



**PHSDSBC**

PUBLIC HEALTH AND SOCIAL DEVELOPMENT  
SECTORAL BARGAINING COUNCIL

# ARBITRATION AWARD

Arbitrator: Mr. Anand Dorasamy

Case No.: PSHS590-12/13

Date of Award: 25 July 2017

In the matter between:

SAMA OBO GROENEWALD R

(Union / Applicant)

and

DEPARTMENT OF HEALTH- KWAZULU NATAL

(Respondent)

## **DETAILS OF HEARING AND REPRESENTATION**

1. The arbitration proceedings commenced at 10H00 on the 27 June 2017 at the Labour Relations Boardroom in Pietermaritzburg. Mr M S Buthelezi of SAMA represented the applicant and Ms P P Bot represented the respondent.

## **ISSUES TO BE DECIDED**

2. I am to decide whether the respondent interpreted or applied the Resolution 2 of 2004 correctly and whether the withdrawal of the rural allowance as well as the interpretation of the term "full time" was fair. Further I am to determine whether the applicant should be paid rural allowance from April 2009 to July 2016.

## **BACKGROUND**

3. This matter was remitted from the Labour Court. The parties applied for the matter to be dealt with on written submissions as the only factual issues to be determined were whether the withdrawal of the rural allowance was fair and the interpretation of the term “full time”
4. I considered the application to deal with the matter on written submissions based on the onus of proof on the applicant to make submissions based on the issue of the withdrawal of the rural allowance and the interpretation of the term “full time” and that this could be ascertained from the documents and policy of the respondent I granted the application. The parties’ submissions are copied verbatim below.

The submission dates were as follows:

APPLICANT’S FOUNDING SUBMISSION DUE	04:07:2017
RESPONDENT’S ANSWERING SUBMISSION DUE	11:07:2017
APPLICANT’S REPLYING SUBMISSION DUE	18:07:2017

## **SUMMARY OF EVIDENCE AND ARGUMENTS**

### **5. APPLICANT’S SUBMISSION**

#### **Background**

1. The applicant has been employed as a Medical Practitioner at Edendale hospital since the 1st of February 2005. It is a common cause that Edendale Hospital is classified as the rural institution, and the respondent paid rural allowance to the applicant from the 1<sup>st</sup> of February 2005 and discontinued it on the 1st of April 2009.
2. The payment of rural allowance was discontinued when the applicant opted to work at reduced hours. The applicant worked in a 5/8 capacity from the 1<sup>st</sup> of April 2009 and increased her hours to a 6/8 capacity from the 1<sup>st</sup> of September 2013 to the 1<sup>st</sup> of July 2016. The period under dispute in which the respondent failed to pay the rural allowance is the 1<sup>st</sup> of April 2009 to the 1<sup>st</sup> of July 2016 - at which stage the applicant reverted to her old working arrangement
3. The responded deliberately discontinued the rural allowance pay and stated that the applicant did not qualify for rural allowance since she was working reduced hours at a 5/8 capacity. According to the respondent, a 5/8 arrangement is not full-time but part-time, and therefore the applicant could not be paid.

4. Our argument is based on two grounds, firstly: Is it fair that the respondent did not pay rural allowance to the applicant and secondly: Does the respondent understand the reason for the existence of the rural allowance and have they applied it according to its intent.

5. **Unfairness of the respondent by discontinuing the rural allowance**

1. The spirit of Resolution 2 of 2004 is to attract and retain doctors in rural inhospitable areas.

2. These areas are considered inhospitable because they are:

- A distance from main centres – This will result in wear and tear on vehicles and it will take extra time to travel to and from work
- Possibly poorly resourced in terms of staff and equipment– leading to increased work stress
- They are also in “dangerous areas” due to protest marches and throwing of stones en route to the hospitals.

3. Rural allowance is meant for people who travel to and work in these inhospitable hospitals as their primary employment and on a daily basis.

4. It is not meant for doctors who occasionally work in these areas and have other employment opportunities

5. Doctors employed primarily in this capacity - even in reduced hours posts – drive the same road and therefore have the same wear and tear on their cars and take the same (extra) time to get to and from work.

6. These doctors are exposed to the same stressors and resource limitations and risks.

7. Circular 87 of 2004 was used to explain Resolution 2 of 2004 but it did not take into account the spirit of this Resolution – to retain and attract clinicians.

8. Reduced hours post for clinicians who have no other employment and work at the hospital on a daily basis should also be compensated and retained due to the input they have to the hospital as they are exactly in the same situation as the 8/8.

