



# ARBITRATION AWARD

Panelist/s: Cindy Dickens  
Case No.: PSHS122-11/12  
Date of Award: 4-Nov-2011

In the ARBITRATION between:

**IN THE PUBLIC HEALTH AND SOCIAL DEVELOPMENT SECTORAL  
BARGAINING COUNCIL HELD AT KIMBERLY**

**COMMISSIONER: C L DICKENS  
CASE NO. : PSHS 122-11/12  
DATE OF AWARD: 4 November 2011**

In the Arbitration between:

**HOSPERSA obo J BEREND**

**APPLICANT**

**and**

**DEPARTMENT OF HEALTH: NORTHERN CAPE**

**RESPONDENT**

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ARBITRATION AWARD

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## **1. DETAILS OF HEARING AND REPRESENTATION:**

- 1.1 An Arbitration hearing was scheduled for the 3<sup>rd</sup> of October 2011 at the James Exum Building, Kimberley Hospital Complex, Kimberley.
- 1.2 The Applicant, Mr. Berend, was represented by Mr. Olivier, an Official of Hospersa. The Respondent, Department of Health: Northern Cape, was represented by Mr. Kammies, District Health Manager.

1.3 The parties requested to file Written Submissions only and the dates were agreed to as follows:

- The Applicant to file their submissions by the 13<sup>th</sup> of October 2011.
- The Respondent to file their submissions by the 19<sup>th</sup> of October 2011.
- The Applicant to file their replying papers by the 24<sup>th</sup> of October 2011.

**2. ISSUE TO BE DECIDED:**

2.1 The dispute which has been referred to the Bargaining Council is an unfair labour practice dispute, relating to promotion.

2.2 The question which I am required to determine is whether the Respondent made themselves guilty of an unfair labour practice regarding promotion.

**3. BACKGROUND TO THE ISSUE:**

3.1 The Applicant is employed by the Department of Health as a Chief Professional Officer with effect from the 1<sup>st</sup> of July 1996.

3.2 The post of Deputy Director Human Resource Management was advertised at Gordonia Hospital which advertisement was withdrawn prior to the advertised closing date.

3.3 No shortlist was drafted, no interviews were held and no appointment has been made for the post.

3.4 The Applicant did not apply for the post.

**4. SURVEY OF EVIDENCE AND ARGUMENT:**

#### **4.1 SUBMISSIONS ON BEHALF OF THE APPLICANT:**

**4.1.1 *Mr. Olivier* argued that the dispute which has been referred to the Bargaining Council is an unfair labour practice dispute relating to promotion. He argued that the Respondent created a reasonable expectation to the Applicant by advertising a higher post at Gordonia Hospital of a Deputy Director Human Resources Management where the employees of the Department are required to report to the Applicant.**

4.1.2 He stated that the Applicant was appointed as a Chief Personnel Officer with effect from the 1<sup>st</sup> of July 1996 at the Siyanda District.

4.1.3 The function attached to the appointment was the human resources for the district office, clinics, and the supervision of smaller institutions around the Upington area. This included driving to these institutions.

4.1.4 As the years past the hospital secretaries left and their functions were shifted to the Applicant. This included more driving to the towns outside Upington.

4.1.5. Mr. Olivier held that by January 2010, the staff compliment, for which the Applicant was responsible for, moved to 424 (FOUR HUNDRED AND TWENTY FOUR) employees, for which the Applicant and one seconded staff member were responsible for.

4.1.6 During November 2010 the Applicant submitted a grievance stating that the workload of the office had increased dramatically. This included new policies such as Performance Management and Development System, Policy for Incapacity and Ill Health Retirement.

4.1.7 Mr. Olivier held that the Respondent did not respond to the grievance.

4.1.8 He argued that in 2011, the Gordonia Hospital advertised a post of Deputy Director for Human Resources. He held that a Deputy Director starts at salary level 12. He held that the advertisement gives the exact same competencies as performed by the Applicant.

4.1.9 He stated that at exactly the same time the Provincial Head Office advertised the posts of the current District Managers at a new level of Director. He held that Gordonia Hospital only had 360 (THREE HUNDRED AND SIXTY) employees with 3 (THREE) employees responsible for human resources.

4.1.10 He held that according to the Code of Remuneration (CORE) the Public Service strives to ensure that employees doing the same work, will be remunerated equally.

4.1.11 He stated that the following can be noted:

- The Applicant has 1 (ONE) support employee for over 400 (FOUR HUNDRED) employees, while the other 3 (THREE) employees at the hospital have fewer than 370 (THREE HUNDRED AND SEVENTY) employees.
- The Respondent has not assisted the Applicant by appointing employees to assist with the functions that need to be performed.
- The Respondent did not respond to the grievance by the Applicant.

4.1.12 Mr. Olivier argued that the Respondent has failed to comply with the CORE with regard to equal work for equal pay. He held that the Respondent has failed to respond to the grievance of the Applicant, thus not ensuring that employees are correctly treated by the Respondent.

4.1.13 He concluded by saying that the Applicant has proven that the Respondent has treated the Applicant unfairly by not upgrading the Applicant's post to that of a Deputy Director and has caused the Applicant a loss of income.

