



ARBITRATION AWARD

Panellist/s: Ananthan Sanjivi Dorasamy
Case No.: PSHS556-11/12
Date of Award: 1-May-2012

In the ARBITRATION between:

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NEHAWU O B O MAKHATHINI T

(Union / Applicant)

and

DEPARTMENT OF HEALTH: KZN

(Respondent)

Union/Applicant's representative

: Ms M B DLAMINI

Union/Applicant's address

: P.O.BOX 1690

PIETERMARITZBURG

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Respondent's representative

: Ms N A GUMEDE

Respondent's address

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OZWATHINI

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DETAILS OF HEARING AND REPRESENTATION

1. This arbitration hearing took place on the 16 February 2012 at the Natalia Building, Labour Relations Boardroom, 7th Floor, North Tower, Pietermaritzburg.
Ms M B Dlamini of PSA represented the applicant/employee and Ms N A Gumede represented the respondent /employer.
2. The parties agreed that no oral evidence will be tendered and that the matter be determined on their Heads of Arguments as follows:
 - 2.1 The respondent will serve its Heads of Arguments on the Points In Limine on the commissioner and applicant on or before 23 February 2012
 - 2.2 The applicant will serve its Heads of Arguments on the Merits on the commissioner and respondent on or before 23 February 2012
 - 2.3 The applicant will serve its opposing Heads of Arguments on the Points In Limine on the commissioner and applicant on or before 29 February 2012
 - 2.4 The respondent will serve its Heads of Arguments on the Merits on the commissioner and respondent on or before 29 February 2012
 - 2.5 The award will be rendered thereafter.

BACKGROUND TO THE MATTER

3. On the 9th of September 2008, she was informed by the employer that she has been demoted to the post of Clinical Nurse Practitioner Grade 1 PHC. The reason being she was wrongly translated. The Applicant seeks to be re- instated to her Operational Nursing Managers post with effect from the date of demotion.
4. The applicant lodged a dispute relating to interpretation or application of a collective agreement. The matter was set down for arbitration on 16 February 2012. The applicant's representative changed the nature of dispute and categorized it under unfair labour practice relating to demotion. The argument of the respondent is that there is no demotion but the respondent is recovering the overpayment as a result of wrong translation.

The employer was applying that provision hence my argument is that there was no demotion but it was merely a recovery of salary overpayment as a result of wrong translation. The respondent further submits that the dispute relates to salary and the Council does not have jurisdiction to hear the matter.

ISSUE TO BE DECIDED

- 5.1. Whether the Council has the requisite jurisdiction to hear the matter.
- 5.2 Whether the employer had demoted the employee to the post of Clinical Nurse Practitioner Grade 1 PHC or whether she was wrongly translated. Further and should my finding favour the applicant what relief may be appropriate in the circumstances and should she be reinstated to her Operational Nursing Managers post with effect from the date of the alleged demotion.

SUMMARY OF THE EVIDENCE

6. APPLICANT'S (EMPLOYER) SUBMISSION

1.

The applicant lodged a dispute relating to interpretation or application of a collective agreement. The matter was set down for arbitration on 16 February 2012.

2.

The applicant's representative changed the nature of dispute and categorized it under unfair labour practice relating to demotion.

3.

The argument of the respondent is that there is no demotion but the respondent is recovering the overpayment as a result of wrong translation.

4.

The applicant was employed as Chief Professional Nurse at Stanger Hospital before the implementation of the OSD in November 2007. She was then translated as Clinical Nurse Practitioner.

5.

The applicant applied for a Chief Profession Nurse (Team Leader) post at Appelsbosch, she was found suitable .She assumed duties in this post on 01 October 2007, which was after 30 June 2007.The post was advertised on 06 March 2007 (Page 1 &2).

6.

The applicant was holding a level 8 post of Chief Professional Nurse on 01 July 2007 and was paid at notch R132054.00. As a result of the implementation of OSD in November 2007 which was back dated to 01 July 2007 she was translated to notch R160470.00 (**page3&4**).

7.

On the same date she was translated to R165 285.00 and she moved to Appelsbosch Hospital in October 2007.

8.

The applicant was later translated to Operational Manager and back paid from 01 October 2007. She was translated to R235659.00 (**page 3**).

9.

The employer discovered that the applicant was wrongly translated to R235659.00. She was supposed to get a once off payment which would put her to R160470.00.

10.

The applicant was not the Team Leader on 01 July 2007, which could have qualified her to be translated to Operational Manager. She therefore did not qualify for translation to Operational Manager.

11.

The Public Service Act, 1994, Section 38 indicates that if an employee has been overpaid or received an amount equal to the amount of the overpayment shall be recovered from him or her by way of deduction from his or her salary.

12.

