



**PHSDSBC**

PUBLIC HEALTH AND SOCIAL DEVELOPMENT  
SECTORAL BARGAINING COUNCIL

# ARBITRATION AWARD

Commissioner: **Advocate Ronnie Bracks**

Case No: **PSHS9- 11/12**

Date of award: **29 October 2017**

In the matter between:

***Sithole, P***

(Applicant)

and

***Department of Health-Mpumalanga***

(1<sup>st</sup> Respondent)

and

***Department of Correctional Services***

(2<sup>nd</sup> Respondent)

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## **DETAIL OF HEARING AND REPRESENTATION**

- 1 The Arbitration was scheduled for hearing at the First Respondent's office at Sonjoy Building, Riverside, Nelspruit on various dates culminating on 2 October 2017. The Applicant was represented by Macbeth Ncongwane. Rickson Khoza represented the First Respondent and Godfrey Ramabasa represented the Second Respondent. *The proceedings were recorded both manually and electronically.*

## **ISSUE TO BE DECIDED**

- 2 I must determine whether or not the OSD is applicable in respect of the Applicant as per her referral form and whether the Respondents' conduct constituted an unfair labour practice.

## **BACKGROUND TO THE ISSUE**

- 3 The Applicant is currently employed at the Second Respondent in Nelspruit as a Professional Nurse. She was previously employed by the First Respondent from 1995. During July 2007 Resolution 3 of 2007 was passed which was an agreement on the implementation of an Occupational Specific Dispensation (OSD) for nurses. According to the Applicant the Respondent failed to correctly interpret the OSD or alternatively has not interpreted it at all in respect of her. This formed the basis of the dispute.
- 4 The matter was heard by the Labour Court on 8 February 2017 and a settlement agreement was reached between the parties that the dispute between the parties whether the OSD is applicable to the third respondent (Applicant) must be referred to arbitration for consideration or adjudication by a newly appointed arbitrator.
- 5 The parties were allowed to cross-examine and re-examine during the presentation of their evidence. Furthermore, the parties agreed to submit their closing arguments in writing by no later than 9 October 2017.
- 6 I have considered all the evidence and argument, but because the LRA requires brief reasons (section 138(7)), I have only referred to the evidence and argument that I regard as necessary to substantiate my findings and the determination of the dispute.

## SURVEY OF EVIDENCE AND ARGUMENT

### EVIDENCE

#### Documentary

10 Bundles of documents were submitted that were accordingly marked.

***\*\* As noted previously the proceedings were digitally recorded therefore what appears hereunder constitutes a summary of the evidence deduced by the parties in so far as is relevant for the purpose of this arbitration; it is by no means a minute of what transpired in the course of the proceedings.***

#### Applicant's evidence:

#### The Applicant, Phumzile Harriet Sithole after being sworn in testified as follows:

- 11 She is employed by the Department of Correctional Services (DCS) in Nelspruit as a Professional Nurse in Primary Health Care. She has been in the health care sector since 1995. She was a comprehensive student from 1997 – 2009 and became a Professional Nurse in 2003 and a midwife in 2007. She had 22 years' experience.
- 12 She understood that for OSD one had to have a speciality and she was sent to do Termination of Pregnancy (TOP) by the Department of Health (DOH). When she returned they told her they were going to translate her. She worked in the day ward dealing with day operations. She left her friend in the maternity ward; day ward was a speciality ward. She was dealing with primary health care nursing, doing family planning and operations. She was permanently in theatre and was there on her own. She was told this was a scarce skill in terms of OSD. When they implemented OSD she was shown the annual notch she was to get by Raubenheimer and this was R123 000. He told her she would get it via the bank in two weeks' time. She returned to the office to find that Raubenheimer had resigned and she was told he had gone with the computer. There were three of them: Sonnyboy Njiko, Constance Hlatshwayo and her.
- 13 She went to Rob Ferreira to fill in a BAS form. She was to be paid in 14 days' time but this didn't happen. After two months she followed it up and was told to go and speak to

Raubenheimer and if he wasn't there to speak to Khalishwayo. He told her that the person who had to assist her was Hawa. They phoned Hawa and she was not aware that Khalishwayo had put her on. Hawa told him that she knew the Applicant who was killing babies and there was no way she would get the OSD; she must go home. Khalishwayo tried to tell her that she was on loud speaker. She started crying and went home; she was feeling very emotional. If they took her to kill babies she would not have rendered the service.

