



ARBITRATION AWARD

Case No: **PSHS855-16/17**

Commissioner: **Suria van Wyk**

Date of award: **10 July 2017**

In the matter between:

Nteselang Maria Manoni

(Union/Applicant)

and

Department of Health-Free State

(Respondent)

DETAILS OF HEARING AND REPRESENTATION

1. The arbitration hearing convened on 19 April 2017 Bophelo House in Bloemfontein, and was concluded on 26 June 2017.
2. The applicant represented herself and Mr M Nhlapo appeared on behalf of the respondent.
3. A recording was made of the hearings.

ISSUE TO BE DECIDED

4. The issue to be decided is whether the applicant was demoted and if demotion is established, the appropriate remedy must be determined.
5. The applicant sought placement into the position of Nursing Assistant Grade 3 with retrospective effect.

BACKGROUND TO THE ISSUE

6. The following facts were common cause between the parties:
 - a. The applicant applied for the position of Nursing Assistant.
 - b. She was interviewed and subsequently appointed.
 - c. She received a letter dated 30 March 2015, indicating that she was appointed as a Nursing Assistant Grade 3, this was however later changed to reflect that she was appointed as a Nursing Assistant Grade 1.
7. The issues in dispute are:
 - a. Which position she applied for Grade 1 or Grade 3 Nursing Assistant.
 - b. Whether the actions of the respondent to change the appointment letter unilaterally amounted to a demotion or whether there was justification to do so.
8. The applicant submitted that she was demoted and that such demotion was unfair.

SURVEY OF EVIDENCE AND ARGUMENT

9. At the outset, it must be noted that not all the evidence led at the arbitration will be captured in the award. The award will only contain a brief summary of the relevant and salient points. The summary is a compilation of evidence in chief, cross examination and re-examination. Simply because evidence is not recorded in the summary, does not mean that the evidence was not considered. For a full record of all evidence parties should refer to the digital recordings of the hearing which is available from the PHSDSBC upon request.

Applicant's case:

10. Ms Nteselang Maria testified under oath to the following:

- a. She applied for the position of Nursing Assistant. She never saw the advertisement but was informed of the position by the Operation Manager. They were a few persons that applied and they were told that they must simply fill in "Nursing Assistant" on the application form. No indication was given what the Grade of the position was. She did not put in any reference number. In cross-examination reference was made to the request to the MEC for approval of the filling of posts.¹ The reference to the appointment of Assistant nurses² refers to a salary notch of R94 404.00/annum which correlates with the salary package indicated in the corrected appointment letter.
- b. She was the only person that was appointed as a Nursing Assistant.
- c. She received an appointment letter stating that she was appointed as a Nursing Assistant Grade 3.³ She only became aware in July 2015 that she was being paid as a Nursing Assistant Grade 1. Upon enquiry from Mr Mafabatho he indicated that the appointment letter contained the wrong grade and notch. She was never informed of this mistake by the respondent. She became aware of the correction letter (dated 19 June 2015) for the first time when a copy of it was given to her by Me Carien Boontes. Me Carien Boontes in October 2015. She told her that she was the one who made the mistake on the appointment letter.
- d. The appointment letter contains a clause which states that in terms of section 38 of the Public Service Act, 1994, as amended, any overpayment/ underpayment of salary, allowances and other monetary awards contained in this letter, will be rectified (recovered/reimbursed) as soon as it is discovered, irrespective of the cause of such error. It was put to her that the initial appointment letter contained an error and that it was rectified by the respondent as soon as it was discovered.

¹ Bundle A, page 9-24.

² Bundle A, page 14.

³ Bundle A, page 2.

- e. After a meeting with the District Manager she lodged a grievance but the matter was not resolved. She then referred the matter to the Council.
- f. She wanted to be appointed on a Grade 3 Nursing Assistant because she deserved to be a Grade 3 Nursing Assistant. She had extensive experience as a nurse, at the time of the interview she had 10 years' experience. In her opinion, she was a nurse even before she became a nurse, the qualification was a mere formality.
- g. It was established in cross-examination that her qualifications and experience was not all nursing related and she had no tertiary nursing qualification. She only registered with the Nursing Council in November 2013. It was put to her that to be appointed as a Nursing Assistant Grade 3, she needed 20 years' experience. Even if her alleged experience would be recognized she would still not qualify for a Grade 3 position. The extract from the OSD did not contain the category of Grade 2 and 3 Nursing Assistants, but since this was a public document it was indicated that same would be consulted to confirm the correctness of the statement.
- h. She acknowledged that from the onset she received the salary of a Grade 1 Nursing Assistant, she was never paid according to the salary scale of a Grade 3 Nursing Assistant.