9. Since rural allowance is a percentage of the doctor’s salary – any allowance will be in keeping to the number of hours worked at a rural hospital, this alone shows that the drafters of the resolution understand that the beneficiaries do not work the same number of hours.

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In addition, we state the following:

- The 5/8 and 8/8 employees are working under exactly the same conditions
- They both travel twice a day to and from their work stations
- They are both exposed to the same dangers
- They both incur the same costs due to tyre wear and any other cost
- They also travel the same number of days to and from work
- Neither is allowed to perform RWOPS unless they are given permission to do so.

7. We further state that the respondent has confused the 5/8 employee with the sessional employee, the

latter have their own practices, they do not have to request permission from the employer to do

RWOPS, they also travel once or twice per week to render their sessions, whereas the 5/8 must come

to work the whole week, and cannot do any other work without the permission of the employer, they are treated exactly in the same way as the 8/8.

No mention was made for employees working at a 6/8 capacity in the circular issued by KZN Health –

but the same is true as for those working at a 5/8 capacity

#### **8. The application of Resolution 2 of 2004 by the respondent**

The objective of Resolution 2 of 2004 is to attract and retain health professionals...involved on a full time basis with clinical work.

Circular 87 of 2004 (see bundle page 11) has interpreted the Resolution and has classified 5/8 employees as part-time.

The circular was authored without the recognised trade unions involvement, and since the intention of any circular is to guide the employees to implement the resolutions correctly, the authors may not introduce new concepts without the involvement of the relevant parties.

9. Section 198C (b) (ii) of LRA as amended even though it is largely applicable to employees who meet the threshold, it can however be useful in clarifying the matter as there is no ambiguity in law, this section hints at the fact that there is a difference between the employees who are part-time, full-time and full-time with reduced hours through an agreement, we strongly believe that 5/8s fall to the latter.

#### **10. Closing**

We therefore request that the applicant be paid her rural allowance with retrospective effect and that the award be made enforceable as the order of court.

## **6. APPLICANT'S REPLY**

### APPLICANTS FINAL RESPONSE

1. The applicant agrees with points 1-3 stated by the respondent
2. The applicant disagrees that the respondent was correct in stopping the rural allowance pay.
3. The stopping of rural allowance for people working permanently with reduced working hours amounted to unfair labour practices based on the spirit of the PHWSBC Resolution 2 of 2004 where one of the objectives is "to attract and retain health professionals on a full time basis to the Public Health Service as managed by the Health Employer to the rural areas"
4. The applicant concedes that according to the DPSA circular 2/2011 and KZN Health HRM circular 87/2004 as expounded by the respondent classifies 5/8s as a part time worker, however the Circulars are the employer interpretation of the resolution and we posit that it is a misinterpretation.
5. Even if the 5/8s were part time employees our view is buttressed by section 198C of the Labour Relations act, (3) (a) states that "an employer must—  
(a) treat a part-time employee on the whole not less favourably than a comparable full-time employee  
doing the same or similar work, unless there is a justifiable reason for different treatment"  
Reasons cited included  
(a) Seniority, experience or length of service;  
(b) Merit;  
(c) The quality or quantity of work performed; or  
(d) Any other criteria of a similar nature, and such reason is not prohibited by section 6(1) of the Employment Equity Act, 1998 (Act No. 55 of 1998).
6. With reference to the same act – the applicant could also be considered to be a comparable full time employee  
(5) "a comparable full-time employee—

(i) is an employee who is remunerated wholly or partly by reference to the time that the employee works and who is identifiable as a full-time employee in terms of the custom and practice of the employer of that employee

For the purposes of identifying a comparable full-time employee, regard must be had to a full-time employee employed by the employer on the same type of employment relationship who performs the same or similar work—

(a) in the same workplace as the part-time employee; or

(b) if there is no comparable full-time employee who works in the same workplace, a comparable full-

time employee employed by the employer in any other workplace.

