



ARBITRATION AWARD

Commissioner: LINDIWE MAKHANYA

Case No: PSHS998-16/17

Date of award: 6 November 2017

In the matter between:

HOSPERSA obo MHLONGO, A.D

(Applicant)

and

DEPARTMENT OF HEALTH- KWAZULU NATAL

(Respondent)

DETAILS OF HEARING AND REPRESENTATION

1. This is an arbitration award in the compulsory arbitration hearing in terms of Section 74 of the Labour Relations Act of 66 of 1995 (as amended), and in the matter between the parties as set forth above was held under the auspices of the Public Health and Social Development Bargaining Council ("the Council"). The hearing was held on 30 August 2017 and 25 October 2017. It was held at the premises of the Respondent, Doctor's Quarters in Durban.
2. The Applicant, Ms. Mhlongo, was represented by Mr. W. O. Baloyi, a Union Official from HOSPERSA and the Respondent, Department of Health-

Kwazulu Natal, was represented by Mr. S Nene, an Assistant Director; Labour Relations. The proceedings were digitally recorded.

PRELIMINARY ISSUES, JURISDICTION and ISSUES TO BE DECIDED

3. No preliminary or jurisdictional issues were raised and Public Health and Social Development Sectoral Bargaining Council has jurisdiction to hear the matter.
4. I am enjoined to determine whether the Respondent has unilaterally changed terms and conditions of the applicant's employment, if so, determine the appropriate relief.

SURVEY OF EVIDENCE AND ARGUMENT

5. The Applicant presented a bundle of documents which was marked "A" and the Respondent presented bundle "B". I was enjoined by both parties to accept the documents for what they purport to be and consider them to the extent that it may be required for purposes of this award. I will deal with these documents as they were dealt with by the parties.
6. The following is a brief summary of the relevant evidence led by the parties. It is not intended to be exhaustive; however, I have considered all the evidence led and arguments submitted in reaching my decision. Both parties submitted their closing arguments orally.

THE APPLICANTS' CASE

7. Ms. Mhlongo testified that she was employed by the Respondent on 1 December 1998. She stated that while working as an Assistant Nursing Manager for Critical Care and Trauma at Port Shepstone Hospital, she applied for the same position at Prince Mshiyeni Hospital and to which she was appointed and started duties on 4 April 2015.

8. She further testified that her role includes dealing with the critical care and trauma unit, which is mainly adult patients. She referred to page 24 of bundle “A” which is the structure that is being used for her position and not the structure on page 23 for the Neonatal ICU (NICU). According to her a person working in NICU requires an Advanced Midwifery Neonatal qualification which she did not possess. She submitted that page 24 of bundle “A” reflects a component number for her position, which was allocated to her by the Head Office which is Critical Care and Trauma. She further stated that Neonatal has its own Assistant Manager Nursing as reflected in bundle “A”, page 23. She did not understand why she was required to manage it.
9. She also testified that she was not qualified to do any work at the NICU as it was too risky and the Respondent was facing a lot of litigation in that unit. She did not resume work in the NICU because she refused to do so and had been constantly victimized by her Manager, who during the Performance evaluation in 2016 scored her zero in NICU duties.
10. 10. She testified that prior to the implementation of the Occupational Specific Dispensation (OSD) while working at Mahatma Gandhi hospital she had worked in the NICU, because this was permitted at that time, but changed after the NICU was classified under Specialty Nursing Stream in July 2007. After this introduction, she was required to look for a position in another hospital since she no longer qualified to work in the NICU, which she did and was later appointed at Port Shepstone hospital in critical care and trauma because that was where she qualified.
11. She also stated that the Respondent required her to work in the Short Stay Ward (SSW) which was also not part of her duties, her manager handed it to her without consulting with her. When she queried this, she was told that it was an extension of Trauma Unit, but at a later stage the CEO clarified that it fell under the surgical ward not the critical care and trauma unit. She required the Respondent not to change her original terms and conditions of employment.

