



PHSDSBC

PUBLIC HEALTH AND SOCIAL DEVELOPMENT
SECTORAL BARGAINING COUNCIL

ARBITRATION AWARD

Panellist: **JOSEPH MPHAPHULI**

Case No: **PSHS951-16/17**

Date of award: **29 June 2017**

In the matter between:

PSA obo Mtsweni, M.V.D

(Union/ Applicant)

and

Department of Correctional Services – Mpumalanga

(Respondent)

1. DETAILS OF HEARING AND REPRESENTATION

1.1 The hearing was conducted at Barberton in Mpumalanga and on 15 June 2017. The hearing was conducted in terms of Section 191 of the Labour Relations Act 66/1995.

1.2 Mr. Flip Van der Walt official of PSA appeared on behalf of the Applicant. The Respondent was represented by Mr. Elvis Mkhabela, an employee in the service of the Respondent.

1.3 The proceedings were digitally recorded.

2. ISSUE IN DISPUTE

2.1 I had to determine whether there was an unfair labour practice or not, if so, what remedy would be appropriate

3. BACKGROUND TO THE DISPUTE

3.1 The Applicant was appointed on 01 October 2015. The Applicant provided health services to the inmates and was remunerated at R 246 000.00.

3.2 The Applicant sought that he be appointed as clinical nurse practitioner as was previously the case before the demotion.

4. SURVEY OF EVIDENCE

4.1 The Applicant testified in his case. The Applicant responded to an external job advert. The advertised post was for a clinical nurse practitioner. Requirements were in short: a recognised three-year degree/ diploma in nursing or an equivalent qualification plus registration with the SA Nursing Council as a professional nurse.

4.2 He met all the specified requirements. As a result he was shortlisted, interviewed and was appointed to the advertised position on 01 October 2015.

4.3 The advertised salary was R275 571.00 per annum. The salary increased to R294 861.00 per annum at the time of his appointment. He rendered services as a clinical nurse practitioner until he was served a letter stating that his appointment was defective. He received the letter in July 2016.

4.4 According to the letter he was overpaid for the duration of his appointment as a clinical nurse practitioner. He received a new appointment in August 2016 with a reduced salary. He was referred to as a professional nurse grade 1 in the letter effective 01 August 2016. The salary at which he was appointed was R 213 978.00.

4.5 The deductions for the alleged overpayment commenced in December 2016 and for the period October 2015 to July 2016.

- 4.6 To date an amount of R 30.000.00 has been deducted from his salary including the amount deducted from his bonus in December 2016.
- 4.7 The Respondent opted not to cross examine the Applicant or to lead evidence of its own. Instead the Respondent intimated that it would present its case in the form of closing argument following its failure to secure postponement.
- 4.8 The request for postponement was based on the Respondent's wish to step up its preparations in defence of the unfair labour practice claim and suggested reasonable prospects for a settlement.
- 4.9 Although the Applicant Party did not oppose the application, the application lacked a factual and legal basis to succeed. At any rate the fact that an opposing party does not object to a postponement only serves as a favourable factor in considering an application for postponement and not a determining factor.
- 4.10 The decision to postpone rest with the arbitrator seized with the matter who should exercise the discretion judiciously.
- 4.11 I have on account of lack of merit turned down the application.

5. ANALYSIS OF EVIDENCE AND SUBMISSIONS

- 5.1 I only had a single version presented before me and this was the Applicant's version. The Applicant's version was not at all contested, contradicted or controverted. The Applicant's version remained untested and untainted at the conclusion of the Applicant's testimony.
- 5.2 I had no reason to doubt the veracity of the Applicant's testimony and the fact that this version was presented in an opposed process made it the more reliable and conclusive of the matter in dispute.
- 5.3 The essence of the Applicant's testimony was that he responded to an advertisement for the position of a clinical nurse practitioner. The Applicant was appointed on merit.

For inexplicable reasons the Respondent saw it fit to remove him from the advertised position and placed him in a lower position.

5.4 The Applicant found the Respondent's act to be irrational and factually and legally unjust. The reason advanced by the Respondent for demoting the Applicant was that the Applicant did not possess a material qualification to be appointed to the post.

5.5 The Respondent's argument was however not consistent with the main specifications on the advertisement.

5.6 The Respondent must stand or fall by its advertisement. As matters stood the Applicant was a complete fit for the advertised position. The appointment was fair and legitimate.

5.7 The Respondent's representative sought to introduce new evidence in his closing argument by way of a job advertisement. On the face of it the job advertisement with additional qualification requirements to suit the Respondent appears to be unrelated to the position for which the Applicant applied. The document reads in bold letters that it is a draft and could have never served as an advert.

5.8 At any rate the job advertisement incidental to the dispute was presented at arbitration and was not at all disputed. The Respondent lacked the courage of its conviction by not presenting its own the job advertisement at arbitration for it to be tested. I accordingly reject the document as superfluous material that does not meet the test of evidentiary material. Closing argument does not open the door for new evidence.

5.9 The decision to relieve the Applicant of his duties as a clinical nurse practitioner was devoid of merit, unjust, irregular and unfair and stands to be reversed.

6. RELIEF

6.1 The Applicant is entitled to the relief sought.

6.2 To this end it is my conclusion that the Respondent must pay the Applicant all the monies deducted from the Applicant's salary in the guise of overpayment totaling R30 000.00 at the time of arbitration. The Applicant also wished to be paid the difference between what he was paid and what he would have earned had it not been for the unfair demotion.

6.3 The amount in question being the difference between R294 000.00 and R213 978.00 effective August 2016 up to and including the date of arbitration. The difference amount to R 80.022.00 plus R 30.000.00 (deducted from the Applicant's salary following the demotion) = R110 022.00.

7. AWARD

7.1 There was an unfair labour practice as contemplated by Section 186 (2) (a) of the Labour Relations Act.

7.2 I order the Department of Correctional Services- Mpumalanga to reinstate Mr. Mtsweni MVD to the position of clinical nurse practitioner with attendant benefits and conditions by no later than 01 August 2017.

7.3 The Respondent must simultaneously pay Mr. Mtsweni an amount of R110 022.00 for the unjustified demotion and arrear salary in order to place the Applicant in the financial position that he would have been had it not been for the unfair demotion.



Joseph Mphaphuli

Signed

PHSDSBC Panelist

29 June 2017