



ARBITRATION AWARD

Panellist/s: Lungile Matshaka
Case No.: PSHS581-11/12
Date of Award: 30-May-2012

In the ARBITRATION between:

IN THE PUBLIC HEALTH & SOCIAL DEVELOPMENT SECTORAL BARGAINING COUNCIL

HELD AT MANGUZI

CASE NO: PSHS581-11/12

DATE OF AWARD: 24 May 2012

In the matter between:

DENOSA obo Mngomezulu, R. T Applicant

And

Department of Health – Kwazulu Natal Respondent

ARBITRATION AWARD

DETAILS OF HEARING AND REPRESENTATION

1. The matter was set for arbitration hearing at the Boardroom of Manguzi Hospital at Manguzi on 25 April 2012. It took place under the auspices of the Public Health & Social Development Sectoral Bargaining Council. Mr C Lekhoati, assisted by Mr N Khumbuzile, both trade union officials of DENOSA, represented the Applicant, while Mr T Ntshangase, Labour Relations Officer of the Department, represented the Respondent. The proceedings were mechanically recorded and the Applicant gave evidence under oath.
2. The parties requested to submit heads of closing arguments in writing and this was duly granted.

ISSUE TO BE DECIDED

3. I am required to determine whether the Respondent's conduct constituted an unfair labour practice by not enabling the Applicant to return back to Phelandaba Clinic as a Chief Professional Nurse as per his appointment in 2004.

BACKGROUND TO THE ISSUE

4. The Applicant was employed on 14 July 2004 under the establishment of the Phelandaba Clinic and he assumed duties on 2 August 2004 as a Chief Professional Nurse.

5. On 26 May 2006 the Applicant entered into an agreement which is being referred to as “Gentlemen’s Agreement” with the former PHC (Public Health Centre) Manager, Mrs B. D. Mlambo. According to the Applicant they agreed that he would be transferred to Mobile Clinic because there was no one with a driver’s license. Following the internal processes including the grievance procedure the Respondent only conceded after the conciliation process to enable the Applicant to return to the Phelandaba Clinic, but not to his original position. The Applicant viewed the Respondent’s conduct as an indication of demotion, because he reported he found somebody already occupying his position.

6. On the other hand the Respondent submits that the Applicant had actually requested the PHC Manager to place him at the Mobile Clinic.

SURVEY OF THE EVIDENCE AND ARGUMENTS

The Applicant’s evidence

7. The Applicant in his testimony under oath, testified as follows:
8. He was appointed as a Chief Professional Nurse (Clinical Nurse Grade 1) in August 2004 to be based at Phelandaba Clinic under the establishment of the Manguzi Hospital Clinic as per his appointment letter included in his bundle of documents and issued from the office of the Human Resource Manager.
9. Mrs Mlambo, PHC Manager at the time asked him to come and relieve in the mobile clinic. On trust he accepted the temporary arrangement. The Applicant confirmed that there was no specific time frame for his engagement. He understood that as soon as there was a person who meets all the requirements, he would then go back to his original post.
10. The Applicant further testified that around November 2011 he was informed that somebody has been absorbed in his post. On making further enquiries the Nursing Manager advised him that he no longer has a post at Phelandaba.

11. Following a grievance process as per a letter dated 14 December 2011 the Applicant was informed that his transfer back to Phelandaba Clinic as a Clinic Nurse Practitioner was effect from 19 December 2011. On his arrival at Phelandaba there was just one CPN (Chief Professional Nurse).
12. He is therefore seeking for his re-instatement back to his position
13. In cross-examination the Applicant conceded that the advert does not indicate that the post was in charge. He only relied on his letter of appointment which reflects that he was appointed as a Chief Professional Nurse at Phelandaba Clinic. The Applicant did not deny that there was no written agreement or official letter sanctioning his temporal transfer. This applies to the fact how long would remain there at the Mobile Clinic. Now that he is back at the Phelandaba Clinic he is no longer in the position he would have been had he remained.
14. In re-examination the Applicant confirmed that as a CPN his duties and responsibilities were to manage the clinic, being in-charge and supervising other staff members.

The Respondent's evidence

15. The Respondent's witness, Mrs J J Masinga, testified as follows:
16. She confirmed her position as the Nursing Service Manager and has been with the institution since 2001. She testified that Mrs Mlambo the Applicant's supervisor, who retired in October 2010, reported to her. When matter arose in November 2009 it was directly under her control. The problem related to drivers as there were few people with a driver's licence. The assistance secured was only on a temporary basis. Further, as a Hospital they did not appoint a person as a CPN until 2006.
17. Mrs. Masinga further testified that she only learnt of the Applicant's grievance for the first time in November 2009 as per his letter included in his bundle of documents

18. In cross-examination Mrs Masinga confirmed that she was the overall head of the department and both Mrs Mlambo reported to her. She insisted that the temporary arrangement of the Applicant's engagement had been done on his request. She conceded that if the Applicant had remained in his post he would have been absorbed.

