



# ARBITRATION AWARD

Panelist/s: A.N MAFA  
Case No.: PSHS 518-11/12  
Date of Award: 16 MARCH 2012

In the ARBITRATION between:

NPSWU obo MONAISA, KS AND 6 OTHERS

(Union / Applicant)

And

Department of Health and Social Development

(Respondent)

**Union/Applicant's representative:** Mr, Wandi Montjane

Union/Applicant's address:

**Respondent's representative:** Mr. Tebogo Machiche

Respondent's address: Department of Health and Social Development

## **DETAILS OF HEARING AND REPRESENTATION**

- [1] The matter was scheduled for arbitration of the 22<sup>nd</sup> February 2012 at Medunsa Medical School, Ga-Rankuwa at 10h00 am. Both parties attended the proceedings. The Applicants were represented by Mr, Wandi Montjane of NPWSU and Mr. Tebogo Machiche represented the Respondent.
- [2] The proceedings were not recorded but detailed handwritten notes were taken, which forms part of the record.

## **PRELIMINARY ISSUES**

- [3] No preliminary issues were raised throughout the proceedings.

## **ISSUE TO BE DECIDED**

- [4] Whether the payment of all Applicants emanating from their translation in line with Resolution 3 of 2009 constitutes promotion and/or the recovery of monies from them after the reversal of that translation constitutes demotion or not.

## **BACKGROUND TO THE ISSUE**

- [5] The following issues are common between the parties:-
- The dispute emanates from implementation of the Resolution 3 of 2009, specifically Clause 3.6.2 read together with Circular no 2 of 2009 from DPSA, specifically Clause 7.11.1 and 7.11.2.
  - All Applicants are employees of the Respondent and around April 2010 they were translated in line with Resolution 3 of 2009.
  - On or about the 1<sup>st</sup> June 2011 the Respondent reversed their salary translation effectively from July 2011 by deducting payment made to them emanating from their translation.
  - Both Parties indicated that in essence there is no dispute of facts in the matter and proposed that heads of arguments be filed. It was then agreed that in rendering the award the Commissioner should take into account the written Head of Arguments submitted by both parties together with the issues identified as common between the parties.

## **SURVEY OF EVIDENCE AND ARGUMENT**

[6] **The essence of the Applicant case is as follows:-**

- The Applicants were promoted by the Respondent using Personnel Circular Minute 61 of 2009.
- After 14 months of their promotion, the Respondent demoted them.
- When demoting them, the Respondent did not furnish the Applicants with reasons and further refused to engage them when they queried deductions made on their salaries.
- The Applicants have been in the employ of the Respondent occupying the same levels for over 20 years.
- They have been performing satisfactorily over the years that they have been in the employ of the Respondent.
- Both Personnel / Circular Minute 61 of 2009 and Circular 2 of 2009 were directives instructing the Respondent's Senior Managers to promote employees who qualified which in this case included the Applicants.
- It is submitted that the aforesaid directives were informed by an agreement reached between the Respondent as an Employer and Organised Labour representing the employees which was signed at the Public Service Co-ordinating Bargaining Council called PSCBC Resolution 3 of 2009.
- Furthermore, Clause 3.6.2.2 of Resolution 3 of 2009 provides that ***“ with effect from 1 April 2010 (Salary adjusted with effect from 1<sup>st</sup> July annually), an employee on salary level; 4,5,6 or 7 who has completed 15years of continuous service on a salary level, irrespective of the notch, and has obtained at least satisfactory rating in his or her performance assessments ( the average assessments over the last two year period will determine the performance rating), shall grade (Salary Level) progress to salary level 5,6,7 or 8 respectively”***.
- It is submitted on behalf of Applicants that the aforesaid is not subject to the availability of posts and that the Respondent erroneously believes that the wording on Clause 3.6.2.2. speaks exclusively about the policy on performance management and development, in that there has always been performance management tools before the policy on performance management and development.
- Furthermore, it was contended that some Applicants should have benefited from Occupation Specific Dispensation and when the Resolution 3 of 2009 was implemented, Applicants were non-OSD employees. The Resolution that translated them was signed on the 24<sup>th</sup> July 2009 and Resolutions 2 of 2010 was signed on the 5<sup>th</sup> November 2012.
- In conclusion it was submitted that in view of the above the Commissioner should find in their favour and restore the Applicants respective notches before demotion being R130, 425.00 for those on level 7 and on level 8 R161,971.00 from 1<sup>st</sup> July 2010 to date.

[7] **The Essence of Respondent's Case is as follows:-**

- All employees that were translated in terms of PSCBC Resolution 3 of 2009 as submitted by the Applicant were neither employed or elevated to a different post than they are occupying currently and/or at the time of translation, neither their status and/or authority changed.
- The recovery of the monies erroneously paid to Applicants will not constitute demotion.
- In terms of Section 38 of Public Service Act any overpayment/ underpayment in salary, allowance and other monetary awards will be rectified [recovered /reimbursed] as soon as it is discovered, irrespective of the cause of the error.
- **Clause: 3.6.2.2** of the Resolution 3 of 2009 states that with effect from 1 April 2010, all employee on salary level 4,5,6 or 7 who completed 15 years of continuous service on a salary level..... shall grade progress to salary level 5,6,7 or 8.
- *The current salary level system started on the 1 July 1996 which makes it 13 years old as at March 2010, therefore there are no employees who are 15 years on salary level.*
- Clause 3.6.2.2. states that an employee who has performed above satisfactory for 12 years accumulatively in a specific salary level, shall grade progress to the next level.
- *The current performance management tool is effective 1 April 2003 (Annexure E) which makes it 7 years old as at 31 March 2010, therefore there is no employee who has performed above satisfactory for 12 years as there is a period of five years whose performance cannot be accounted for.*
- **Annexure A** states on the heading that “Agreement on a revised salary structure for employees on salary level 1-12 is not covered by an occupation specific dispensation (OSD)”.
- **Annexure G** attached as agreed is Resolution 2 of 2010 which is OSD for Therapeutic, Diagnostic and Related Allied Health Professionals.
- Clause 3(3.2) Annexure G says its binds:-
 

