



ARBITRATION AWARD

Case No: PSHS740-17/18

Commissioner: THABE PHALANE

Date of award: 10 MAY 2018

In the matter between:

PSA obo Bongobongo, S

(Union/ Applicant)

And

Department of Health- Northern Cape

(Respondent)

DETAILS OF THE HEARING REPRESENTATION

1. An Arbitration hearing was held on 19 February 2018 and 25 April 2018 at the Harry Surtie Hospital, Upington.
2. The Applicant is currently an employee of the Respondent, appeared in person and was represented by Mr H.A Thomas, the Union Official, whilst the Respondent was represented by Mr F Kammies, the Respondent's Official.
3. The Applicant submitted a bundle of documents marked bundle 'A'.
4. The Applicant testified and was cross examined, and the Respondent called a witness who testified and was cross examined.

ISSUE TO BE DECIDED

5. I am determined to decide whether the Respondent had breached and violated the provisions of the Public Health and Social Development Sectoral Bargaining Council Resolution 1 of 2002 by not paying the Applicant the Acting Allowance. If I find that there was a breach of the resolution, I am further required to determine the appropriate remedy.

JURISDICTIONAL ISSUE

6. There was no jurisdictional point raised by the parties.

EVIDENCE FOR THE APPLICANT

Ms Seretha Susanna Bongobongo

7. The Applicant submitted that she was a Production Level 5 Clerk and was approached by her Supervisor, the Assistant Director, HR, to act on a level 9 position, as the Assistant Director, Human Resource Management.
8. She submitted that there was a huge reporting gap. She told her supervisor that she wanted the appointment in writing.
9. A submission was drafted and a recommendation made to the MEC who approved the acting appointment.
10. The acting was for a period of 6 months from 01 February to 31 July 2017.
11. There was no vacant post at Dr Harry Surtee Hospital. They communicated with the Provincial office and they said they could use a post in the district Office at Kakamas Hospital.

12. All the requirements and approval were made and her personal was matched to the post.

13. The Director, HR, however stopped finance from paying her.

14. She is still performing the duties of a level 9.

15. The Applicant wants to be paid the acting allowance for the period 01 February to 31 July 2017.

Under cross examination

16. The Applicant agreed that the HR is the driver of the acting process.

17. There was a need for the acting post because the Assistant Director was acting as the Deputy Director. Some functions needed authorisation by the Managers.

18. The Acting CEO was also aware of the issues at the Hospital.

19. She acknowledged that she was acting for a post level more than 1 higher than hers.

20. She submitted that it was not illegal. She was the person with the most experience.

21. She advised the Managers throughout the application process and did not fail to create a new post for her own benefit.

22. The post was matched. It was not vacant and funded.

23. The majority of the people who approved were also acting in their posts. They all knew the policies.

EVIDENCE FOR THE RESPONDENT

1st witness, Mr Francois Van Neel

24. The witness is the Assistant Director Recruitment, in the Province, but currently works as the Assistant Director, HRM, in the District.
25. The duties have changed because acting allowance is now part of his job description.
26. The process is that a facility will have a post that is vacant. The CEO then makes a submission formally.
27. The MEC is the authority that approves the submission for a person to act in a position. The MEC can overrule the administrative errors. He is guided by the recommendations submitted to him.
28. The person must meet the minimum requirements for the post. A memo will then be sent to finance for payment.
29. He does not know why there was no payment.

Under cross examination

30. He was aware that the Applicant was executing the acting duties as he at one stage called the Applicant asking for her qualifications. She indicated that she was struggling to send the application through.
31. He acknowledged that the Applicant's acting appointment was issued after the MEC approved the acting appointment.
32. The funds were made available after they borrowed a funded vacant post.
33. The Applicant should therefore be paid.

ANALYSIS OF EVIDENCE AND ARGUMENT.

34. The provisions of Resolution 1 of 2002, Public Health and Welfare Sector Bargaining Council Resolution 1 of 2002 (the Resolution), are very useful as they provide the process that the Respondent and Applicant should follow in acting on a higher grade and payment of the higher allowance.
35. The agreement is not static because it makes provision for deviating from its provisions.
36. I am inclined to agree with the Applicant that the Respondent breached the provisions of the resolution and should pay her the acting allowance because the Applicant was acting in the position which was vacant and funded, albeit from another hospital.
37. There was a submission that was made, and the acting appointment was therefore issued after the MEC approved.
38. The Applicant must therefore be paid and it will not be fair that an Official, who for his or her own personal reasons, refuses to pay the Applicant because of their personal motives.
39. The Respondent did not call the HR Director to explain why he stopped finance from paying the Applicant.
40. The witness who was called agreed that the Applicant should be paid and he was aware that the Applicant was performing the duties.
41. I am therefore convinced that the Applicant has established that she was acting lawfully and has exhausted all internal mechanisms to resolve the dispute. She is therefore entitled to be paid the acting allowance.
42. The Respondent has violated the provisions of the resolution by not paying the Applicant the acting allowance that was approved by the MEC, and I find that there is no justifiable reason not to pay her the acting allowance because she has already performed the functions.

43. In the premises the following award is in order:

7. AWARD

44. The Applicant is entitled to the acting allowance due to him.

45. The Respondent has breached the provisions of Resolution 1 of 2002 by not paying the Applicant his acting allowance.

46. The Respondent is ordered to pay the Applicant the acting allowance for the period 01 February to 31 July 2017 by no later than 30 June 2018.

47. There is no order as to costs.

Commissioner: THABE PHALANE

Signature : _____