



**PHSDSBC**

PUBLIC HEALTH AND SOCIAL DEVELOPMENT  
SECTORAL BARGAINING COUNCIL

# ARBITRATION AWARD

Case No: PSHS769-16/17

Commissioner: Samuel Baron

Date of award: 5 April 2017

In the matter between:

**SASAWU OBO MPOFU, N**

(Union/Applicant)

and

**DEPARTMENT OF HEALTH- EASTERN CAPE**

(Respondent)

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## DETAILS OF HEARING AND REPRESENTATION

1. This arbitration was heard and finalized on 24 March 2017 at the offices of the Department of Health: Eastern Cape in Bhisho. It concerns the interpretation or application of Resolution 1 of 2002, which is termed "Agreement on Acting Allowances" ("the Resolution") concluded in the Public and Welfare Sectoral Bargaining Council (as it was known then). The parties requested 7 days to submit written closing arguments and they duly obliged.
2. The Applicant, Mr. Nkululeko Mpofu, was present and was represented by Mr. Mlamli Batha, an official from the union SASAWU, of which the Applicant is also a member.
3. The Respondent, the Department of Health: Eastern Cape, was represented by Mr. Malusi Mapisa, its Assistant Director: Employee Relations.
4. The proceedings were digitally recorded.

## ISSUE TO BE DECIDED

5. I am required to interpret the provisions of Resolution 1 of 2002 and in doing so, determine whether the Applicant qualifies for the payment of an acting allowance as a driver: Level 3, for the period 18 October 2013 to 13 November 2016

## BACKGROUND TO THE DISPUTE

6. It is common cause that the Applicant was appointed as a property caretaker on Salary Level 2. He however was never required to perform such duties, but instead immediately started duties as a driver of vehicles of different codes. That situation gave rise to the dispute before me: namely whether the Applicant, in performing the duties of a driver on a level higher than his, is entitled to be paid an acting allowance for the period he performed the driver duties.

## SURVEY OF ANALYSIS AND ARGUMENT

### Applicant's case

7. **The Applicant** testified that he was appointed as a property caretaker as per his appointment letter but he never performed such duties. Instead he was instructed to be a driver. He wanted to know for how long he was going to drive because he was not appointed as a driver. He was told that he will be a driver for a short time, the post will be advertised and then he will be appointed as a driver. So he kept on driving.
8. The Applicant stated further that he kept on enquiring from Mr. Simakuhle, the Human Resources officer, when the post of driver will be advertised, but he never received a positive answer. He was then advised by his colleagues to approach the union, which he did and a grievance was lodged by the union on his behalf.
9. The Applicant was then called to the office and told that he must stop driving and return to Peddie, where he is to resume his property caretaker duties. He was told that it was management's decision.
10. The Applicant testified that he was of the belief that he should have been paid the acting allowance because he acted in a position that was higher than his. He received no such benefit whilst he was driving. He only received overtime money when he worked such.
11. During cross-examination the Applicant conceded that he was not appointed to act in the position of driver. He was asked verbally and he agreed to this because of ignorance. He also conceded that Mr. Simakuhle

did not inform him how he would be appointed as a driver. He stated that he is not aware of anyone that was appointed without a recruitment process.

## **Respondent's case**

12. **Mr. Mxolisi Simakuhle** testified that he was employed by the Respondent as an ASD: Administration. He agreed that the Applicant never commenced duties as a property caretaker, but was allocated duties as a driver.
13. The duties of driver were requested verbally from the Applicant. The position of property caretaker was on Level 2, whilst the position of a driver is on Level 3. The Applicant, Mr. Simakuhle testified, was never appointed as a driver and he never acted as such.
14. The person who is supposed to authorize the appointed of an employee in an acting position is the HOD. The delegated authority is normally a Director for Post level 1-8. An acting appointment will normally be authorized prior to the employee commencing the acting appointment. In the case of the Applicant, he was never appointed to act. The post of driver was also never vacant or funded.
15. Mr. Simakuhle testified under cross-examination that no policy was applied when the Applicant started working as a driver. He was requested to do the duties and he agreed. He agreed that the post of driver was not funded. It did not exist.
16. Mr. Simakuhle was requested to read a paragraph from a directive from the Department of Public Service and Administration which stipulates as follows: *"It is included in the PSR to grant HOD's additional flexibility to manage the appointment of employees and to compensate them for acting in higher graded posts that are not vacant due to the actual incumbent of the post acting in a higher vacant post. Although the application of this provision is not covered in the acting allowance policy, it does not prohibit a HOD to apply this provision. Although the provision does not stipulate that the higher post must be funded, the Minister for Public Service and Administration has indicated that such higher post should be funded if HOD's are to apply this provision"*. Mr. Simakuhle responded by saying that the HOD did not give any instruction on the acting of the Applicant in the position of driver.