The applicant was advised of overpayment and consulted to arrange repayment options (**page 5**). She responded on 12 September 2008 agreeing to make a repayment of R500.00 for 60 months (**page 6**).

13.

The employer was applying that provision hence my argument is that there was no demotion but it was merely a recovery of salary overpayment as a result of wrong translation.

14.

It is further my argument that the dispute relates to salary and the Council does not have jurisdiction to hear the matter.

15.

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

7. RESPONDENT'S (EMPLOYEES) SUBMISSION

In the Applicant's closing arguments, the Applicant wishes to place the following facts on record:

1

The Applicant had applied for an Advertised post: Mobile Team Leader that was advertised in April 2007. She was appointed in Team-leaders Post on 01 October 2007 as she was a successful candidate. She complied with all the requirements and responsibilities attached to the post.

2

When Occupational Specific Dispensation, Resolution 3 of 2007 for Nurses was implemented, she was translated as an Operational Nursing Manager-Level 8 PN-B 3(PHC)-Translation Tables (KEYS); page 51- Resolution 3 of 2007- And as stipulated in Resolution 3 of 2007; page 8: 3.2.5.3 (iii). Salary Advice of 30.May 2008 attached. Reference: Resolution 3 of 2007 Document.

3.

On the 9th of September 2008, she was informed by the employer that she has been demoted to the post of Clinical Nurse Practitioner Grade 1 PHC. The reason being she was wrongly translated. However, she continued performing the duties attached to Operational Nursing Manager as per appointment to the post. Job Description and Salary Advice of 31 August 2011 attached. (Langa T)

4.

The Applicant is persuading the Arbitrator to re- instate her to the Operational Nursing Managers post with effect from the date of demotion. The reasons being:

1. She applied for the post and met the minimum requirements of the post which required amongst others the Post-basic qualification of PHC.
2. When OSD for Nurses was implemented ***retrospectively*** by employer, all the Professional nurses who were in charge of the wards, including the unit managers and Team-leaders were translated as per the Translation Tables stated in page 51.The Post advert was before OSD implementation i.e. April 2007 and is in line with OSD Resolution 3 Of 2007 requirements. OSD for nurses implementation date was **01 July 2007,page9(4)**
3. The Applicant continued to perform the duties of an Operational Nursing Manager even after demotion to date; no change in her Job- description was done by employer inspite of being demoted. She did not refuse to perform the duties of the Operational Nursing Manager but continued to provide service efficiently, diligently and effectively to date.

5.

ATTACHED DOCUMENTS: TO BE FAXED.

- Salary Advice for Operational Nursing Manager (T. Makhathini)
- Salary Advice for Clinical Nurse Practitioner (T. Langa)(Marriage Name)
- Job Description of Operational Nursing Manager.
- Work Plan Agreement of Operational Nursing Manager.
- Certified Copy of the Applicants Post Basic Qualification- PHC.
- Photo taken by employer after appointment to the Operational Nursing Manager's Post.
- Advert of the Post in April 2007.

- **Reference: Resolution 3 of 2007.**

ANALYSIS OF EVIDENCE AND ARGUMENT

8. In this matter the applicant initially referred the dispute as one in terms of the interpretation an application of a collective agreement. Thereafter she changed her dispute as one of an unfair labour practice dispute viz that she was demoted. The employer had determined that she was wrongly translated in terms of the provisions of the collective agreement and decided to recover the wrongly granted remuneration.

9. The real issue here is whether the employer's action to recover overpaid remuneration is open to an arbitrator deciding the matter. Clearly this matter relates to salary and as such it is trite that the Council does not have the requisite jurisdiction to hear the matter as it is a matter of mutual interest. The following is recorded for completeness.

The applicant alleges that she was demoted and that such a demotion is unfair. On the 9th of September 2008, she was informed by the employer that she has been demoted to the post of Clinical Nurse Practitioner Grade 1 PHC. The reason being she was wrongly translated. However, she continued performing the duties attached to Operational Nursing Manager as per appointment to the post. Job Description and Salary Advice of 31 August 2011 attached. (Langa T)

The Applicant is persuading the Arbitrator to re- institute her to the Operational Nursing Managers post with effect from the date of demotion. The reasons being:

1. She applied for the post and met the minimum requirements of the post which required amongst others the Post-basic qualification of PHC.
2. When OSD for Nurses was implemented **retrospectively** by employer, all the Professional nurses who were in charge of the wards, including the unit managers and Team-leaders were translated as per the Translation Tables stated in page 51. The Post advert was before OSD implementation i.e. April 2007 and is in line with OSD Resolution 3 Of 2007 requirements. OSD for nurses implementation date was **01 July 2007,page9(4)**
3. The Applicant continued to perform the duties of an Operational Nursing Manager even after demotion to date; no change in her Job- description was done by employer inspite of being demoted. She did not refuse to perform the duties of the Operational Nursing Manager but continued to provide service efficiently, diligently and effectively to date.