7. The applicant once again reiterates the fact that employees who work reduced hours on a daily basis should be compensated and be retained due to the
  - i) Clinical input they have in the hospital
  - ii) Since they are exactly in the same situation as their full time colleagues with regards to time taken to get to work, wear and tear on vehicles, work stress due to limited resources and personal risk
  - iii) Lack of other employment opportunities when employed in this capacity
8. The spirit of the Resolution aimed to exclude sessional or occasional employees from the rural allowance benefit  
Permanent “full time” as well as “reduced hours” employees should be regarded in the same light since the only difference between them is the number of working hours
9. Since rural allowance is paid as a percentage of the basic salary – which is based on the number of hours worked, the allowance will be in keeping with the number of hours worked and will not unduly benefit the applicant
10. The applicant requests remuneration for the time period in which rural allowance was stopped until the time it was reinstated (July 2016)
11. We therefore assert that the respondent submission does not alter any facts, especially, that she never refuted the fact that that the applicant work under same conditions as those employees who are paid the allowance.

## **7. RESPONDENT’S SUBMISSION**

1. The applicant declared a dispute relating to unfair labour practice relating to benefits in that the respondent terminated the payment of Rural Allowance.
2. It is not in dispute that the applicant is employed as a Medical Practitioner at Edendale Hospital since 1<sup>st</sup> February 2005 till date. It is also a common cause that Edendale Hospital is classified as the rural institution and that the respondent discontinued the payment of rural allowance to the Applicant on the 01 April 2009.
3. The payment of rural allowance was discontinued when the applicant opted to work reduced hours, that is, from full time 8/8 hours to part time 5 hours out of 8 hours or 6 hours out of 8 hours (5/8 and 6/8). It should be noted that the applicant requested to work reduced hours (5/8 or 6/8 hours) which resulted in change in the employment capacity from full-time to part-time.
4. The respondent was correct in stopping the rural allowance pay to the applicant as she did not meet the criteria and the definition of full time employee in terms of the PHWSBC Resolution 2/2004, DPSA circular 2/2011 and KZN Health HRM circular 87/2004 and the action of the respondent amounted to fair labour practice based on PHWSBC Resolution 2 of 2004 paragraph 1.1 that the one of the objectives is “to **attract and retain health professionals on a full time basis to the Public Health Service as managed by the Health Employer to the rural areas**”.
5. The respondent fully understand the objectives for the existence and its intent of the rural allowance resolution as it clearly indicates who should benefit on this resolution in terms of full-time and part-time employees, reference is made to PHWSBC Resolution 2/2004 paragraph 3.7 that “the rural allowance is only payable to designated employee appointed on a full time basis”.
6. The spirit of the PHWSBC Resolution 2/2004, DPSA circulars 02/2011 and the Department of Health HRM circular 87/2004 seek to address the following:-
  - To attract and retain health professionals on a full time basis to the Public Health Service as managed by the Health Employer to the rural areas;
  - DPSA Circular No 2/2011 paragraph 37 which seek to differentiate between the employment capacity which the employer can exercise when employing staff
    - Permanent either in a full time or part time (5/8<sup>th</sup> or 6/8<sup>th</sup>) capacity
    - Fixed term contract in a full time or part time (5/8<sup>th</sup> or 6/8<sup>th</sup>) capacity
    - Sessional appointees (fixed number of hours sessional per work).

7. The respondent dispute the fact that employees who work reduced hours on a daily basis should be compensated and be retained due to the input they have to the hospital as they are exactly in the same situation as the full time, in terms of the benefits attached to different employment capacity the full time employee does not have the same benefits as part time employee and also in view of the definition outline below.
8. Our submission to the commissioner is that he dismissed the findings as per the submission of the applicant that the respondent confused the 5/8 employees with sessional employees on the basis that this are two different employment capacity and the respondent has never committed such mistake during the employment of the applicant, it is just a speculation that are unfounded.
9. It is further our submission that the conditions of service attached to sessional employees and either permanent full time or part time employees (5/8<sup>th</sup> or 6/8<sup>th</sup>) are not the same base on their employment capacity. Reference is made to the page 33 of the Bundle (Translation Keys) where it is indicated that 5/8 or 6/8 falls under the Part-time category.
10. In terms of KZN Health HRM Circular 84/2004 paragraph 8.4 and 8.5 (page 26 of the bundle) clearly stipulates that:

*“8.4 the payment of non-pensionable rural allowance is applicable only to designated health  
Professionals categories working in clinical service delivery on a full time basis  
(5/8<sup>th</sup> or 6/8,  
**sessional and senior management are excluded).***

*8.5 The non-pensionable rural allowance is only applicable to designated employees  
appointed on a  
full time basis”.*
11. In terms of the definition taken from Google website “[legal\\_match.com/law-library/article/full-Time-and-part-time-employment-dispute.html](http://legal_match.com/law-library/article/full-Time-and-part-time-employment-dispute.html)” the difference between full time and part time are as follows:-

**Part-time employment**– is usually any work week that is less than 40 hours a week...

**Full time employment** – is defined as a standard 40 hours work week.



Further reference is made to Google from the website <http://southafrica.smetoolkit.org/sa/en/content/en/57553/Part-time-employment>

### **What is a part-time employee?**

**A part-time-time** employee is defined as “an employee who is remunerated wholly or partly by reference to the time that the employee works and who works less hours than a comparable full-time employee” This would include employee who work only a few hours per day or only a few days in a week. Part time employee could and often are permanent employed.

