acting allowance which is an amount of plus minus R49 678 plus interest. It is evident from the above-mentioned period that the acting was longer than six weeks period and she had performed the duties of Senior Nursing Manager, as she had accepted the appointment in writing.

In the afore said circumstances, I am of the view that the four criteria have been satisfied. Mrs Khumalo has acted in a higher post. She is entitled to a fair and equal treatment by her employer.

The none compliance of the respondent to accept her acting and pay her what is due to her for the period she has acted and the fact that she has performed in the post effectively since she has been there, is prejudicial against her.

The employer has to comply with Resolution 1 of 2002; in the circumstances the I find that the applicant has been prejudiced financially. She rendered a comprehensive service that entitles her to her claim.

RELIEF SOUGHT

The above establishes a reasonable apprehension for applicant to be paid her acting allowance as per the terms of Resolution 1 of 2002, and base on the above quoted clauses. There has further been fatal non – compliance with the Collective Agreement. Therefore:

1. The commissioner must decide the issue on the basis of his own sense of fairness by taking into account of the quoted resolution and award written undertaking for employer to comply and remunerate the claimed amount to the applicant.

6. RESPONDENT HEADS OF ARGUMENT

1.

The Applicant is in the employ of KZN health in post of an Assistant Nursing Services Manager stationed at East Boom CHC.

2.

Mrs. Khumalo was appointed to Act as Nursing Service Manager as per letter dated 17th September 2007 and she accepted the request, although she had been asked to start acting on the 18th of September 2007 but she officially started acting as from 01 October 2007 until October 2008. During this period of acting the Applicant was remunerated in line with Human Resources Management Circular NO. 59 of 2002 emanated from Resolution No. 1 of 2002 of the agreement on acting allowances and she never disputed that.

3.

The applicant was again appointed to Act as the CHC Manager at East / Boom CHC with effect from 01 June 2010 until May 2011, again her acting was inline with the resolution 01 of 2002 , further more she accepted the appointment as per the letter dated 01 June 2010.

4.

The applicant refused to accept payment for acting as CHC Manager; she referred to the amount as lousy R67. 00 and mentioned that she was not expecting to receive such a small amount for acting as the CHC Manager and her Union advised her not to accept this lousy R67.00.

5

The applicant and her Union failed to understand that acting allowance is calculated on the basis of the difference between the current salary notch of the employee and the commencing notch of the higher post. In this case the applicant is on OSD notch therefore the different from her salary to the one of the CHC manager was/ is R67. 00 off which she refused.

6.

The applicant had been acting as the CEO at the very same institution and she had all the powers to advertise the post of Nursing manager but she did not advertised the post and the post has since been advertised and soon there will be a Nursing manager at East boom.

7.

It is the respondent's submission that the applicant was not dismissed but the contract between the Department of Health KZN and his Agency was terminated and Pronnel Consultant did not dispute that and the applicant did not approach his employer to dispute this termination.

8.

It is submitted that the commissioner reminds the applicant that advertisement of posts rests with the employer who sees the need of the post not the employee who also wants to apply for the post.

9.

It is respondent's prayer that the applicant's case be dismissed accordingly, in line with legal principles gleaned from the latest judgments on this aspect of law.

ANALYSIS OF EVIDENCE AND ARGUMENTS

7. The applicant declared a dispute and according to the referral form the Nature of the Dispute is recorded as Interpretation and/or application of a collective agreement (1 of 2002). The issue in dispute is an acting allowance and as such relates to Section 186(2) (a) of the LRA in regards Benefits.
 - 7.1. The first issue to be determined is whether the acting allowance claimed by the applicant constituted a benefit in terms of Section 186(2)(a) of the LRA;
 - 7.2. Secondly whether the Bargaining Council had the requisite jurisdiction to arbitrate the dispute;
 - 7.3. Thirdly whether the Employer / respondent committed an unfair labour practice relating to the provision of benefits, regarding an acting allowance to Ms Khumalo "ACT"
8. This dispute is although referred as an interpretation and application of a collective agreement (Resolution 1 of 2002) The relief sought is contained in terms of section 186 (2)(a) of the Labour Relations Act and specifically in terms of benefits. In order to determine this matter as there may be more cases of similar nature that require determine whether an acting allowance falls within the definition of benefits. . At the outset I intend to refer the authorities decided that give direction in this regard before making a finding on the issue.
9. According to *Schoeman & Another v Samsung Electronics SA (Pty) Ltd* [1997] 10 BLLR 1364 (LC) the following was determined:

"An unfair labour practice means an unfair act or omission that arises between an employer and an employee, involving.....

