



# ARBITRATION AWARD

Commissioner: **KM Moodley**

Case No: **PSHS62-17/18**

Date of Award: **3 July 2017**

In the matter between:

LA Buthelezi

Applicant

and

Department of Health- Kwazulu Natal

Respondent

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## **DETAILS OF THE HEARING AND REPRESENTATION**

1. The Arbitration commenced on 13 June 2017 at the boardroom, Benedictine District Hospital, Pongola Road, Nongoma.
2. The Applicant was represented by attorney, M Shamase. The Respondent, Department of Health (KZN) was represented by its official, S A Gumede.
3. The proceedings were mechanically recorded and all witnesses testified under oath. I am satisfied that the parties have been correctly cited and that the PHSDSBC has jurisdiction to hear this matter. No preliminary points were raised by either of the parties.
4. The Applicant tabled a bundle of documents, i.e. Bundle A, and the Respondent tabled bundles of documents, i.e. Bundles B and C which were introduced and accepted as evidence by both parties.

5. No objection was raised to Commissioner Moodley presiding over the Arbitration.

**ISSUE TO BE DECIDED**

6. The issue to be decided is whether the Applicant should be paid an acting allowance from October 2011 to 13 June 2016.
7. Applicant sought to be paid an acting allowance with retrospective effect, ie with effect from October 2011.
8. The Respondent disputed that the Applicant should be paid an acting allowance and sought to have this matter dismissed.

**COMMON CAUSE ISSUES:**

9. HRM Circular 132 of 2015 and the Collective Agreement No 1 of 2002 are binding on the parties.
10. The Applicant submitted letters of complaints to the Respondent regarding payment of an acting allowance (letters dated 11/2/2012, and 12/5/2014)

**ISSUES IN DISPUTE:**

11. Whether or not the Applicant qualifies to be paid an acting allowance from October 2011, to June 2016.

**BACKGROUND TO THE DISPUTE:**

12. The Applicant was employed by the Respondent in October 2011, at the Benedictine Hospital as a Shift Supervisor. At the time of this dispute the Applicant was earning a salary of R17,933.25 per month.
13. In September 2011, the Sub District Manager (SDM), one Masekani, left the employ of the Respondent.
14. Dlamini, the then Supervisor of the Applicant, requested him to act as a SDM (Nongoma). The Applicant accepted this acting appointment and assumed his duties. He expected to be paid an acting allowance but this did not happen. He queried this several times with his supervisor but to date, no acting allowance was paid to the Applicant.
15. The Applicant then lodged a grievance but this was unsuccessful. He then declared a dispute with the Bargaining Council, hence this arbitration.

## **SURVEY OF EVIDENCE AND ARGUMENTS**

### **APPLICANT**

#### **WITNESS 1: T B Vilane (EMS Shift Leader):**

16. Vilane testified that he was working at Nongoma under the supervision of the Applicant, from 2008 to September 2011.
17. He stated that when Masekani the SDM at the time, left the services of the Respondent Dlamini informed them at a staff meeting that the Applicant would be acting as SDM and that he would be getting an acting allowance.
18. He testified that the Applicant immediately gave up his duties as Shift Leader and undertook the duties of an acting SDM from September 2011 onwards.

#### **WITNESS 2: K Zulu (Emergency Care Officer):**

19. Zulu testified that the Applicant was his supervisor from 2008 to September 2011 and he then became the acting SDM from September 2011 to 2016.
20. Zulu previously reported to the Applicant directly when he was still the Shift Supervisor, but after he became Acting ADM, Zulu was then required to report to Velani.
21. The Applicant then started signing his documents as Acting SDM.

#### **WITNESS 3: L A Buthelezi (Shift Leader/Acting SDM):**

22. The Applicant testified that Dlamini telephonically asked him to act as SDM (Nongoma) because Masekani was no longer employed by the Respondent. The Applicant readily accepted the acting appointment.
23. Dlamini then called up a staff meeting where he announced to the staff that the Applicant is the new acting SDM. He then showed the Applicant everything that needed to be done in the office of the SDM, and as per the job description of SDM, and explained to him the duties required to be performed.
24. The Applicant then enquired from Dlamini about the remuneration of the acting SDM. Dlamini told him that he would arrange an acting allowance for him.
25. Applicant testified that as Shift Leader, he received allowances, including compulsory overtime, Sundays overtime, and Sundays and public holidays. He had his own office but he had to vacate it completely when he took over the acting appointment.
26. Secondly as a shift leader, he had to work according to a roster, for example, he worked four days on and four days off. As acting SDM, he worked Monday to Friday

and he was on standby most of the time. His acting period ran from October 2011 to 2016.

27. Dlamini was based in Ulundi, whereas the Applicant was based in Pongola. Dlamini came to the Pongola base whenever there was a problem.

28. As no acting allowance was forthcoming the Applicant then wrote to Dlamini about payment of the acting allowance. Dlamini replied that he would submit the necessary documents to one Mabaso at Head Office for payment of the acting allowance.

29. He produced a letter dated 11 February 2012, as being his first letter of complaint. No response was received from Dlamini. Applicant then went to see Dlamini in Ulundi where he was told that they were still working on it. The Applicant also submitted letters to Dlamini who repeatedly told him "we are busy with it".