12. Under cross examination, she reiterated that she was no longer qualified to work in NICU due to the implementation of the OSD in 2007 and that the job advertisement did not mention anything in this regard.
13. When asked about the document from the South African Nursing Council on page 3 of bundle “B” where it is stated that Intensive care units can also be classified according to the populations served e.g. Neonatal ICU and Adult ICU, she stated that it was a proposed document for the year 2019 curriculum which was not yet implemented. She maintained that the structure that was being used for her position only included critical care and trauma.
14. She further maintained that when she joined Prince Mshiyeni Hospital, she had engaged her supervisor that she was not qualified to work at NICU, but was unsuccessful, this resulted in her lodging a grievance which was also not resolved by the Respondent.
15. When asked the reason why her certificate of service indicated that she had worked in Port Shepstone hospital as an Assistant Nursing Manager - NICU as per page 29 of bundle “B”, she responded by saying that it was an error from HR department, she occupied a position of an Assistant Nursing Manager - critical care and trauma.
16. During re-examination, she maintained that the Respondent relied on the incorrect structure which did not pertain to her, page 14 of bundle “B” and furthermore that the information on the certificate of service which was issued by the Respondent’s HR department contained errors.
17. Ms. Ntokozo Chili, Sister in Charge at Prince Mshiyeni Hospital testified that the Applicant was a registered Nurse with Midwife and Critical and Care Diploma qualifying her to work in a specialized area ICU Adult not NICU. She further testified that the qualifications required for Neonatal were pediatric nursing, neonatal nursing care and advanced midwifery. She referred to Bundle “A”, page 24 (Structure) for critical care and trauma Assistant Nursing

Manager stating that nothing is said about Neonatal and that there was no reason for the Applicant to work there as it did not form part of her duties.

18. Under cross-examination she was asked if she was trained on the structure, she said no, but was shown by her Supervisor how it is interpreted. She reiterated that the Applicant was not responsible for NICU because she and other staff members were told before the Applicant commenced her duties that Ms. Khumalo was to be responsible for NICU and the Pediatric Unit. There was no re-examination.

THE RESPONDENT'S CASE

19. Ms. Busisiwe Mhlongo was the only witness, she testified that she occupied a position of Nursing Manager at Prince Mshiyeni Hospital and had been in the employment of the Department since 1978. She stated that the advert for the position occupied by the Applicant was created by her and that the Applicant was appointed in the position because she met all the requirements. She referred to page 23, bundle "B", Applicant's certificate of service which reflects that she worked as an Assistant Manager nursing-Neonatal ICU at Mahatma Gandhi Hospital.
20. She further testified that even if the Applicant had not worked at NICU before, she would have been employed in this position because she had worked at ICU which meant that she had pediatric, neonatal and maternity experience. She also stated that the document on page 12 and 13 of bundle "B" was valid and was presented by the South African Nursing Council prior to the appointment of the Applicant. The document states that NICU also forms part of Intensive Care Unit.
21. Before the Applicant had commenced her duties, she had inducted her and specifically indicated that NICU, Adult ICU and SSW fall under her responsibility. On May 2015, the Applicant allocated duties for NICU staff, page 30 of bundle "B", however on July 2015 the Applicant started neglecting

her duties claiming that NICU and SSW were not her areas of work. Staff in these two units were left unsupervised, this had a serious impact especially in the NICU as a high-risk area and had seen an increase in mortality.

22. She further testified that on February 2016, she wrote a letter to the Applicant, page 35 of bundle “B” requesting an explanation as to why she had neglected NICU and SSW, to which she did not get any response. She stated that after the Applicant lodged a grievance, a meeting was held with a committee which created the structure where it confirmed that she was in charge of NICU according to the structure at Prince Mshiyeni Hospital.
23. During cross-examination, when asked if the component number on pediatrics & neonatal were the same on the structure as that of critical care and trauma, page 23 and 24 of bundle “A”, she said no. When also asked if the Applicant was furnished with a job description stating that she was to be in charge of NICU and SSW, she said no, but the advert was designed in accordance with the establishment of the department. She also claimed that it was not possible for the department to include all the duties to be performed by the Applicant on the job advert.
24. She conceded that NICU was not appearing on the structure, but it formed part of critical care and trauma and this was also approved by the South African Nursing Council. Also, she conceded as per Human Resource Management circular no 68 / 2008 document that the OSD was implemented, but was no longer used as it was replaced by the structure.
25. During re-examination, she maintained that the Applicant was responsible for NICU and SSW, but was not required to have Neonatal Care qualification which was the reason why she was appointed being in possession of critical care qualification.
26. She also reiterated that the document from the South African Nursing Council on page 12 of bundle “B” was valid because such documents are only published once they have been approved by the Council.

