



ARBITRATION AWARD

Commissioner: **KM Moodley**

Case No: **PSHS1191-19/20**

Date of award: **11 September 2020**

In the matter between:

PSA obo Anishinee Moodley

Applicant

and

Department of Health- KwaZulu Natal

Respondent

Details of the hearing and representation:

1. The Arbitration was held at the boardroom, Estcourt hospital, in Estcourt on 4 September 2020. The Applicant was represented by Mr M.Mbanjwa of trade union PSA and the Respondent, Department of Health (KZN) was represented by its official Mr SS Mankathi. The proceedings were mechanically recorded and all witnesses testified under oath. I am satisfied that the parties have been correctly cited and that the PHSDSBC has jurisdiction to hear this matter.
2. The parties tabled bundles of documents, i.e. Bundle B was tabled by the Applicant and Bundle A was tabled by the Respondent. The contents of the bundles were accepted by both parties as being what they purported to be. No Points In Limine were raised by either of the parties.
3. No objection was raised to me as the Commissioner presiding over the Arbitration.

Issue(s) to be decided

4. The issue to be decided is whether the Applicant performed the duties as Acting Pharmacy Manager and if so whether she qualifies for payment of an acting allowance for the period 1 September 2018 to 30 November 2019.

Common cause issues:

5. The following were issues of common cause.
 - A) The Respondent appointed the Applicant in writing to act as Pharmacy Manager at Estcourt hospital for the following three consecutive terms:
 - a) 1 September 2018 to 28 February 2019.
 - b) 1 March 2019 to 31 August 2019.
 - c) 1 September 2019 to 31 March 2020.
 - B) The Applicant accepted her appointment, in writing, to the post of Acting Pharmacy Manager, for the three consecutive terms.

Issue in dispute

6. The issue in dispute is whether or not the Applicant qualifies for payment of an acting allowance for the period 1 September 2018 to 30 November 2019.

Background to the dispute

7. On 23 August 2018 Dr. P Kande the Acting Medical Manager of Estcourt hospital, appointed the Applicant in writing, to act as the Pharmacy Manager at the hospital. The acting appointment was for the period 1 September 2018 to 28 February 2019. On 1 March 2019 Dr Kande duly extended the appointment of the Applicant as Acting Pharmacy Manager, for the period 1 March 2019 to 31 August 2019. On 1 September 2019 Dr EM Kekana, the Medical Manager of Estcourt hospital, appointed the Applicant as Acting Pharmacy Manager for the period 1 September 2019 to 31 March 2020, or until such time as a new manager assumed duties. The new Pharmacy Manager assumed duties on 1 December 2019.
8. As the Applicant did not receive an acting allowance for performing her duties as acting Pharmacy Manager, she lodged a grievance, which grievance remained unresolved. She then referred a dispute to the Council and the matter was set down for arbitration. The Applicant sought to be paid an acting allowance only for the

period 1 September 2018 to 30 November 2019, as the new incumbent to the post of Pharmacy Manager commenced duties on 1 December 2019. The Respondent denied that the Applicant qualified for payment of an acting allowance.

Survey of evidence and arguments

9. As the proceedings were mechanically recorded, reference will only be made to that evidence which bears relevance to my findings.

Applicant: Witness: 1: Anishinee Moodley: (Pharmacist Grade 3).

10. The Applicant testified that on 23 August 2018, Dr P I Kande, appointed her in writing to act as the Pharmacy Manager, for the period 1 September 2018 to 28 February 2019. She accepted this appointment in writing, and thereafter performed all the duties of a Pharmacy Manager.

11. Her duties included the supervision and control over 11 x clinics, one x satellite clinic and one x pharmacy. She was also responsible for managing the pharmacy budget of between R9 million to R11 million worth of drugs per month.

12. Dr Kande then reappointed her as Acting Pharmacy Manager for a further period i.e. from 1 March 2019 to 31 August 2019. Dr EM Kekana, the Medical Manager of the hospital at the time, then reappointed the Applicant as Acting Pharmacy Manager for the period 1 September 2019 to 31 March 2020.

13. Applicant testified that she performed all her duties as an Acting Pharmacy Manager but did not receive an acting allowance for performing these duties. She then approached Mrs. Nunes, the CEO of the hospital, who informed her that there was an ongoing communication with one Mr. Moji of the provincial head office about this matter, and he assured her that it would be resolved.

14. She further testified that the Respondent did not inform her in writing of the outcome of the application to the provincial head office for payment of the acting allowance. She only heard about it at an EXCO meeting which she had attended.

She argued that as other staff had also been appointed to act in posts for which they were paid an acting allowance, she also expected the same to happen to her. But this did not happen.

