



ARBITRATION AWARD

Case No: PSHS811-18/19

Commissioner: Jules McGillavray-Teale

Date of award: 23 January 2019

In the matter between:

HOSPERSA obo Maria Bergoor

(Union/ Applicant)

and

Department of Health- North West

(Respondent)

DETAILS OF HEARING AND REPRESENTATION

1. The applicant referred a dispute to the PHSDSBC in terms of section 186(2)(a) of the Labour Relations Act 66 of 1995 (LRA) in regard to an Unfair Labour Practice related to benefits. The dispute was alleged to have arisen on 15 August 2018 and the referral was received by the Council on 22 October 2018. The arbitration took place on 16 January 2019 at the Klerksdorp Hospital in the boardroom.
2. The applicant was present and represented by Mr. Phila Tsholo, while the respondent was represented by Mr. Kagiso Oseile of the Department of Health- North West.
3. The respondent presented a bundle of documents.

4. The proceedings were electronically recorded and filed with the PHSDSBC administration.
5. This award is issued in terms of section 137(7) of the LRA, which requires a commissioner to provide brief the reasons for the outcome.

ISSUE TO BE DECIDED

6. I must decide whether the respondent committed an unfair labour practice in respect of benefits due to the applicant and if so to grant the appropriate relief or compensation in terms of section 194 of the LRA.
7. The applicant seeks retrospective repayment for her purchase of her uniform out of her own pocket and the provision of a uniform in future in line with the Public Health and Social Development Sectoral Bargaining Council (PHSDSBC) Resolution 1 of 2005.

SURVEY OF EVIDENCE AND ARGUMENTS

8. The following constitutes a summarised version of the evidence of the parties but has not been captured verbatim. The fact that I have not captured it all should not be misconstrued to suggest that I have not taken evidence into account. My findings are accordingly within the context of all the relevant evidence tendered.

EVIDENCE FOR THE APPLICANT

9. The applicant submitted a bundle of 49 pages into evidence.
10. The applicant submitted, under oath, that she was employed in 2004 as a Nursing Assistant. In 2008 she applied for a promotion to the position of Auxiliary Services Officer (ASO) in the Cardiology Unit. A nursing qualification, experience and accreditation with the nursing council were prerequisites in order for her to qualify. She was successful and began working in the cardiology department.

11. The applicant referred to pages 6-10 of the bundle which is a copy of her performance management and development document for the period 2015 to 2016. Her primary Key Performance Indicator as per page 7 of the document is to maintain high standards of patient care by providing nursing care to patients.
12. She submitted that since 2008 her duties were to perform ECG's on patients, lung function tests, screening, preparing trolleys for surgical procedures and offer nursing care to patients.
13. The applicant submitted that she was required to wear a uniform to work and should she not be dressed appropriately; her senior could send her home. Since 2008 however, she had not received a uniform or a uniform allowance from the department and had been required to buy her own uniform in line with hospital standards.
14. The applicant then submitted into evidence the uniform allowance provided by the Department of Health per year for the period 2008 to 2018 which I have captured on a separate excel spreadsheet for ease of reference. The values had been verified with the HR Department at the Klerksdorp hospital just prior to the arbitration. She advised that the 2019 uniform allowance had not been prescribed yet and therefore could not be considered.
15. In 2017 she qualified to study at the nursing college in order to obtain her nursing diploma. In her capacity as a student she was also required to wear full uniform but was not being provided with her uniform allowance or uniform.
16. She had raised this issue with the HR department as informal grievances over the period of 10 years which went unanswered until she raised a formal grievance in August of 2018 and received feedback from the Hospital HR department to say that since was now Auxiliary staff, she did not qualify for a uniform allowance in line with section 1.1 of the PHSDSBC Resolution 1 of 2005 which only made provision for uniform allowances for Professional Nurses, Staff Nurses and Nursing Assistants (page 45 of the bundle).

17. She submitted that she did however qualify for a uniform in terms of section 1.2 of the Resolution which provided for protective clothing to be provided to all employees who are required to wear a uniform in the execution of their duties (page 45 of the bundle).
18. The applicant concluded her case at this point.
19. Under cross examination, the applicant was asked what her duties were when she applied for her role as an ASO and the applicant verified that she provided nursing care such as dressings and screenings in addition to performing ECG's, Lung function tests on patients as well as preparing surgical equipment.
20. The witness was asked what she did before she became an ASO and she responded that she was a Nursing Assistant.
21. The witness was asked if she was still a nurse to which she responded that she was still nursing only in cardiology and still wearing a uniform.
22. The witness was asked if the PHSDSBC Resolution 1 of 2005 covered ASO's to which she responded yes as she was required to wear a uniform and would be sent home if she did not wear one. She noted that in the absence of a uniform she would not be able to practice nursing in the cardiology unit of the hospital.
23. It was put to the witness that she had only raised a grievance when she had started attending the nursing college in 2017. She denied this saying that she had been dealing with HR and her Supervisor for 10 years, but after not receiving any feedback, she had formalised her grievance in writing.