ANALYSIS OF EVIDENCE AND ARGUMENT

27. I have taken note of section 64(4) of the Act, which states that “any employee who or trade union that refers a dispute about unilateral change to terms and conditions of employment to a council or the Commission in terms of subsection (1) (a) may, in the referral, and for the period referred to in subsection (1) (a)-
- (a) require the employer not to implement unilaterally the change to terms and conditions of employment: or
 - (b) if the employer has already implemented the change unilaterally, require the employer to restore the terms and conditions of employment that applied before the change.
28. In *Intercape Ferreira Mainliner v Numsa LC* (C179/ 2015) the court held that the starting point in order to consider whether the drivers terms and conditions of employment have been altered, is to consider what they were before. In the current case, the following are common cause:
- 28.1. The job advert and the Applicant’s offer of employment stated “Assistant nursing manager- critical care and trauma”. It did not mention NICU and short stay ward.
- 28.2. The Applicant was never given a job description and also the Applicant was verbally informed by her supervisor during the induction that she was to manage critical care and trauma, neonatal ICU and short stay ward.
29. The Applicant claimed that the structure of the department for her position did not include NICU and SSW. She further claimed that her qualifications did not allow her to work at NICU due to the implementation of OSD in 2007. On the other hand, the Respondent argued that the Applicant met all the requirements as she had worked at NICU in her previous positions and that the 2007 OSD was no longer applicable. It must be noted that the crux of the matter is whether the Respondent unilaterally changed the terms and

conditions of the Applicant's employment and not to decide whether the OSD is applicable or not.

30. The Applicant argued that offer of her employment did not mention NICU and SSW which means she was not supposed to manage these two units because they did not form part of her duties. The Respondent's witness argued that it was not possible that all duties be included in the structure and that it was her responsibility to allocate duties to employees according to the needs of the Respondent. The testimony of the Applicant also revealed that NICU forms part of the Critical Care and Trauma because she was scored on it by her supervisor during performance evaluations. The Applicant claimed that the structure did not include NICU. She also referred to her previous position at Port Shepstone hospital where she did not perform such duties. In my view it is the management's prerogative to determine the methods by which jobs are to be performed. In *Cele and others v Eskom Holdings SOC Ltd* LC (JS1086/12) (2015) ZALCJHB 271, the court held that the terms and conditions of employment are mostly established in a written contract of employment. The court emphasized that for there to be a change in an employee's terms and conditions of employment, there would have to be a change in the employee's contractual rights. In this case the Applicant did not provide any evidence that the Respondent unilaterally changed terms and conditions of her employment. No contract of employment was provided to show that there was a change to terms and conditions of her employment.

31. The testimony of the Respondent's witness revealed that the Applicant was informed of her duties during induction, the question that needs to be answered is whether or not the Respondent altered the Applicant's terms and conditions of her employment. The Applicant argued that NICU and SSW were not part of her duties, but the Respondent claimed that it was part of her duties from the beginning of her contract. The Respondent further claimed that in May 2015, a month after the Applicant started in her position she was allocated work for the staff in the NICU, but later decided to neglect her duties. In *Staff Association for the Motor and Related Industries (SAMRI)*

v Toyota of South Africa Motors (Pty) Ltd 1998 it was held that in terms of Section 64, an employee must show firstly, that unilateral changes were effected to the terms and conditions of the employment contract and secondly, that there was no consent to the changes. The Applicant knew from the day she started in her position what her duties would entail, but believed that she was not qualified to perform them, therefore, it cannot be said that the Respondent should be required to restore the original terms and conditions of employment when they have never been altered in the first place.

32. Clearly, the Applicant's contention that there had been a change in employment conditions is incorrect. Both parties have a different view on whether NICU and SSW fall under Critical care and Trauma, and even if it so, the scope of work for which the Applicant would be responsible, was discussed at the outset of her employment and it was clear from the testimony of the Respondent's witness that the operational needs of the hospital dictated that NICU and SSW fall under Critical Care and Trauma, so for the Applicant to claim that the Respondent altered her terms and conditions of employment is not correct.
33. The Applicant's main argument is that she does not qualify to work with NICU patients which is the reason she did not want to perform duties there, but it is not clear why she also refused to manage the SSW. The Applicant was unable to point to any term contained in her contract of employment that accords her a vested right to only perform duties at critical care and trauma. It is my view that the Respondent did not alter the duties of the Applicant - it is the same work that the Applicant had agreed to perform under the terms of her service from the date she resumed her duties.
34. The Applicant failed to prove that the Respondent unilaterally changed the terms and conditions of her employment.

AWARD

35. There was no unilateral change to terms and conditions of the Applicant's employment.
36. The Applicant is not afforded any relief and her claim is hereby dismissed.

LINDIWE MAKHANYA
COMMISSIONER