



ARBITRATION AWARD

Case No: **PSHS1172-16/17**

Commissioner: **Suria van Wyk**

Date of award: **15 June 2017**

In the matter between:

PSA obo A Petrus and 1 other

(Union/ Applicant)

and

Department of Health – Free State

(Respondent)

DETAILS OF HEARING AND REPRESENTATION

1. The arbitration hearing convened on 19 May 2017 at Bophelo House in Bloemfontein. The parties agreed to argue the matter in writing and a ruling regulating the submissions was issued. Arguments were submitted timeously by all parties.
2. Mr J Greeff, from PSA, represented the applicants and Mr M Supi appeared on behalf of the respondent.

ISSUE TO BE DECIDED

3. The dispute related to the interpretation and application of a collective agreement (section 24 of the LRA) and in particular, the interpretation and application of Resolution 3 of 2009: Occupational

Specific Dispensation for Medical officers, Medical Specialists, Dentists, Dental Specialists, Pharmacologists, Pharmacists and Emergency Care Practitioners.

4. The applicants sought to be upgraded from *Basic Pharmacist Assistants* to that of *Post Basic Pharmacist Assistant*.

BACKGROUND TO THE ISSUE

5. The applicants in this matter are:

- 5.1. Ms Anita Petrus

- 5.2. Ms Carolina Frederika (Rika) Arnold

6. A dispute about the interpretation and application of the collective agreement was referred and after a certificate of non-resolution was issued, the matter was thereafter referred to arbitration.

SURVEY OF EVIDENCE AND ARGUMENT

7. The matter was argued in writing and therefore no *viva voce* evidence will be recorded. A brief summary of the arguments of the parties will be provided.

Applicant's Submissions:

8. Ms Anita Petrus, qualified as a *Post Basic Pharmacist Assistant* and she was registered as such with the South African Pharmacy Council (SAPC) on 16 August 2014. She was appointed as a *Basic Pharmacist Assistant* in Port Elizabeth at Jose Pearson TB Hospital. Her lateral transfer to Universitas Hospital into the position of *Basic Pharmacist Assistant, Grade 3* was approved on 20 March 2015 and she assumed duty on 1 May 2015. In terms of Part D1 of the Collective Agreement, she was never upgraded to the salary level of a *Post Basic Pharmacist Assistant*, whilst she was performing all the functions of a *Post Basic Pharmacist Assistant*. This should have been done with effect from 1 May 2015 when she was transferred to Universitas Hospital. The Pharmacy Manager recommended that she be upgraded to the position of *Post Basic Pharmacist Assistant*.

9. Ms Carolina Frederika (Rika) Arnold, qualified as a *Post Basic Pharmacist Assistant* and she was registered as such with the South African Pharmacy Council (SAPC) on 30 July 2011. She was trained as a *Pharmacists Assistant* and appointed in the Xhariep District. Her lateral transfer to Universitas Hospital into the position of *Basic Pharmacist Assistant* was approved on 7 July 2010 and she assumed duty on 1 August 2010. She was currently on a level 7 of a *Basic Pharmacist Assistant, Grade 3*. The Pharmacy Manager recommended that she be upgraded to the position of *Post Basic Pharmacist Assistant*.
10. The respondent failed to comply with the provisions of Resolution 3 of 2009: Occupational Specific Dispensation for Medial officers, Medical Specialists, Dentists, Dental Specialists, Pharmacologists, Pharmacists and Emergency Care Practitioners.

Respondent's Submissions:

11. The employee, Me Anita Petrus, received the post basic qualification in Port Elizabeth before being transferred to Universitas Hospital. The letter of transfer clearly state that she would be laterally transferred into the position of *Basic Pharmacist Assistant* and she accepted the transfer. The post basic qualification was not recognized before her transfer and the post advertised and filled at Universitas Hospital, was that of a *Basic Pharmacist Assistant*. A motivation by the manager did not compel the respondent to comply with such a recommendation when the needs of the employer did not require or permit such an upgrade.
12. Ms Anita Petrus was requesting a grade progression. There was not a post advertised for a *Post Basic Pharmacist Assistant* and no vacancy for such a post existed in Universitas Hospital. Therefore, no basis for a claim to be upgraded as such existed.
13. No submissions were made in relation to Ms Rika Arnold and therefore her case will be evaluated on the submissions of the union only.

ANALYSIS OF EVIDENCE AND ARGUMENT

14. Arbitration is a new hearing (*de novo*). The arbitrator determines the dispute in the light of the evidence admitted and the standard of proof is that of a balance of probabilities. If, in this analysis, certain evidence is not referred to, this does not imply it had not been considered.