## ANALYSIS OF EVIDENCE AND ARGUMENT

17. The Applicant requires me, in terms of Section 24 (1) of the Labour Relations Act 66 of 1995, as amended, to interpret Resolution 1 of 2002 with a view to find that the Respondent is not in compliance thereof and to order such compliance by finding that he is entitled to be paid an acting allowance for the period in question.
18. In the Labour Appeal Court matter of *Western Cape Department of Health v MEC Van Wyk and Others 11 BLLR 1122 (LAC)*, which principles I will endeavour to apply, the following was stated in relation to the type of dispute that I am called upon to resolve (at paragraph 22):

*“In interpreting the collective agreement the arbitrator is required to consider the aim, purpose and all the terms of the collective agreement. Furthermore, the arbitrator is enjoined to bear in mind that a collective agreement is not like an ordinary contract. Since the arbitrator derives his/her powers from the Act, he /she must at all times take into account the primary objectives of the Act. The primary objectives of the Act are better served by an approach that is practical to the interpretation and application of such agreements, namely to promote the effective, fair and speedy resolution of labour disputes. In addition, it is expected of the arbitrator to adopt an interpretation that is fair to the parties”*

19. Before I get there though, a word with regards to how the Applicant approached this matter is necessary. In these types of disputes, the cornerstone of the Applicant’s dispute should be the document itself; the provisions of which, if properly applied, points to non-compliance by the Respondent of such provisions. It is therefore imperative that the aggrieved party which alleges the breach should centre its arguments around the provisions of the document, in this case Resolution 1 of 2002. Mr. Batha, for the Applicant, did no such thing. He led no evidence on how the situation the Applicant found himself in relates to a provision in the Resolution.
20. When I pointed this out to Mr. Batha, he informed me that he would address this issue in his closing arguments. Such an approach is clearly wrong. Closing arguments are not evidence. Its intention is to persuade the presiding officer that a case was made out based on the evidence already led and perhaps what legal principles and authority a party rely on in pursuit of that.
21. Be that as it may, I took the approach that I will scrutinize the Resolution nevertheless as well as take into account the Applicant’s closing arguments insofar as it sought to convince me of the merits of his arguments. This will allow the speedy resolution of the dispute in front of me, which is in line with the purpose of the Act.

22. The purpose of the Resolution (Clause 1), is “to determine a policy on acting allowance and compensation to be paid to an employee appointed to act in a higher post.
23. Clause 3.1 provides as follows:
- 3.1 An EMPLOYEE appointed in writing to act in a post higher than the grade of the employee by the Head of Department or his/her delegate at provincial level or national level (“here-after the appointing authority”) shall be paid an acting allowance to act in vacant posts provided that:
- 3.1.1 the post is a vacant and funded post,
  - 3.1.2 the acting period is longer than 6 weeks,
  - 3.1.3 the appointing authority is a level higher than the acting appointee
  - 3.1.4 the EMPLOYEE must accept the acting appointment.
24. The first issue to note is that for an employee to receive an acting allowance, he / she must be *appointed* to act in such position by the HOD or his / her delegate; in this case a manager with at least director status. The Applicant was never appointed to act by a director in the position of driver
25. The initial evidence led by the Applicant was that he was *instructed* to do the driver duties but never *appointed*. In other words, he was never issued with a letter appointing him to act in the driver position. As he also testified, he was awaiting the “paperwork” from Mr. Simakuhle, meaning from the time he assumed the driver duties until such time that he left the Respondent’s employ, he never acted in the driver position.
26. Another prerequisite for the payment of the acting allowance in terms of the Resolution is that the post must be *vacant* and *funded*. The Applicant in his evidence conceded that he was enquiring on several occasions from Mr. Simakuhle when the position will be advertised. So at the time he performed the duties of driver, the post was not vacant. He was thus not capable of acting in such a post.
27. It follows further that the post was not funded and evidence to that effect was led by the Respondent which was not challenged by the Applicant. The Applicant could not act in a post that did not exist at the time.
28. The Applicant’s reliance on the Clause in the directive of the Department of Public Service referred to above, is also misplaced. This only refers to a scenario when an employee acts in a post that becomes vacant because the employee who occupies that post is acting in a higher post. The Applicant did not act in the post of a driver who acted in a higher post. As I said, the driver post did not even exist, so that clause does not find application here.

29. The Applicant further did not “accept” the acting appointment because no such appointment was made. The Applicant referred me to the Labour Court case of *Gauteng Department of Local Government and Housing v Sirkhot & Others* (case nr. JR 408/2012). However, that case is distinguishable from the matter at hand. In the *Sirkhot* case, the employee was appointed in an acting position and it was disputed whether the correct delegated authority appointed the employee and whether, on that basis, the employee was entitled to be paid an acting allowance. In the case before me, the Applicant was not appointed at all, which in terms of the Resolution, was a proviso for the payment of the allowance.
30. The Applicant, when he assumed the duties of a driver, did so with the knowledge that he would not receive payment for it. He did so nevertheless. Also, he was aware that he could refuse to perform such duties because of the non-payment issue. In the end, having assessed the provisions of the Resolution and its purpose, it is clear that in terms of the Resolution, he is not entitled to the payment of an acting allowance.
31. In the circumstances therefore, I make the following award:

#### **AWARD**

32. The Applicant is not entitled to the payment of an acting allowance in terms of Resolution 1 of 2002.
33. The application is dismissed and the Applicant is not entitled to any relief.

Signature: \_\_\_\_\_



Commissioner: **Samuel Baron**

Sector: **Public Health**