



PHSDSBC

PUBLIC HEALTH AND SOCIAL DEVELOPMENT
SECTORAL BARGAINING COUNCIL

ARBITRATION AWARD

Case No: PSHS1227-16/17

Panellist: Thando Ndlebe

Date of Award: 12 June 2017

In the matter between:

NEHAWU obo SOQAKA, PULENG

APPLICANT

and

DEPARTMENT OF HEALTH- FREE STATE

RESPONDENT

DETAILS OF HEARING AND REPRESENTATION

1. The matter was sat down before me as an arbitration process on 26 May 2017 in Bloemfontein. The Applicant, Ms. Puleng Soqaka, was present and was represented by Mr. Khuzane Mjwayi, an official of the National Education, Health and Allied Workers Union (Nehawu).
2. The Respondent was represented by Ms. M. Moko, its Senior Labour Relations Officer.
3. The parties submitted bundles of documents and same were admitted and marked as **Applicant's Bundle "A"** and **Respondent's Bundle "B"**, respectively.

ISSUES TO BE DECIDED

4. I am required to determine whether or not the Respondent has properly interpreted or applied Resolution 1 of 2002. In the event I decide in favour of the Applicant, that I make an appropriate award.

BACKGROUND TO THE DISPUTE

5. The Applicant was appointed by the Respondent on 11 August 2011 and is currently holding the position of Supply Chain Clerk. The Applicant is currently earning an annual salary of R134 379.00. The Applicant was appointed to act in the position of State Accountant with effect from 28 October 2015 by an Assistant Manager. The Applicant's appointment into the acting position of State Accountant was uplifted by the Respondent on 31 July 2016. The Applicant's claim is that the Respondent is liable to pay her an acting allowance for the period she was appointed into the position of State Accountant. The Respondent's position is that there is no acting allowance due to the Applicant, as the Manager who appointed her into that position did not have authority to do so.
6. The Applicant's trade union referred the dispute to the Council as it believes that she is entitled to be paid an acting allowance for the period in dispute.

SUMMARY OF EVIDENCE AND ARGUMENTS

THE APPLICANT'S CASE

Ms. Puleng Soqaka

7. The Respondent appointed her as an Acting State Accountant, Level 7, on 28 October 2015. She was appointed into the position by Ms. Tsotetsi, the Assistant Manager-Finance. She was not aware that Ms. Tsotetsi did not have the authority from the Respondent to appoint her into the position of Acting State Accountant.
8. She was not aware of the delegations prescripts of the Respondent. She acted in the position in dispute for nine (9) months, namely from 28 October 2015 to 31 July 2016. She was not remunerated by the Respondent for acting as a State Accountant even though she held that position for more than six (6) weeks. She lodged a grievance with the Respondent in respect of her not being remunerated, She then received a response from the Respondent in a letter dated 11 August 2016, and as found at page 4 of Bundle "A", where she was advised she would not be remunerated as she was appointed by a person

who lacked the requisite authority to do so. Ms. Tsotetsi is four occupational levels above her in as far as the Respondent's staff establishment is concerned.

Under cross-examination, Ms. Soqaka responded as follows:

9. She was once appointed by a Manager to act on another position. In view of the fact that she has been within the employ of the Respondent for approximately six (6) years, she should have been aware of the delegation provisions. She thought that Ms. Tsotetsi had the authority to appoint her into the position in dispute. A Respondent's official cannot make an appointment of an employee without its approval. The Head of Department was supposed to have charged Ms. Tsotetsi with misconduct. The Respondent is supposed to remunerate her as she acted in the position of State Accountant.

THE RESPONDENT'S CASE

Ms. Mapule Makoa

10. A person being appointed to act into a higher post must be appointed by a person with authority to do so. The official who appointed the Appointed was a Level 9 employee, whereas the appointment was supposed to have been made by the District Manager. The appointment of the Applicant was not procedural and she is not entitled to any remuneration.