***“The employees of the Employer employed in terms of the Public Service Act, 1994 as amended, either in fulltime or part-time capacity, who are not members of any trade union parties to this agreement, but fall within the registered scope of the Public Health and Social Development Sectoral Bargaining Council (PHSDBC) and who occupy a post in a therapeutic, diagnostic or related allied health profession as contained in Annexure A of the Resolution 2 of 2010”.***
- **Annexure G PAGE 9** number 1 of mid-level 1 year qualification categories is Dental Assistants. All employees represented by the union, union submitted on the referral

form are Dental Assistants, therefore covered by Annexure G are not covered Annexure A ( Resolution 3 of 2009).

- On the 25<sup>th</sup> February 2011 majority of unions agreed that the Resolution 3 of 2009 should be sent back to the crafters that is PSCBC because it is not implementable. (Annexure F page 2[5.3.).
- Commissioner is therefore requested to dismiss the matter.

## [8] ANALYSIS OF EVIDENCE AND ARGUMENT

- It is common cause that all Applicants were translated on or around April 2010 in line with Resolution 3 of 2009 by the Respondent. It is further not in dispute from the evidence presented by the parties that on or around June 2011 the Respondent reversed their translation and deducted monies paid to them emanating from their translation effectively from July 2011.
- The Applicants being dissatisfied with the reversal of their translation approached their union which made attempt to resolve the matter with the Respondent unsuccessfully. It was on the basis of the aforesaid that the Applicants declared a dispute through Council for unfair Labour Practice relating to demotion, and seeks the Respondent to reinstate them to the levels they were promoted to and paying them back the difference.
- I have to place it on record that in arriving at my findings I have taken into account the written heads of arguments submitted by both parties and annexures filed jointly in a form of a bundle marked "A" to "G" respectively.
- I am required to determine as whether the translation of Applicants constitute promotion or not, whether the reversal of their translation and recovery of monies from them constitute demotion.
- Promotion can be described as advancing or rising of employee to higher rank, position or status. On the other hand demotion is the lowering of employee in status, rank, job content or responsibilities or **reduction of his salary, wage or other benefits or any combination of the aforementioned.**
- Herein, the effect of translation to Applicants increased their salary from one level to another and also their notch increased. As a result of the reversal of their translation their notch and levels were down-graded and their salaries were reduced and the Respondent also recovered what has being paid as a result of the translation.
- In determining whether Applicants were either promoted or demoted, one has to take into account not only the fact that their salaries were increased and later reversed but also to consider a combination of all factors led to their translation and reversal to make a finding as to whether the Respondent conduct constitute unfair labour practice.
- Furthermore, consideration has to be made on the application of the provision of section 38 of the Public Service Act which makes it possible for the Respondent to rectify any

over-payment or underpayment in salary, allowances and other monetary awards as soon as there are discovered irrespective of the cause of such error.

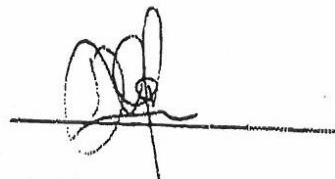
- I am persuaded that the translation of Applicants constitutes a promotion as defined above and that the reversal of the translation and recovery of monies constitute a demotion. My findings are based on the fact that their translation did not only increase their notch but also their salary level was elevated. In my view, I cannot find any reason why the increase or reduction of a salary cannot be a factor to be considered in determining as to whether there was a promotion or demotion.
- A further determination has to be made on whether the demotion of Applicants substantively and procedurally fair or not.
- Substantively I find the demotion to be fair in that as at the 31<sup>st</sup> March 2010 Applicants had 14 years of continuous service in their salary level as the current salary level started on the 1<sup>st</sup> July 1996. Applicants would therefore not qualify to be translated in line with Clause 3.6.2.2 of Resolution 3 of 2009.
- From the evidence presented by both parties I cannot find anything suggesting that due process was followed by the Respondent. It was expected of the Respondent to give Applicants a hearing or at the least to afford them an opportunity to make representations before reversing their translation. All I could find is that there was no proper consultation and that letter of demand was sent to Applicants before the recovery of monies was effected.
- In as much as Respondent has the right to recover the monies from Applicants as a result of its decision to reverse the translation, in my view, the principles of fair administration and labour practice expected of them to invoke the audi alteram partem rule.
- Consequently, I find the demotion of Applicants to be procedurally unfair and proceed to render the following award:

#### AWARD

- [9] The demotion of Applicants is substantively fair and procedurally unfair.
- [10] The Respondent is ordered to pay arbitration costs in the amount of R2 500.00
- [11] The Respondent is further ordered to comply with paragraph 10 above within 14 days after receiving the award.

**DATED AT PRETORIA ON 30 MARCH 2012.**

Signature:



Commissioner: Archibald Ngoako Mafa

Sector: Public Health & Welfare