APPLICANT'S CLOSING STATEMENTS

24. The applicant requested that the respondent pay her retrospectively for her uniform for the period 2008 to 2019 for which she had paid personally.

25. She further requested that her uniform allowance be reinstated or that she be provided with a uniform going forward in line with the PHSDSBC Resolution 1 of 2005 and that her title on her payslip be corrected to read ASO and not Admin clerk.

EVIDENCE FOR THE RESPONDENT

26. The respondent testified under oath that as at 2008 when the applicant had successfully applied for the ASO position, she no longer qualified as a nurse. She was therefore not entitled to a uniform allowance as per the PHSDSBC Resolution 1 Of 2005.
27. The respondent submitted that the applicant was bound by the resolution in question.
28. The respondent submitted that she had received a salary adjustment and back pay in 2015 for her promotion in 2008 and that the opportunity to study at the college confirmed that there was no intention by the Department of Health to subject their employees to unfair labour practices.
29. Under cross examination, the respondent was asked if he was aware that she was required to wear a uniform. He responded by saying that it wasn't a specific uniform but rather to be professionally attired in either navy and white or black and white.
30. The respondent was asked if he was aware that she could be sent home if not in uniform to which he responded that she had never been sent home.
31. It was put to the respondent that the applicant was never sent home because she was always in uniform that she had personally paid for.
32. The respondent was asked if he was aware that she was also required to report to college in full uniform each day. He responded that he was not sure if that was the case but if all other D4 students were required to wear a full uniform to college then she would be entitled to one.
33. The respondent was asked if the Deputy Director of Nursing wore a uniform to which he responded that she did.
34. The respondent was asked if the Deputy Director of Nursing performed any nursing duties to which he responded that she didn't but that she was a Professional Nurse and on that

basis was entitled to a uniform allowance in terms of the PHSDSBC Resolution 1 of 2005, paragraph 1.1.

35. It was put to the respondent that all other allied workers wore uniforms to which he agreed and clarified that Porters, X-ray staff and other auxiliary staff were required to wear uniforms.

36. He was asked how they got their uniforms to which he responded that they were either provided by allowance or that uniforms were provided by the respondent.

37. It was put to the respondent that the applicant is required to wear a uniform in her capacity as an ASO as well as a student and therefore in line with the PHSDSBC Resolution 1 of 2005, paragraph 1.2 she should be provided with a uniform allowance or an actual uniform.

RESPONDENT'S CLOSING STATEMENTS

38. Mr Oseile submitted that the applicant's claim be dismissed as she does not qualify for a uniform allowance or a uniform.

ANALYSIS OF EVIDENCE AND ARGUMENT

39. It was common cause that both the applicant and the respondent were bound by the PHSDSBC Resolution 1 of 2005. Importantly, the Resolution in question provides for either a uniform allowance in terms of paragraph 1.1 or a uniform in terms of paragraph 1.2.

40. The Resolution further provides under paragraph 3.1 that employees may be reimbursed where they are required to wear a uniform in the execution of their duties and that the uniform allowance should be used for the purchase of clothing and shoes as required in line with paragraph 3.3 and 4.2 which indicates that the Heads of Department will determine and provide uniforms to staff who are required to wear them.

41. It was further common cause that nursing experience and registration with the Nursing Council were prerequisites for the applicant being successful in her application for her position as an ASO.
42. The respondent submitted that as a result of the applicant's promotion, she was not entitled to either a uniform or a uniform allowance but as pointed out during cross examination, the applicant is still required to perform nursing as part of her role and to wear a full uniform to college.
43. It was also acceded by the respondent that other auxiliary staff were provided with uniforms which contradicts his assertion that her promotion from Nursing Assistant to ASO would effectively not entitle her to a uniform even though she was required to wear one each day both at the hospital as well as at the nursing college.
44. The respondent did not dispute the amounts provided by the applicant for the uniform allowances for the period 2008 to 2018.
45. What became apparent during the arbitration but was not raised by either party was that the referral was late in terms of section 191(1)(ii) of the LRA.
46. The LRA stipulates that a dispute around unfair labour practice may be referred to the council within 90 days of the act or omission that the applicant alleges is an unfair labour practice.
47. This therefore raises a jurisdictional issue which I must consider.

AWARD

48. Under the circumstances, I find the applicant's referral outside of the 90-day time frame allocated to refer an unfair labour practice in terms of the LRA.

49. The PHSDSBC therefore lacks jurisdiction to hear the matter.

A handwritten signature in black ink, appearing to read 'Jules', is centered on a light blue rectangular background.

Jules McGillavray-Teale