- 14 She returned to Rob Ferreira and tried to explain to Matron Khoza. She told her that Hawa was right as what she was doing was against the bible and maybe the termination brought bad luck in terms of OSD. If the money is gone its gone and she didn't know where Raubenheimer is. She then decided to approach an attorney to assist her. When she went to the DCS she explained the whole story and they were willing to assist her but only if DOH responded positively otherwise there was nothing they could do - it depended on DOH. She was expecting DOH to communicate with DCS but she wasn't getting anything. According to DCS she was expecting them to implement the OSD. She was told they were late, they fell under the DOH and she would be compensated under the notch. When she arrived at the DCS her notch was R138 000. They told her it must be converted by the DOH and she was supposed to be at R265 000.
- 15 She didn't know why she wasn't translated. They told her she was a student and asked her which student was translated. Rickson came with R140 000. She then went to another lady in HR who gave her the notch she was expecting. Daphne got R264 285. They were in the same class and wrote the exam. Daphne doesn't have a speciality. She didn't understand because they were not telling the truth. The nursing manager said if she didn't run away they would have fixed the problem. They sent her to college and now she was qualified she was told she is doing the devil's work.
- 16 Since she has left no one has done the TOP training. She worked at the maternity ward for 14 months. They were students. According to the OSD whoever was there should have gotten it; they rendered a service for more than 12 months. There were two other applicants. Sonnyboy was consulting and left for National Laboratories and had no speciality. Constance Hlatshwayo transferred from Rob Ferreira to Johannesburg Hospital. None of them had a speciality. According to NEHAWU the DOH would settle for the two. She has been waiting since 2012 for the correction to be made. Whenever she met Khoza she would tell the Applicant that until she came to the hospital and fixed

the mess she made she would not get the OSD. There has been no formal communication from the DOH regarding the matter.

- 17 DCS did not convert her notch but Ramabasa constantly checked on the developments. She would like her notch to be adjusted like the other Primary Health Care people. Some were above R400 000 and she was above R240 000. She wants the department to convert her notch. She is a single parent and can't manage. She was represented by POPCRU.

**The Applicant called one witness who testified after being duly sworn in:**

**Daphne Fuwuela, testified as follows:**

- 18 She has been a professional nurse since 2003 and is employed at the DOH Rob Ferreira. She and the Applicant were in the same class at Rob Ferreira and they did midwifery in the same department. She explained her qualifications and gave a history of her and the Applicant's career paths while they were together.
- 19 In OSD they were told that if they worked in a speciality ward they would be given money. They were given just over R100 000 for the OSD in January 2007 and the department told them they would be given OSD. When they came to the hearing the Applicant told her that they all received it but she didn't because she was transferred to DCS.
- 20 While they were speciality nurses they worked at the children's ward; to work there you need to have done a speciality course.
- 21 She was referred to B15 and said she knew the document. It was an OSD payment she received in January 2011. She knew Constance Hlatswayo as she had worked with her. She wasn't sure what department they were in.
- 22 She was referred to B75 and said on 1 July 2010 she was on R107 000. After adjustment (2011) it went to R231 000 in 2012 and this was before she had the speciality. After she got the speciality it increased to R264 850. She was on R188 000. She specialised and they qualified together. This means that she didn't get the grandfather clause.

**The Respondent called one witness who testified after being duly sworn in:**

**Musa Petros Mlambo, Deputy Director, testified as follows:**

- 23 He confirmed his position and that he is responsible for checking all conditions of services which included OSD. He had worked in HR for 30 years and Resolution 3 of 2007 dealt with OSD. The information of the employee which is the Applicant, is contained on p.80. He then explained the content of the document pointing out that on 1 July 2007 the Applicant earned R87 960 per annum. When the OSD was implemented, which is phases 1 and 2, it took the employee from R87 960 to R106 086 for phase 1. This phase did not take into consideration the experience of the Applicant. In the second phase where the experience was considered the Applicant's salary moved to R109 269 per annum. This is clearly evidence that the OSD was implemented and everything was considered in doing it. There was a further adjustment to R112 548 where the Applicant's performance was considered.
- 24 He refuted the Applicant's evidence that the printout was not her's and explained that employees are identified by either a PERSAL or identity number. When either of these is entered into the system all of the employee's details are given. In addition, the system is also geared for identifying who the user was. He stated that even if the Applicant denied the content, the appearance of her number makes it genuine.
- 25 In respect of Daphne he said her salary was R264 285 for a clinical nurse in 2013.
- 26 The Applicant was transferred on 31 March 2009. The notch is for 2013 and the person at that notch could have studied further or have received a PHC qualification. Student midwives cannot be translated.

## **ANALYSIS OF EVIDENCE AND ARGUMENT**

- 27 The Labour Relations Act (LRA) prohibits unfair labour practices. An unfair labour practice is any unfair act or omission at the workplace, involving: unfair conduct of an employer relating to the promotion or demotion or probation of an employee;
- unfair conduct relating to the provision of training of an employee;
  - unfair conduct relating to the provision of benefits (for example, pension, medical aid, etc.) to an employee;
  - unfair disciplinary action against an employee (short of a dismissal). For example, a final written warning or unfair suspension;
  - the refusal to reinstate or re-employ a former employee in terms of any agreement. For example, a retrenchment;

- an occupational setback in contravention of the Protected Disclosures Act (No 26 of 2000) because an employee has made a protected disclosure defined in that Act. For example, an employee is denied overtime because he made a disclosure in terms of the 'Disclosure of Information Act.'