19. I will reflect on the parties' closing argument in my analysis below.

ANALYSIS OF THE SUBMISSIONS

20. As a point of departure Section 186(2) (a) of the Labour Relations Act, No. 66 of 1995 defines "*Unfair labour practice*" as 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, or training of an employee or relating to the provision of benefits to an employee."

21. In the present case it is common cause that the Applicant's appointment as a Chief Professional Nurse was at Phelandaba Clinic under the establishment of Manguzi Hospital, with effect from 2 August 2004. It is further common cause that Matron Mrs Mlambo made an arrangement with the Applicant to assist temporarily at the Mobile Clinic at Manguzi Hospital in 2006, because at the time somebody with driver's license was still being sought.

22. It is the Applicant's version that he complied in good faith with the proviso he would still go back to his original post at Phelandaba Clinic. Between his initial engagement in 2006 and 2009 at the Mobile Clinic the Applicant submits that he made several attempts in November 2009 to return to his post to no avail. Again in November 2011 he made another attempt and this did yield the desired results on 14 December 2011. This was confirmed by means a letter addressed to the Applicant by the Nursing Service Manager, Mrs Masinga. The transfer spelt out he was being transferred back as a Clinical Nurse Practitioner.

23. On the other hand the Respondent submits that the Applicant is not being honest on his version that he was requested to rescue the driving needs of the Mobile Clinic because a driver's license is part of its requirements for its personnel attached to it. That the Applicant could not produce any written document to confirm his assertion supports the Respondent's submission. This also goes for the fact the Applicant could call Mrs Mlambo as his witness to confirm the "gentlemen's agreement" they had entered into. The Respondent further submits that the Applicant failed to state terms and conditions of the agreement.
24. The Respondent further submits that in December 2006 the Provincial Head Office through the District Offices issued a communication to all the hospitals instructing that all those nurses who are running clinics but **NOT** on posts should now be absorbed and be referred to as "**IN CHARGE**" of the clinics. As the Applicant was no longer at Phelandaba Clinic in December, another Chief Professional Nurse who had already occupied the post of being in charge of the clinic was therefore absorbed.
25. The Respondent further submits that the Applicant never challenged this development because he was happy at the time and therefore kept quiet.
26. The Respondent draws my attention to the introduction of the OSD (Occupational Specific Dispensation) in 2007 under Resolution 1 of 2007. In essence the Resolution makes it clear that "*For a person to benefit accordingly, she or he must have been in the post on 30 June 2007*". In the case of the Applicant he was not occupying the Chief Professional Nurse's position, because he had requested to be placed at the Mobile Clinic. Nevertheless he did benefit from OSD as Mobile Clinic is also under speciality and he was leading a team. As already alluded to above the Applicant never lodged a grievance about the matter.
27. On a balance of probabilities it is clear that the Applicant's engagement in terms of his temporal transfer to Mobile Clinic was done at his request. Despite the Applicant's assertion that he started enquiring about his return to Phelandaba three months after his

engagement, that there is nothing written to prove that makes his assertion unlikely. Indeed one would have expected the Applicant to have called Mrs Mlambo as obviously, according to the Applicant, she played a key role in this scenario.

28. What is crucial important to me is the fact that even at the initial time of his engagement at Phelandaba Clinic, in as much as he occupied the position of being in charge, he was NOT on post. Another Chief Professional Nurse who occupied his position in his absence, following the Head Office communication in 2006, was only then absorbed in the said post. It was only from 2009 and 2011 that the Applicant made a formal request to be re-instated at Phelandaba Clinic to resume his original duties of an in-charge.

29. What is further clear to me is that events overtook the Applicant. That the Respondent conceded that had the Applicant remained at Phelandaba Clinic he would have been absorbed in the post of in-charge he had occupied initially. The fact of the matter at the time when he either requested to be transferred to the Mobile Clinic on a temporal basis, or at the instance Mrs Mlambo, he had no legal entitlement to the position. If this engagement had happened after he in all probabilities been absorbed I would have no problem in acceding to his request.

AWARD

30. I therefore find that the Applicant has failed to discharge the onus of establishing that the Respondent's conduct constituted an unfair labour practice by not re-instating him in his initial position. The matter is hereby dismissed.

A handwritten signature in black ink, appearing to be 'J. Mlambo', written on a light-colored background.

Lungile Matshaka

PHSDSBC Panellist