Respondent: Witness 1: Sifiso Semenye (HR Manager Estcourt Hospital)

15. Semenye the HR Manager at Estcourt hospital, testified that the following procedure was to be followed when making an acting appointment.

- a.) The post must be vacant for more than 6 weeks.
- b) The post must be funded.
- c). The acting appointment must be in writing.
- d). The employee must accept the appointment in writing and
- e) Authorisation from head office must be obtained in writing for the acting appointment.

16. He testified that in this case the post was not vacant, and was not funded and therefore there was no legitimate expectation of payment of an acting allowance, by the Applicant.

17. He also stated that the Respondent submitted an application to head office for approval of the acting appointment but that the application was unsuccessful. He, together with Mrs. Nunes then informed the Applicant that she will not be paid an acting allowance. The Applicant saw no problem in continuing to act in that post.

18. He also testified that the only reason the Applicant was requesting for payment of an acting allowance was that he had rejected a request from her to employ a certain pharmacist to the hospital.

Respondent: Witness 2: Mabatho Kekana (Medical Manager).

19. Kekana testified that she signed the letter dated 1 September 2019 in which she appointed the Applicant to act as Pharmacy Manager for the period 1 September 2019 to 31 March 2020, or until such time as a new manager assumed duties. She

made the appointment in order to retain the pharmacy licence for the hospital as the hospital could not operate its pharmacy without a licence.

20. She testified that no remuneration was to be paid to the Applicant as remuneration was not mentioned by her in the letter. If the Applicant qualified for the allowance, she would have mentioned it in the letter.

Analysis of evidence and argument:

21. The evidence of Semenye and Kekana was contradictory at times and therefore I found both of them to be neither credible nor reliable witnesses.

22. It was not in dispute that the Applicant was appointed in writing by the Respondent to act as the Pharmacy Manager for the periods 1 September 2018 to 28 February 2019, and from 1 March 2019 to 31 August 2019, and thereafter from 1 September 2019 to 31 March 2020.

23. It was also not in dispute that the hospitals pharmacy could not operate legally without a pharmacy licence. Should the hospital not appoint someone as the Pharmacy Manager or as an acting Pharmacy Manager the hospitals pharmacy licence would have been revoked. This was corroborated by Kekana who testified that "*I was more concerned about the licence being revoked.*"

24. Semenye also corroborated this when he testified that the Applicant was appointed because of a fear of the licence being revoked. He stated that "*They would have revoked the hospitals pharmacy licence*". However, he then contradicted himself by stating that she was not appointed to perform the duties of the Pharmacy Manager and that "*...she was never appointed to act.*" He later stated that "*She was not acting as a Pharmacy Manager. She was representing the pharmacy*". I find this to be a serious contradiction on the part of Semenye.

25. In addition, the letters of appointment from doctors Kande and Kekana to the Applicant informed her in writing, and in no uncertain terms, that she was required to take full responsibility for, and that she was to be accountable for all matters related to the post. Therefore, it stands to reason that if she was to be held responsible and accountable for the post of Pharmacy Manager, then she was

obliged to perform the duties pertaining to that post. Any failure on the part of the Applicant to do so could have led to serious consequences for her, as she was accountable.

26. I also note that no evidence was led by the Respondent as to who physically performed the duties of the Pharmacy Manager during the 15-month period claimed by the Applicant (i.e. 1 September 2018 to 30th of November 2019). It is highly unlikely that such important duties were not performed by the hospital during such an extensive period as the hospital would not have been able to render a pharmacy service, if at all.

27. The Applicant on the other hand testified that she supervised 11 x clinics, one x satellite clinic and one x pharmacy and that she also administered a budget of between R9 million to R11 million worth of drugs per month. In addition, she attended meetings of the hospital's Exco. This was not disputed by the Respondent. I therefore find it more probable that the Applicant was performing the duties of Acting Pharmacy Manager during the period of her appointment.

Procedure for acting appointment

28. The Respondent went to great lengths to argue that the Applicant did not qualify for payment of an acting allowance. Kekana testified that she was “...*not concerned...*” about the remuneration at the time she made the acting appointment, but that she was more concerned about the pharmacy licence being revoked. Surprisingly, when asked whether she had complied with the Respondents approved policy on acting appointments at the time that she made the acting appointment, she admitted that “ *I'm not aware of it and did not follow the policy on acting appointments.*” As a senior manager at the hospital this was a very serious admission for Kekana to make. Kekana ought to have taken into account the aspect of an acting allowance, and she ought to have complied fully with the policy and procedure pertaining to acting appointments i.e. Resolution No.1 of 2002. Unfortunately, she “...*did not follow the policy on acting appointments*”.