Under cross-examination, Ms. Makoa responded as follows:

11. A Collective Agreement supersedes any Internal Circular within the Respondent. A Collective Agreement is more binding on the Respondent. The District Manager was supposed have been aware of who was acting in the position in dispute. The District Manager was unaware that the Applicant was appointed into the position in dispute by an official without authority.

ANALYSIS OF EVIDENCE AND ARGUMENTS

12. In my analysis I have considered the evidence and written arguments from both parties.
13. The case of the Respondent is that Applicant was not appointed into the position of Acting State Accountant by a person with authority. In other words, Ms. Tsotetsi did not have the authority to appoint

the Applicant. It is common cause that the Applicant acted for a period of nine (9) months. Ms. Makoa stated that in terms of its Human Resources Delegations and as confirmed at page 2 of Bundle "B", the Applicant was supposed to have been appointed into the position in dispute by the Respondent's Chief Executive Officer or the District Manager. The Respondent's witness also submitted that a Collective Agreement supersedes the Respondent's Human Resources Delegations.

14. At paragraph 1 of Resolution 1 of 2002, Agreement on Acting Allowance, it is stated that "the purpose of this agreement is to determine a policy on acting allowance and compensation to be paid to an employee acting in a higher post". At paragraph 3.1 of Resolution 1 of 2002, it is further provided that "an EMPLOYEE appointed in writing to act in a higher grade than the grade of the employee by the Head of Department or his or her delegate at provincial level (here-after the "appointing authority") shall be paid an acting allowance to act in vacant posts provided that:

3.1.1 The post is a **vacant and funded post**;

3.1.2 The **acting** period is **longer than 6 weeks**;

3.1.3 The **appointing authority** is a **level higher than the acting appointee**.

3.1.4 The **EMPLOYEE** must accept the **acting appointment**". (**Emphasis**)

15. It can be inferred from paragraph 14 above that the Applicant's appointment fulfilled all the requirements in so far as paragraph 3.1 of Resolution 1 of 2002 is concerned. Moreover, the Respondent benefitted in terms of her skills when the Applicant acted into the position for approximately nine months. The District Manager should have been aware which employees were in acting positions. The submission by the Respondent that the District Manager was unaware that the Applicant was acting in the position of State Accountant does not make sense. It is my finding that it is probable that the Applicant was not aware that Ms. Tsotetsi did not have the authority to appoint her in to the position in dispute. The Applicant was far more junior to Ms. Tsotetsi and it could have been justifiable for her to have an innocent mistaken belief about the authority of Ms. Tsotetsi. In a matter concerning the binding effect of a settlement agreement, it was held *in Unicab Taxis (Pty) Ltd v Kammes (2000) 21 ILJ 2478 (LC)* that "the simple question was whether a reasonable man in the position of the respondent would have believed that Mullins had the authority to enter into and sign the settlement agreement. The Court found no reason to believe that the respondent could not rely on the fact that Mullins had been duly authorized to do so. Accordingly, the applicant could not escape the consequences of the agreement on this ground either".

16. It is therefore my finding that the Respondent is liable to remunerate the Applicant for the period she acted into the position of State Accountant. Whether the Respondent should effect recovery or recourse against Ms. Tsotetsi is another issue that was not placed before me by the parties. However, I am satisfied that the Respondent is liable to reimburse the Applicant for the period she acted as State Accountant. I want to put it on record that I was not addressed by the parties during the arbitration proceedings on the quantum of the acting allowance.

AWARD

17. The Respondent is ordered to compensate the Applicant with an acting allowance for the period from the 28th October 2015 to the 31st July 2016.

18. The Respondent is ordered to pay the acting allowance due to the Applicant mentioned above by the 30th June 2017.

A handwritten signature in black ink, appearing to read 'NDLEBE', is written over a horizontal line. The signature is stylized and cursive.

PANNELIST: THANDO NDLEBE