12. It is respondent’s final submission that there is no ambiguity between the PHWSBC Resolution 2/2004, DPSA circulars 2/2011 and KZN health HRM circular 87/2004 as all the reference clearly indicates who should be eligible for the payment of rural allowance and considering the fact that the applicant does not meet the criteria of the full time employee definition and the conditions outlined in PHWSBC Resolution 2/2004 during the period in dispute which is 01 April 2009 to 01 July 2016. The respondent does not have the requisite jurisdiction to amend the resolution and DPSA Directive in order to suite the applicant since these documents are negotiated at National level.

### **13. PRAYER**

It is the respondent prayer that this application be dismissed.

## **ANALYSIS OF EVIDENCE AND ARGUMENTS**

8. This matter is remitted from the Labour Court where the judge directed “The matter is remitted to the Second Respondent for a hearing *de novo* before a different commissioner. The applicant’s claim is in respect of payment of rural allowance. She was initially paid rural allowance but it was stopped. She challenges the stopping of the rural allowance. Her claim is to be paid from April 2009 to July 2016.
9. The applicable Resolution dealing with rural allowance is Resolution 2 of 2004.
10. The issues to be determined are the interpretation of the term “full time” and whether the withdrawal of the rural allowance was fair.
11. The following are recorded from Resolution 2 of 2004:

### **1. OBJECTIVES**

1.1.To attract and retain health professionals on a full time basis to the Public Health Service as managed by the Health Employer to the rural areas.

3.7. The Rural Allowance is only payable to designated employees appointed on a **full-time** (my emphasis) basis

12. The following are recorded from Human Resource Management Circular 87 of 2004:

8.4. The payment of a non-pensionable rural allowance is applicable only to designated Health Professional categories working in clinical service delivery on a full-time basis (**5/8, Sessional and Senior Management Service employees are excluded** (my emphasis)

13. It is clear from the above recordings that the rural allowance is granted to employees on a “full time” basis. The next question is the definition of “full time” employee and how it relates to the applicant.

14. According to the applicant the payment of rural allowance was discontinued when she opted to work at reduced hours. The applicant worked in a 5/8 capacity from the 1<sup>st</sup> of April 2009 and increased her hours to a 6/8 capacity from the 1<sup>st</sup> of September 2013 to the 1<sup>st</sup> of July 2016.

15. **A part-time-time** employee is defined as “an employee who is remunerated wholly or partly by reference to the time that the employee works and who works less hours than a comparable full-time employee” This would include employee who work only a few hours per day or only a few days in a week.

**Part-time employment**– is usually any work week that is less than 40 hours a week...

**Full time employment** – is defined as a standard 40 hours work week.

16. If one looks at the applicant’s salary advice dated 16 August 2012 (p9) it shows that her appointment date was 1 April 2009 Nature of Appointment PART TIME 5/8. Work Week Code- 25 hours.

17. The Resolution is clear that only **full time Health professionals** qualify for the rural allowance. Further the applicant can be termed to be in **part time employment** whether she was 5/8 or 6/8 when compared to a full time employee.

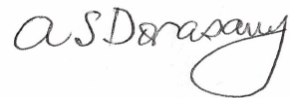
18. The fact that the rural allowance is only granted to full time Health Professions only and the applicant being categorised as a part time employee (see salary advice) did not qualify for the rural allowance for the period claimed hence the withdrawal of the rural allowance was not unfair.

19. As a consequence of the above the applicant does not fall under the interpretation of the term “full time” and the withdrawal of the rural allowance was fair.

## AWARD

20.1. The applicant does not qualify for rural allowance for the period April 2009 to July 2016.

20.2. The withdrawal of the rural allowance was fair as she did not qualify for the allowance in terms of the Resolution.

A handwritten signature in cursive script that reads "aSDorasamy". The signature is written in black ink on a white background.

Arbitrator: Anand Dorasamy