28 The definition of unfair labour practice is limited with reference as to what it in fact entails as well as the scope of its application since not everyone can rely on the provisions for protection.

29 The issue which I am required to determine is whether or not the Applicant was entitled to receive her OSD and if the First Respondent had acted unfairly.

30 I need to state at the outset that the matter mainly focussed on the omission of the First Respondent and was not against the Second Respondent.

31 In order to make the determination required in 29 above, during the evidence I was presented with PHSDSBC Resolution 3 of 2007 which provides under section 3.2.5.2

3.2.5.2 Translation could be done by means of two phases (steps).

(i) 1st Phase:

Minimum translation to the appropriate salary scale attached to posts (and grades in respect of production levels, as contained in Annexure B to this agreement. This implies an implementation adjustment in salary to at least the next higher notch on the salary scale attached to the post to which the employee is translated.

(ii) 2<sup>nd</sup> Phase (in respect of production levels/grades):

Re-calculation of relevant experience obtained by a person who occupies a post on a production level after registration in the relevant nursing category, based on full years' service/experience as on 31 March 2007, in order to award a higher salary at a production level subject to and within the limits of the measures for such recognition contained in Annexure C. If the nurse is eligible for a higher notch on the scale attached to the specific grade or for

translation to a higher grade (scale attached to the higher production grade) in terms of the re-calculation in terms of limits of the measures for such recognition contained in Annexure C, then the higher notch or grade in terms of the re-calculation basis applies.

### 3.2.5.3 Translation of Professional Nurse (Registered Nurse) to specialty posts

(i) A Professional Nurse (Registered Nurse) who occupies a post in a nursing specialty and who -

a. is in possession of a **post-basic clinical** nursing qualification listed in Government Notice R212, as amended, shall translate to the appropriate specialty post; and

b. is not in possession of a post-basic clinical nursing qualification listed in Government Notice R212, as amended, but who has been permanently appointed **in a post in a specialty unit and has been performing these duties of the specialty post satisfactorily on 30 June 2007. shall be translated as a once-off provision to the first salary scale attached to the production level.** (emphasis during the evidence)

32 Reference was also made to section 3.3.3 which stipulates "As the accelerated grade progression for employees will be based on above average performance for a cumulative period of 4 years in their respective grades, and also noting that certain departments have not assessed nursing staff consistently since the introduction of departmental performance management and development systems, the provision for accelerated grade progression will only be effective from 1 April 2012 - based on the performance assessment cycles 1 April 2008 to 31 March 2009, 1 April 2009 to 31 March 2010, 1 April 2010 to 31 March 2011 and 1 April 2011 to

31 March 2012, based on assessment in terms of the Performance Management and Development System for nursing personnel.. Employees on production levels where grade progression opportunities exist will in terms of the OSD, first qualify for accelerated grade progression on 1 April 2012.”

33 The Applicant was adamant that during her consultation with the First Respondent the system reflected that she didn't qualify for OSD, but she presented no evidence to support this. In fact, her own witness initially supported this contention but later during cross-examination conceded that the Applicant was in fact translated after she was referred to document 74 which is the PERSAL service record of the Applicant.

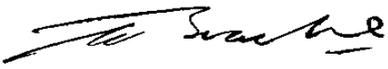
34 In respect of this document the testimony of Mlambo was that “... on 1 July 2007 the Applicant earned R87 960 per annum. When the OSD was implemented, which is phases 1 and 2, it took the employee from R87 960 to R106 086 for phase 1. This phase did not take into consideration the experience of the Applicant. In the second phase where the experience was considered the Applicant's salary moved to R109 269 per annum. This is clearly evidence that the OSD was implemented and everything was considered in doing it. There was a further adjustment to R112 548 where the Applicant's performance was considered.” It is therefore evident that the First Respondent had complied with the requirements of section 3.2.5.2 of PHSDSBC Resolution 3 of 2007.

35 However, the Applicant challenged the voracity of this evidence, alleging that the First Respondent cannot be trusted and hence the information also cannot be trusted. She could however, not present me with any other evidence and in the absence thereof, I have no other choice but to accept the record. In the light thereof, it is clear that the Applicant was translated in terms of Resolution 3 of 2007.

36 The Applicant has therefore failed to discharge the onus of showing that the First and Second Respondents had committed an unfair labour practice.

## AWARD

- 37 The Applicant failed to prove that the Respondents' conduct constituted an unfair labour practice.
- 38 The Applicant's case against the Respondents is dismissed.



Adv. **RONNIE BRACKS**

**PHSDSBC Panelist**