



# ARBITRATION AWARD

COMMISSIONER: JANINE CARELSE

CASE NO: PSHS1004-17/18

DATE OF AWARD: 1 JUNE 2018

In the matter between:

**NEHAWU obo MNIKELO MQIKELA**

**APPLICANT**

and

**DEPARTMENT OF SOCIAL DEVELOPMENT- WESTERN CAPE**

**1<sup>ST</sup> RESPONDENT**

and

**DPSA**

**2<sup>ND</sup> RESPONDENT**

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## DETAILS OF HEARING AND REPRESENTATION

1. The matter was scheduled for an arbitration hearing into the interpretation or application of a collective agreement dispute, referred in terms of section 24 of the Labour Relations Act 66 of 1995, as amended (the LRA), was held at the respondent's premises, the Department of Social Development, Cape Town, on 24 May 2018 under

the auspices of the Public Health and Social Development Sectoral Bargaining Council (PHSDSBC).

2. The applicant, Mr Mnikelo, a member of NEHAWU, was represented by Mr P Rali, a union official; while the first respondent, The Department of Social Development- Western Cape, was represented by its labour relations official, Ms Ashiqa Champion. The second respondent, the DPSA, was represented by Ms Nozinhle Mzinyanae, its labour relations official. The DPSA was joined to these proceedings as the second respondent.
3. The proceedings were conducted in English and manually and digitally recorded.
4. All of the parties handed in bundle of documents which they relied on as documentary evidence. The applicant's bundle was marked "bundle A", the first respondent's bundle "bundle B" and the second respondent's bundle "bundle C". The contents of all the documents were accepted to be what they purported to be.
5. The parties requested to file their written closing arguments by no later than 31 May 2018. I have received all of the parties written closing arguments.

### **ISSUE TO BE DECIDED**

6. The interpretation and application of PHSDSBC Collective Agreement No. 1 of 2014 herein referred to as "Resolution 1 of 2014." It relates to the payment of a once-off cash bonus when an employee attains an improved qualification that relates to his/her work and that has the effect of enhancing an employee's performance and services delivery. Therefore, the question is whether or not the respondent correctly applied the Resolution when it failed to pay the applicant a once-off cash bonus when he attained a BTech degree in Public Management.

## **BACKGROUND AND COMMON CAUSE FACTS**

7. The applicant is currently employed as a Deputy Director in Partnership Development since 2009.
8. The applicant averred that he qualifies for the once-off cash bonus in terms of Resolution 1 of 2014, in that he has attained an improved qualification that relates to his scope of work. He made an application for the said cash bonus and his application was declined. He then decided to refer this dispute.
9. In terms of Clause 4.1.1 read with clause 4.1.2, the first respondent will recognise the attainment of an improved qualification that is related to the employee's scope of work and enhances the employee's performance and service delivery. On attainment of the said qualification the employee will receive a once-off cash bonus of 10% of his/her annual salary notch, provided it does not exceed the minimum notch of salary level 8, payable with effect from 1 January 2013.
10. The applicant claims that the first respondent is in breach of Resolution 1 of 2014 in that the first respondent has failed or refuses to pay him the bonus and he claims a once off cash bonus.

## **SURVEY OF SUBMISSIONS AND ARGUMENT**

### **Applicant's case**

11. The applicant testified under oath that he completed his BTech degree in 2012 and obtained his degree in April 2013. He averred that he believes that he does qualify for the cash bonus as stated in the resolution. He referred to page 31 of bundle A which is a transcript of his academic results and stated that that was merely his academic results and he was only awarded his degree on 17 April 2012. He studied over a period of one year and there is no way that he could have been regarded as a graduate at the end of the year. It is only when he was issued with the certificate that he could be regarded as having obtained a degree in public management. He contended that he

referred this dispute because he noted that the first respondent had misinterpreted the resolution. He maintained that he completed his studies in December and attained his qualification in April 2013.

12. Under cross-examination by the first respondent he admitted that he had passed all of his subjects but denied that he qualified for his BTech on 1 December 2012. He stated further that if a person has not been issued with a certificate then you have not obtained or attained that degree and cannot be regarded as a graduate. If there is a post in the department then the department would not consider a report that you passed and that only a certificate would be sufficient. He averred that when he was finished writing his exams, he was only issued with a certificate in April 2013. He stated that perhaps the first respondent is deliberately misinterpreting the resolution. He agreed that the certificate indicated that the qualification is awarded with effect from 1 December 2012. No employer would consider his application for employment if he did not have that certificate. He contended that it is not of his own making and it is a technicality that must be addressed and that he has been prejudiced as a result.