10. The action of the employer and the applicant's relief sought is in reality not arising from a demotion but the interpretation and application of the collective agreement relating to the awarding of the OSD. The applicant has selectively clothed the dispute in the form of a demotion. The applicant claims that she was performing the duties of the Operational Nursing Manager but her substantive post was that of Clinical Nurse Practitioner Grade 1 PHC. At no stage was she appointed to the post that she wants to be

appointed. Her disappointment is that she was wrongly categorized with the title of Operational Nursing Manager and wants the employer to be burdened with its mistake. There was no right to claim the post but was done in error and when the employer realized the error it explained the error to the employee who had agreed on the explanation and further agreed to the recovery of the overpayment. It is not about the claim to the job title but the question of payment made to the employee in error. This dispute in reality is one about the interpretation and application of a collective agreement relating to the award of the OSD.

In order to remain within the scope of section 138 (1) of the Labour Relations Act the relevant provisions of the applicable resolutions have been read and taken into account in arriving at my decision. Further I have taken note of the recent decision of Minister of Safety & security v SSSBC & Others (2010) BLLR 705 (LAC). The following are recorded verbatim from the practice notes for completeness:

12. In this matter the LAC dealt with the issue of whether bargaining councils have jurisdiction to arbitrate a dispute referred as an "interpretation" or "application" dispute when in fact the interpretation/application is not the real issue before it but that the real issue is disguised as the interpretation/ application of a collective agreement. In this case Ms Badenhorst applied for a transfer from Zwelitsha Safety and Security Provincial office to Port Elizabeth. Resolution 5 of 1999 regulates transfers. Ms Badenhorst's application was refused and she then referred a dispute concerning the interpretation or application of collective agreement to the SSSBC. Part of her main argument related to questioning the fairness/ appropriateness of the decision not to approve her application and consequently that the decision maker did not apply his mind. The arbitrator found in Ms Badenhorst's favour. The matter was then reviewed and the Labour Court dismissed the application for review and the SAPS took the matter on appeal.
13. The SAPS grounds for appeal were that the SSSBC lacked jurisdiction to arbitrate the dispute because it was not an interpretation or application dispute. The true dispute was about the fairness of the SAPS decision to refuse the transfer. In its judgement the Court dealt with the distinction between a *dispute* and an *issue in dispute*. The Court uses an example of a person who has been dismissed for operational reasons, and the person challenges the dismissal on the basis that the employer failed to follow a procedure that is in a collective agreement in terminating the employee's services for operational reasons.
14. In this case the Court says the real issue is about the fairness of the dismissal and the issue in dispute is the interpretation/ application of the collective agreement that provides for the process of the termination. Simplified, the issue in dispute needs to be decided in order for the real issue to be resolved.
15. This issue is important because it deals with jurisdiction. In the operational dismissal dispute the Labour Court will have jurisdiction and in the interpretation / application disputes the matter would

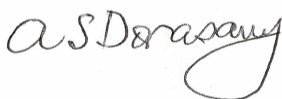
have to be arbitrated.

16. The Court concluded that the dispute before the SSSBC arbitrator was about the fairness of SAPS refusal of Ms Badenhorst's transfer. The application of the provisions of the collective agreement was, according to the Court, an issue in dispute and not the main/real dispute.
17. The Labour Appeal Court overturned the decision of the Labour Court, set the arbitration award aside and held that the SSSBC had no jurisdiction to arbitrate this matter.
18. In the present case the applicant's main dispute is about the employer's decision to reverse the incorrect decision it made and the resultant recovery of an overpayment. The nub of the applicant's claim arises out of the decision of the employer in respect of the decision around the granting of the applicant an OSD award albeit incorrectly. The subsidiary /secondary issue in dispute is the matter of the ambit of the collective agreement, the factors that the employer had to take into account, whether the employer's decision to reverse its decision is fair ect. In any event the employer ought to have considered the guiding principles of the collective agreement and arrived at a decision not favourable to the applicant.
In reality the applicant is unhappy with the employer's decision to reverse its decision on the award granted to her and the recovery of monies paid to her in error.
19. In line with the above reasoning and taking note of the decision of the LAC I determine that the Council does not have jurisdiction to arbitrate this matter.

AWARD

20. The Council does not have jurisdiction to arbitrate this matter.
21. There is no order as to costs.

THIS DONE AT DURBAN ON THIS 6 DAY OF MARCH 2012.



Commissioner: : ANAND DORASAMY
(80 I&A NEW NO JURIS NGUBANE)