The unfair conduct of the employer relating to the promotion, demotion or training of an employee or relating to the provision of benefits to an employee.

according to the Concise Oxford Dictionary the meaning of the word "benefit" is defined as "advantage or an allowance to which a person is entitled under insurance or social security (sickness, unemployment, supplementary, benefit) or as a member of benefit club or society."

Remuneration is different from "benefits". A benefit is something extra, apart from remuneration. Remuneration is always a term and condition of the employment contract.

According to *Sithole v Nogwaza NO & Others* [1999] 12 BLLR 1348 (LC) benefit means material benefit such as pension, medical aid, housing and insurance subsidies, i.e must have monetary value for the employee and be a cost for the employer.

It is further recorded in this case that there can be no better exposition on the question of what constitutes a "benefit" that the one by Commissioner Hutchinson in *SA Chemical Workers Union v*

Longmile/ Unired (1999) 20 ILJ 244 (CCMA) which has been cited with approval by the Court in Northern Cape Provincial Administration v Hambidge NO & Others.

Although opinions as to what constitutes a benefit (as opposed to remuneration) differ, the common thread running through all the decisions and the academic writings is that a “benefit” constitutes a material benefit such as pensions, medical aid, housing subsidies, insurance, social security or membership of a club or society. In other words, the benefit must have some monetary value for the recipient and be a cost to the employer. It is also something which arises out of a contract of employment.

According to Northern Cape Provincial Administration v Hambidge NO & Others [1999] 7 BLLR 696 (LC) benefit is supplementary advantage conferred on an employee for which no work is required. Employee’s claim to higher salary not amounting to claim for benefits, as defined. Claim for higher salary is a matter of mutual interest.

10. There is much confusion about the interpretation of remuneration and benefits. This should not be the case because remuneration/ salary are often misinterpreted. At the commencement of employment and over a period of time the employee becomes aware of the salary initially and thereafter the subsequent increments. This is clear from the salary advice that records salary as the basic component. This is allocated to that specific employee and is determinable. Thereafter other “benefits” are available to the employee for example, if he/she wants to access medical aid he/she contributes a portion and the employer contributes a portion and this is the same in housing subsidies, pension/ provident fund contributions. These benefits are available to all employees on application and for which no extra work is required.
11. The salary of an employee is determined by the hour’s worked and other factors determined by the employer. The access to benefits by an employee flows from the contract of employment and is available to all employees.
12. With regard to the matter at hand, the acting position is not available to all employees. It is subject to certain requirements and those who meet the requirements are offered the position affecting an increase in their salary. The difference is that benefits are available to all employees but an acting position is only available to employees that qualifies or meets the minimum requirements and who are to undertake extra work.
13. In any event the offering of an acting post and acting allowance has the result that the employee’s salary being increased and this process is regulated by a collective agreement. In this case the collective agreement has been regulated by agreement 1 of 2002.

In summary the applicant was aware that in terms of the agreement an employee will be paid an acting allowance in the following respect:

- 13.1 The post is a vacant and funded post

- 13.2 The acting period is longer than six weeks
- 13.3 The appointing authority is a level higher than the acting appointee
- 13.4 The employee must have accepted the acting appointing

The periods in which the applicant was offered, accepted and acted in the post she was paid an allowance. There were no subsequent offers by the respondent and as such she may have assumed other responsibilities but they were not sanctioned or approved by the employer.

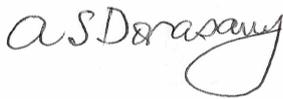
14. Arising from the definition of benefits as been explained above, the Council does not have jurisdiction to arbitrate the matter.
15. As a consequence thereof the application fails in that the applicant has not shown that the dispute falls within the definition of benefits and therefore the Council does not have the requisite jurisdiction to entertain the matter.
16. 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 1 of 2002 and further determine that the applicant was not entitled to an acting allowance.

Award:

17. The Council does not have the requisite jurisdiction to entertain the matter.
18. The application is dismissed and the applicant is not entitled to any relief.
19. No order for costs is made.
20. This file should be closed.

SIGNED IN DURBAN ON THE 09 DAY OF FEBRUARY 2012.

Signature



Arbitrator: Anand Dorasamy