29. Therefore, I could not place any reliance on her testimony. She was neither a credible nor a reliable witness.
30. Also, of concern to me was Semenye's poor understanding of the process to be followed when making acting appointments. He was of the mistaken view that the post "*...must be vacant for more than 6 weeks*" whereas no such requirement is provided for in Resolution No 1 of 2002. He then states that an employee must first be appointed in writing to an acting post and only after the Applicant has accepted the acting appointment in writing, he would seek authorisation for the acting appointment. This was like putting the cart before the horse. He failed to see the obvious flaw in this process and to appreciate that this flawed process is precisely what led to this dispute. Had he obtained authorisation prior to making such an appointment this dispute would not have arisen.
31. In addition, as the HR Manager he ought to have known whether this post was either frozen or under review, and if it was, then an acting appointment should not be made by the Respondent. Instead Kekana the Medical Manager of the hospital went ahead and appointed the Applicant as Acting Pharmacy Manager, in contravention of Resolution No.1 of 2002.
32. Resolution No 1 of 2002 provides that an employee may be appointed in writing to act in a post of a higher grade than the grade of the employee, provided certain criteria are met. Namely,
- a) The post is a vacant and funded post.
 - b) The acting period is longer than six weeks.
 - c) The appointing authority is a higher level than the acting appointee.
 - d) The employee must accept the acting appointment.
33. The Applicant met all the required criteria for an acting appointment and therefore qualified for payment of an acting allowance.
34. This was also confirmed by the Respondent when on 27 August 2018 it submitted an application to the provincial department for approval to appoint the Applicant as acting Pharmacy Manager. In support of this application the Respondent confirmed, in writing, that the post was vacant and funded. It also submitted a cash-

flow certificate confirming that funds were available for the payment of the acting allowance in the amount of R98,785,50, for the 2018 / 2019 financial year. By submitting an application for approval of the acting appointment the Respondent was confirming that the Applicant met all the criteria for the appointment as per Resolution No. 1 of 2002. The Respondent would not have done so if this was not the case.

35. However, on 26 November 2018 the provincial office informed the hospital that the application was unsuccessful. Notwithstanding being told in no uncertain terms that the application was unsuccessful, the Respondent still persisted in appointing the Applicant as acting Pharmacy Manager for two subsequent periods.

36. Semenye once again contradicted himself when he testified that the post of Pharmacy Manager was not vacant and not funded. However, in the Respondents application to its provincial office it was recorded that the post of Pharmacy Manager was vacant and that it was funded. in the amount of R98 785.50, for the 2018/ 2019 financial year.

37. Semenye also contradicted himself when he testified that the Applicant was never appointed to act in the post. He claimed that the letters of appointment that were issued by the Respondent to the Applicant were invalid and that he had only become aware of these letters of appointment at the conciliation stage of this dispute.

38. I find this extremely difficult to accept. Under these circumstances I could not place much reliance upon the evidence of Semenye. The numerous contradictions in his testimony made him to be neither a credible nor a reliable witness.

Conclusion

39. I find that the Applicant carried out the duties of Acting Pharmacy Manager for the period 1 September 2018 to 30th of November 2019 after she was appointed to this post by the Respondent.

40. I also find that she qualifies for payment of an acting allowance in accordance with clause 3.1 of Resolution No.1 of 2002.

41. However, clause 3,6 of Resolution 1 of 2002 provides that an employee may not act in a higher vacant post for an uninterrupted period exceeding 12 months. I therefore propose to award the Applicant an acting allowance for a maximum of 12 months, i.e. for the 12-month period 1 September 2018 to 31 August 2019, calculated as follows:

$(R897\ 936.00 \text{ minus } R833\ 529.00) \times 12 \text{ months equals } R64\ 407.00$ being the difference between the Applicant's notch and the notch of the post of Pharmacy Manager for the 12 months.

Award

42. I find that the Applicant Anishinee Moodley, was appointed by the Respondent, Department of Health-KwaZulu Natal, to the post of Acting Pharmacy Manager at Estcourt hospital, and that she acted in this post for the period 1 September 2018 to 30 November 2019.

43. I find that the Applicant fulfilled the duties as required in the post of Acting Pharmacy Manager and that she qualifies for payment of an acting allowance.

44. I find that the Applicant only qualifies for payment of an acting allowance for a maximum period of 12-months i.e. from 1 September 2018 to 31 August 2019, in the amount of R64 407.00.

45. The Respondent is hereby directed to pay an amount of R64 407.00 into the bank account of the Applicant by no later than 30 September 2020.

46. I make no order as to costs.



COMMISSIONER: KM MOODLEY