15. The Labour Appeal Court in *Western Cape Department of Health v Van Wyk and others* [2014] 11 BLLR 1122 (LAC), held that in interpreting the collective agreement the arbitrator is required to consider the aim, purpose and all the terms of the collective agreement. It is expected of the arbitrator to adopt an interpretation and application that is fair to the parties.
16. From the objectives of the Resolution it is clear that the purpose of the Resolution was to give effect to Resolution 1 of 2007. This in practice meant that a new dispensation – meaning a new system or structure – would be introduced for the therapeutic, diagnostic and related allied professions. The OSD would then provide for career pathing opportunities based on competencies and experience; *Pay progression* within the limits of the relevant grades and based on performance; *Grade progression*, where applicable based on performance; Recognition of appropriate experience for the purpose of *grade progression* and the recognition of performance for accelerated progression to higher *grades and pay progression* within a salary grade.
17. At this stage, it is of paramount importance that the following definitions as contained in the Resolution is understood:
 - 17.1. *Grade progression* is the salary movement from one salary grade (scale) to the first salary notch of the next higher salary grade (scale) attached to the post. This entails that the progression must be in the same band of the post where the employee was appointed.
 - 17.2. *Pay progression* is the salary movement from one salary notch attached to a salary scale grade (scale) to the next higher salary notch attached to the same salary grade (scale).
 - 17.3. *Salary grade (scale)* is the set of salary notches attached to a particular salary grade (scale).
18. The new dispensation introduced differentiated salary scales for identified categories of professionals based on the new remuneration and post structure. The claim of the applicants' rests on Part D1 of the translation keys which deals with: Translation of Pharmacist Assistants (Post-Basic) on salary levels 5, 6 and 7 who have less than 5 years appropriate service/experience after registration as Pharmacist Assistants (Post-Basic), as on 30 June 2009, to Pharmacist Assistant: Post Basic Grades 1, 2 and 3.

19. The facts indicate that neither Ms Anita Petrus nor Ms Rika Arnold had the Post Basic Qualification on 30 June 2009, but only acquired the qualification in 2014 and 2011 respectively.
20. The question pivotal to this dispute is whether Resolution 3 of 2009 places an obligation on the respondent to automatically upgrade the applicants, who are appointed as *Basic Pharmacist Assistants*, but who have qualified as *Post Basic Pharmacy Assistants* after 30 June 2009.
21. Resolution 3 of 2009 sets the structure for employees to be placed on the appropriate salary scales, grades and posts provided for in the new OSD dispensation, taking into account their duties and levels of service / experience. The evaluation on where, in the new dispensation, an employee will be placed and will be evaluated according to the post that the employee occupied on 30 June 2009.
22. The challenge in terms of this dispute is that nowhere in the Resolution 3 of 2009 is any mention made of an automatic translation (after 30 June 2009) to a higher position simply because an additional qualification was obtained. Instead the translation keys clearly indicate that where grade progression is applicable, the position for such a higher post must be advertised. More importantly the appointment of an existing employee to a higher OSD post is dependent on the availability of a funded vacancy and such vacancy shall be advertised and filled through open competition.
23. At the time of the transfer of Ms Anita Petrus, the applicant was transferred laterally into the same level position of *Basic Pharmacist Assistant*. The position advertised and filled was not that of a *Post Basic Pharmacist Assistant* which is a higher post. Had that been the case she could have relied on clause 4.1.12.1 which deals with the right of a person covered by this agreement and who is promoted to a higher position, to gain at least one notch on such appointment. The submissions of the union relating to Ms Rika Arnold was similar, she was given a lateral transfer from Xhariep to Universitas Hospital. She was not promoted into the higher position of *Post Basic Pharmacist Assistant*, but was given a lateral transfer.
24. The critical question here is to determine whether or not the applicants would have been upgraded had they not been transferred. As the positions, they occupied were the same i.e. *Basic Pharmacist Assistant*, and their qualifications were obtained in 2011 and 2014 respectively, the question needs to be asked why Port Elizabeth did not upgrade Ms Anita Petrus accordingly if that was how Resolution 3 of 2009 was being implemented; also, why the applicants did not refer disputes when

they qualified in 2011 and 2014. Furthermore, if the upgrade had to be implemented as a result of the transfer, the question must be asked why the applicants only brought their disputes to the Council about this in 2017 (if transfers were effected in 2010 and 2015 respectively). In addition to this, no evidence was placed before me to indicate or suggest that the Resolution has been implemented in the suggested way with any other employees.

25. I therefore find that the applicants have failed to discharge the onus in proving that their interpretation of the Collective Agreement was correct.

26. Although I do not find the claim of the applicants to be substantiated in terms of the interpretation and application of Resolution 3 of 2009, I nevertheless sympathize with the situation in which they find themselves. Despite them not having found relief in the interpretation and application of the Resolution, several other avenues in terms of the LRA could still be pursued to try and negotiate recognition for the work that they are currently doing. It is however not within my power as Commissioner to order the respondent to create these new positions and to appoint the applicants accordingly. Something like this might possibly be achieved when a mutual interest dispute is referred.

27. In conclusion, the applicants have failed to prove on a balance of probabilities that the respondent's actions are in contravention with Resolution 3 of 2009.

AWARD

19. The interpretation and application of Resolution 3 of 2009, does not support the claim of the applicants to be automatically upgraded to higher positions simply because they qualified as *Post Basic Pharmacist Assistants* after 30 June 2009 or because they were given a lateral transfer.
20. The applicants claim for relief is hereby dismissed.
21. There is no order as to costs.

Signature: _____



Commissioner: **Suria van Wyk**