11. Ms Mamohato Florence Mrazula and Me Thobeka Sylvania Jamba both testified that they were informed to write "nursing assistant" on the application forms and that after the interviews only the applicant was appointed.

Respondent's case:

12. Ms Maleroma Alice Motholo testified under oath to the following:

- a. She was aware of the letters issued to the applicant. Her initial appointment letter dated 30 March 2015 contained the incorrect grade and notch level. A second letter was issued on 10 April 2015 in which the grade and notch was corrected and a letter dated 19 June 2015, titled *Correction of Salary Notch due to your appointment letter*, was issued to confirm the changes made to the original appointment letter.

- b. At the time the applicant was interviewed, she had 2 years relevant experience because she was only registered with the Nursing Council on 9 November 2013 and she would therefore only qualify to be placed as a Nursing Assistant Grade 1.⁴ The witness reiterated that the qualifications presented by the applicant has no value in terms of the post as they relate to Private Security training and non-tertiary certificates which were not recognized for purposes of OSD.⁵ The OSD only recognized experience after registration with the Nursing Council.

ANALYSIS OF EVIDENCE AND ARGUMENT

13. Arbitration is a new hearing (*de novo*). The arbitrator determines the dispute in the light of the evidence admitted at arbitration. The standard of proof is that of a balance of probabilities. If, in this analysis, certain evidence is not referred to, this does not imply it had not been considered.
14. An unfair labour practice is defined in section 186(2) of the Labour Relations Act 66 of 1995 (the "LRA"). It means: "any unfair act or omission that arises between an employer and an employee involving unfair conduct by the employer relating to the promotion, demotion, probation or training of an employee or relating to the provision of benefits to an employee."
15. The applicant referred an unfair labour practice relating to demotion. The onus of proof in unfair labour practice disputes lies with the applicant; therefore, applicant must prove that she was demoted and that the demotion was unfair.
16. In the stated case before me, it is first required to determine which post was advertised, applied for and filled. The applicant submitted that she applied for a Grade 3 Nursing Assistant position and that was the post that was advertised. Her testimony was however contradictory in this regard when it is considered that she testified that she never saw an advertisement; she was told to fill in "Nursing Assistant" on the

⁴ Bundle A, page 7.

⁵ Bundle B, page 6-17.

application form by the Operations Manager and she conceded that she never enquired about what the grade of the position was that she applied for. Hence her only reliance on the fact that it was a grade 3 position is vested in the contents of the first appointment letter.

17. The respondent's case is that the position was advertised as a Grade 1 Nursing Assistant from the onset. This version was supported by the request to the MEC for approval to fill the posts. The reference to the appointment of Assistant nurses⁶ refers to a salary notch of R94 404.00/annum which correlates with the salary package indicated in the corrected appointment letter of the applicant.

18. It is unreasonable to expect that the respondent would be bound by an administrative error of Ms Carien Boontes by issuing the letter as a Grade 3 and not a Grade 1 position. This was also corrected within a reasonable time. The corrected appointment letter was issued within 10 days and another letter was issued on 19 June 2015. The unfortunate incident that letters only reached the applicant in October does not vitiate the actions of the respondent to correct the mistake. A mistake in a letter cannot create no legitimate expectation. The fact that there was a delay in the communication to the applicant after HR issued the letters, could be seen as a procedural irregularity but not one as serious as to justify the awarding of compensation for it.

19. I therefore find that the applicant failed to prove that the position that was advertised was a Grade 3 Nursing Assistant position. On a balance of probabilities, the position was advertised as a Grade 1 Nursing Assistant, which is the only position the applicant could rightfully claim.

20. It was also relevant to note that the applicant did not have the necessary experience to qualify for a Nursing Assistant Grade 2 or 3 as those positions require 10 and 20 years' experience respectively after registration with the Nursing Council. The applicant's opinion that she deserved to be placed on a Grade 3 position or that there was an expectation created of same, is therefore subjective as no proof of that exists.

⁶ Bundle A, page 14.

21. The correction in the appointment letter therefore does not constitute a demotion on the part of the respondent.

AWARD

22. The conduct of the respondent did not amount to an unfair labour practice in terms of section 186 of the Labour Relations Act, 66 of 1995.

23. The applicant's claim for relief is hereby dismissed.

Signature: _____



Commissioner: **Suria van Wyk** _____