30. Applicant testified that the only thing kept him going was that he enjoyed doing the job and he did it well. At no stage did the Respondent tell him to stop acting as he was performing his duties as SDM very efficiently.

31. Applicant believed that as he was performing the functions of acting SDM, he was entitled to be paid an acting allowance from October 2011 to June 2016.

## **RESPONDENT**

32. Respondent did not produce any witnesses to testify of its behalf, but relied on its bundles of documents and the closing arguments submitted in writing.

## **ANALYSIS OF EVIDENCE AND ARGUMENT**

33. HRM Circular 132 of 2005 refers to the Policy for the Appointment and Compensation of Employees Acting in higher vacant posts for the Department of Health KZN, and was effective from 1 November 2005. This policy is applicable to all employees who are employed on a full-time basis by the Respondent and spells out the procedures to be followed in making acting appointments.

34. This policy provides inter alia for the following requirements to be met should an acting appointment be required:

- i) The necessity to have a person appointed to act in a higher vacant post must first be investigated.
- The post must be vacant and must be funded.
- The appointing authority is at a level higher than the current post of the acting appointee.

- The employee must accept the acting appointment in writing.
- The acting appointment shall not exceed an uninterrupted period of 12 months in respect of employees in salary levels 1 to 12.
- No employee shall be reappointed to continue acting after the expiry of the 12 months acting period.
- The acting allowance is to be paid on a monthly claim basis and by way of a claim form, completed and signed by the claimant, and his supervisor.

35. These conditions are further reinforced in Resolution 1 of 2002 which provides for the following:

An acting allowance should only be paid on the following conditions.

- The acting appointment shall be in writing.
- The post is vacant and funded.
- The acting period is longer than six weeks.
- The appointing authority is a higher level than the acting appointee.
- The employee must accept the acting appointment
- No employee may act for an uninterrupted period of 12 months.

36. Therefore any acting appointment made contrary to Resolution 1 of 2002 and HRM Circular 132 of 2005 would be irregular.

37. From the evidence led by the Applicant, it was established that;

- He was appointed telephonically by one Dlamini.
- No written letter of employment was issued to the Applicant.
- The Applicant could not produce written acceptance of the acting appointment.
- The Applicant did not submit monthly claim forms for the Acting allowance.
- No evidence was led to show that an investigation was done to show the necessity for an acting appointment.
- No authorisation was sought for the acting appointment and for the payment of an acting allowance.
- The post was vacant but it was not funded as the vacant posts were frozen

38. From the evidence led by the Applicant it can be seen that the he did not meet all the criteria as provided for in Resolution 1 of 2002 and HRM Circular 132 of 2005

to be appointed in an acting capacity. Therefore the action of Dlamini in appointing the Applicant telephonically, to the post of Acting SDM, was irregular and is therefore null and void.

39. Therefore, the Applicant is not entitled to payment of an acting allowance.
40. The actions of Dlamini, who occupies a managerial post, in appointing the Applicant contrary to the approved policies and procedures of the Respondent, is of serious concern and should be the subject of an investigation, and the necessary disciplinary action. Dlamini, as a manager, ought to have known that he could not simply make an acting appointment 'telephonically'. Despite many requests by the Applicant to Dlamini for payment of an acting allowance Dlamini did absolutely nothing in the 5-year period i.e. from October 2011 to 2016 to correct the situation.
41. The Applicant on the other hand is not entirely without blame as he also shoulders some degree of responsibility. He claims to have been acting as SDM from 2011 to 2016, and he produced sufficient evidence to confirm that he was in fact performing the some of the duties of acting SDM. He believed that by simply performing some duties in an acting post the appointment of which was irregular, he was entitled to an acting allowance for performing these duties. This is not so.
42. However, as acting SDM, (a managerial post), the Applicant ought to have known about the Respondents policies on acting appointments, especially the Collective Agreement 1 of 20012 and HRM circular 132 of 2005. The Applicant ought to have known that no acting appointment outside the policy and procedures of the Respondent, was permissible, and therefore his acting appointment was irregular.
43. To have continued acting in that position from 2011 to 2016, knowing full well that his appointment was irregular, was wishful thinking on the Applicants part. He ought to have known that he did not qualify for an acting allowance as the acting appointment was irregular. Nevertheless, he continued acting anyway.
44. The Applicant could have refused to continue performing the duties of an acting SDM, until such time as his appointment was regularised, but on his own accord he chose not to, and by continuing in this acting position, he carried the risk of not being paid.

**CONCLUSION:**

45. In the final analysis, I find that no authorisation was given to Dlamini to appoint the Applicant as acting SDM. Dlamini, of his own accord, appointed the Applicant telephonically, and without authorisation.

46. Therefore, the Applicant is not entitled to payment of an acting allowance.

**AWARD**

47. I make the following award:

47.1) I find that the Applicant, LA Buthelezi, is not entitled to payment of an acting allowance.

47.2) This application is dismissed

47.3) I make no order as to costs.



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COMMISSIONER: KM MOODLEY