13. Under cross-examination by the second respondent he stated that the reason why he is mentioning resolution 1 of 2012 is because it is not the first time that he has dealt with the resolution. According to the resolution it is clearly stated that the implementation is with effect from 1 January 2013 and the payment is with effect from that date. He averred that he became aware that he attained his qualification in January 2013. He denied that he was made aware in December 2012 already. He stated that he was shocked to see that he passed his exams in December 2012. He contended that completion and attainment have different meanings and that he completed his studies in 2012 but attained his qualification in 2013. He made his application for the cash bonus in 2016 and the first respondent sent him a letter that his application is declined. The reason that was given is that he attained his qualifications in December 2012 and he disputes this. He contended that there are two key-words that must be clarified and it is completion and attainment.

14. Under re-examination he stated that the process that is followed by CPUT is that there is no way that you can finish writing your exam and receive the qualification in the

same month. He contended that the BTech degree relates to his work and having the qualification was necessary and it enables him to deal with the public in general.

### **First Respondent's case**

15. Ms Anika Roodtman testified under oath and stated that she is the deputy director at the directorate of people empowerment and they are responsible for internships and bursaries. She stated that she dealt with the applicant's application for the once-off cash bonus. They will look at whether the qualification was obtained before or after 2013. If the person obtained his qualification before 2013 then the person will not qualify. The HOD and CFO will approve the amount that must be paid to the employee. She was referred to page 40 of bundle B and stated that the letter comes from her office and the letter informs the applicant that his application for the once-off cash bonus is declined because he obtained his qualification prior to 2013. According to page 49 of bundle B the applicant's degree was with effect from 1 December 2012. She averred that the graduation is merely a ceremony and if you look at page 50 of bundle B it is a statement of the applicant's results that the applicant was advised of and there it also states that the applicant qualified with a BTech as of 1 December 2012. When she was invited to a workshop one of the questions that were posed was whether they should work according to the qualification date or the graduation date and it was clarified that they should work according to the date that the employee qualified. She stated that on 1 December 2012 the applicant qualified and the resolution is clear that an employee must qualify after January 2013. The consequences of the applicant qualifying for the cash bonus would be that all employees who qualified in 2012 will also be eligible for the cash bonus.

16. Under cross-examination she stated that as soon as a person receives a statement of their record where it states that the person qualifies for BTech management then they can apply for a job. The graduation ceremony is a mere formality. She did not agree with the applicant's version that when the applicant received his certificate that he attained his qualification. In her mind the applicant had qualified with BTech in December 2012 already and this is in accordance with his academic results for that year. This is so because as soon as an institution certifies that the person qualifies

then the date is taken into account. The applicant's qualification has further indicated that the applicant qualified on 1 December 2012 and that is the date of attainment of the qualification. Clause 4.1.2 of the resolution refers to qualification and not certificate. According to the interpretation of paragraph 5.6 of the resolution the applicant completed and attained his qualification in 2012 and he only received his certificate in 2013. She is not sure why the applicant only received the results in January because it is usually given in December already. The applicant's results were confirmed on 1 December 2012 and stated that he qualified.

### **Second Respondent's case**

17. Mr Zamokwakhe Khuzwayo (Khuzwayo) testified for the second respondent and stated that he is a Director and responsible for HR, development management, strategy and policy. He stated that the role of the DPSA and the history of the resolution is part of the 2012 resolution and from there it was allocated to the different sectors of the PSCBC and the sectors include the GPSSB that deals with conditions of service and all of the employees of the Public service and also the corporate service people and policy making people. The PHSDSBC deals with the health and social development workers. The global resolution says that sectors must clarify what are improved qualifications and which are relevant to their respective work. Section 4.1 of the PSA states that a determination may be issued in order to implement the Collective Agreement properly and the idea is to ensure proper application and interpretation. The role of the DPSA is to ensure that there has been proper interpretation and application of the Collective Agreement. First they draft and issue circulars that defines processes and procedures and indicate where applicable the role players and then they undertake workshops of all departments involving the relevant officials who are selected by the departments. He was referred to Bundle C and stated that they issued a circular when they realised that the departments were having difficulties. The circular was to clarify the PSC and GPSSBC. The resolutions are all connected to the PSCBC resolution and they cannot deviate from that intent and purpose of the original resolution, only on minor adjustments. The majority of the people employed in terms of public health and social development is on OSD posts and they have a predefined career path and different requirements applies and they will not qualify for the cash bonus. Furthermore, if for example a person is not in an OSD post then the person can be considered under GPSSBC for cash bonus. The original resolution indicates

that it operates with effect from 1 January 2013. Page 33 of bundle B at paragraph 7.4. further provides that the resolution is with effect from 1 January 2013. In terms of clause 7.2 of the resolution the whole idea is that it was introduced effective from 1 January 2013 and they use the word attainment which means that when a person attains a qualification it means that anyone who attains it before the specified period on 1 January 2013, that person would not qualify. Attainment happens when a person meets the requirements for a qualification and institutions usually have a graduation ceremony thereafter. Some people do not attend the graduation ceremony for various reasons and that does not mean that if you cannot attend that you did not attain the qualification. He averred that the graduation is an event that does not add anything on top of the qualification which has already been achieved. According to page 1 of bundle A the applicant attained his qualification in December 2012 and the resolution took effect on 1 January 2013. He contended that if the attainment and graduation is conflated then you run the risk with institutions who hold the graduation ceremony immediately afterwards which means that some employees would be excluded. The date of attainment is the date that the institution confirmed that the applicant attained his qualifications. He further stated that the applicant could have applied for a position because he achieved the qualification from 1 December 2012.

18. Under cross-examination he stated that the date is critical because they have to have some kind of gate keeping otherwise they will have somebody who studied in 1960 applying. The applicant could for whatever reasons not attend the graduation ceremony but the qualification could have been posted to him. The graduation ceremony by law is not an arbiter of whether the person achieves or not. The applicant knew before that he had met the requirements for the qualification. He was referred to page 11 of bundle A and stated that attainment means to achieve and means earned and it does not mean giving something. He contended that the purpose of a government policy is always underpinned by the principles of fairness, justice and equity. If they become aware that the departments are not adhering to the circulars then they will intervene. Although the minister has got the powers in terms of sections 3.1 to elucidate and issue the circulars. They also have an obligation to see to it. Where they are not aware of a breach of a resolution then the functionary is in breach of the resolution.

## **Closing Arguments**

19. I acknowledge the parties' comprehensive written closing arguments. Essentially, each party wants me to rule in their favour. I do not wish to repeat their arguments and submissions. I have decided to deal with them in my analysis of the evidence and arguments.

## **ANALYSIS OF SUBMISSIONS AND ARGUMENT**

20. The golden rule in interpreting collective agreements is that words must be given their everyday ordinary meaning. If the language is clear it must be given effect to, even if the results may be harsh, unfair or inconvenient. The nature of the dispute before me is whether the first respondent was in breach of Resolution 1 of 2014, when it failed to pay the applicant a once-off cash bonus in terms of Clause 4.1.1 read with 4.1.2 of Resolution 1 of 2014.

21. It is common cause that clause 4.1.1 read with 4.1.2 of Resolution 1 of 2014 provides that the first respondent will recognise when an employee attains an improved qualification that relates to that employee's scope of work and that has the effect of enhancing that employee's performance and service delivery. Upon the attainment of such qualification, the first respondent will pay the employee a once-off cash bonus that is equivalent to 10% of that employee's annual salary notch, except if it exceeds the minimum notch of salary level 8.

22. It is not in dispute that the applicant has attained an improved qualification when he obtained a BTech degree in Public Management. It is further common cause that this qualification enhances the applicant's performance in his current position.

23. The response that the applicant received from HR was that his application for the said once-off cash bonus was declined because he obtained his BTech degree prior to 1 January 2013, which is when Resolution 1 of 2014 came into effect. The applicant's

case is that he completed his qualification in December 2012, but that he only attained his qualification in 17 April 2013 when it was awarded to him in a graduation ceremony. The first and second respondent's case is that the applicant completed and attained his BTech qualification in December 2012 when he received his results and confirmation that he qualifies for BTech.

24. According to the applicant's statement of academic results, he qualified for BTech: Public Management on 1 December 2012, which qualification was formally awarded to him on 17 April 2013. According to the applicant's degree itself, it states that the applicant's qualification is with effect from 1 December 2012. I agree with Khuzwayo when he testified that "attainment happens when a person meets the requirements for a qualification and institutions usually have a graduation ceremony thereafter. Some people do not attend the graduation ceremony for various reasons and that does not mean that if you cannot attend that you did not attain the qualification. He averred that the graduation is an event that does not add anything on top of the qualification which has already been achieved." When the applicant qualified for the BTech : Public Management degree on 1 December 2012 that is when he attained his qualification. Attained means to achieve, to accomplish, to acquire and to reach and when the applicant qualified for his BTech degree in December 2012, he achieved and accomplished this qualification. He did not accomplish it when he was formally awarded with a certificate at the graduation ceremony. As Khuzwayo rightly stated, the graduation is merely a formality and does not add anything to the qualification or degree itself.

25. In the result, I do not agree with the applicant's argument that he attained his degree at the graduation ceremony on 17 April 2013. The applicant completed and attained his qualification on 1 December 2012 which is prior to the coming into effect of the Resolution 1 of 2014. The resolution is clear that it comes into effect on 1 January 2013 and that it applies to qualifications completed and attained after 1 January 2013. The graduation ceremony is a formality where the applicant's qualification was handed to him in the form of a certificate. The applicant had however prior to that already attained the qualification.

26. Having considered the parties' submissions and documentary evidence before me, I find that the respondent interpreted and applied Resolution 1 of 2014 correctly. The applicant is not entitled to the once-off cash bonus.

**AWARD**

27. The respondent correctly interpreted and applied Resolution 1 of 2014.

28. The application for arbitration is dismissed.

**COMMISSIONER**

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**Janine Carelse**