4.1.14 In reply Mr. Olivier held that it must be noted that the advert was withdrawn based on the fact that Gordonia Hospital was to be re-graded by the Minister of Health. Once the re-grading was done, the post would be re-advertised as the new grading of the hospital would allow for the post to be advertised and filled.

4.1.15 He held that the Respondent has not disagreed with the Applicant as to the additional functions and that it is therefore the belief of the Applicant that the rank and salary of the Applicant be upgraded.

#### 4.2 SUBMISSIONS ON BEHALF OF THE RESPONDENT:

4.2.1 **Mr. Kammies** argued that the Respondent is not disputing the receipt of the grievance, nor is the Respondent disputing the working conditions alleged in the grievance of the Applicant. In response to the grievance, the Respondent has advertised posts in order to obtain staff to assist the Applicant. These posts were advertised, shortlisted and interviews were held. No suitable candidates were found to occupy these vacant posts. The Department is of the intention to re-advertise these posts.

4.2.2 He held that Section 186 (2) (a) of the Labour Relations Act provides that unfair labour practice means any unfair act or omission that arises between an employer and employee.

4.2.3 He held that Grogan in his book Dismissal Discrimination & Unfair Labour Practice states that the element of the definition is that the “act or omission” must constitute a labour practice. He goes further to state that the Act contains no definition of the word “labour” and should therefore be assumed that it means “employment” interpreted as employee.

4.2.4 Mr. Kammies held that Grogan takes the view that the word “practice” suggests that the employer must have actually done something or declined to do something, a mere abstract proposal can not constitute an Unfair Labour Practice, even if it is formalized into a Policy.

4.2.5 Mr. Kammies stated that it is common cause that the Applicant brought this matter to this forum on the basis that a post was advertised on the level of Deputy Director, at Gordonia Hospital. The Respondent is not disputing that the post was advertised.

4.2.6 A week after this post was advertised, prior to the closing date, the Department of Health: Northern Cape, placed a follow-up advertisement indicating that this post was erroneously advertised.

- 4.2.7 He stated that it is common cause that the erroneously advertised post does not exist on the establishment of Gordonia Hospital, nor on the establishment of Siyanda District Office.
- 4.2.8 He stated that had this erroneous advertisement never been placed, no dispute would have arisen. The correction advertisement renders this mentioned advertisement void and can be interpreted as if this erroneous advertisement was never placed.
- 4.2.9 He held that the Respondent is of the opinion that no unfair labour practice took place and it had no intention of harming the Applicant at any stage.
- 4.2.10 He concluded by saying that the Applicant has no locus standi and that no Unfair Labour Practice was constituted as alleged. He recommended that the matter be dismissed.

## **5. ANALYSIS OF EVIDENCE AND ARGUMENT:**

5.1 The dispute which has been referred to the Bargaining Council is an unfair labour practice dispute, relating to promotion.

5.2 Section 186 (2) (a) reads as follows:

*“(2) ‘Unfair labour practice’ means any unfair act or omission that arises between an employer and an employee involving -*

*(a) unfair conduct by the employer relating to the promotion, demotion, probation or training of an employee or relating to the provision of benefits to an employee;”*

5.3 In opening the Applicant states that the Respondent created a reasonable expectation with the Applicant by advertising a higher post at Gordonia Hospital. The post advertised was that of Deputy Director Human Resources Management.

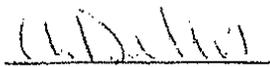
- 5.4 It is common cause that the post of Deputy Director Human Resource Management at Gordonia Hospital was advertised erroneously and a subsequent notice was issued withdrawing the post.
- 5.5 The Applicant conceded that the advertisement was withdrawn based on the fact that Gordonia Hospital was to be re-graded by the Minister of Health.
- 5.6 It is common cause that no shortlist was drafted, that no interviews were held and that the post has to date not been filled.
- 5.7 It would appear that the Applicant's complaint is not that he was not appointed to that position, his complaint lies therein that the Respondent acted unfairly by not upgrading the Applicant's post to that of a Deputy Director and has caused the Applicant a loss of income.
- 5.8 It is undisputed that there is no post such as Deputy Director Human Resource Management on the establishment of Gordonia Hospital or on the establishment of Siyanda District Municipality.
- 5.9 I can not find that the Respondent created a reasonable expectation with the Applicant by advertising a higher post, and subsequently withdrawing the post, as it does not exist on the hospital's structure. Currently the post does not exist therefore the salary scales that were mentioned in the advertisement, which was withdrawn, also do not exist.
- 5.10 I further wish to mention that the dispute as it has been referred does not relate to a promotion dispute. Had the Applicant applied for the post and had he not been the successful candidate, he would have been able to refer a dispute relating to promotion.
- 5.11 The Applicant's dispute is based on the fact that his salary scale is lower than that of the post that was advertised. These facts would not amount to a promotion dispute.

**6. AWARD:**

6.1 The Applicant, Mr. J Berend, has failed to show that the Respondent made themselves guilty of any unfair conduct. The matter is accordingly dismissed.

6.2 No order as to costs is made.

**SIGNED AT BLOEMFONTEIN ON THIS 4<sup>th</sup> DAY OF NOVEMBER 2011**



**SENIOR COMMISSIONER**

**C L DICKENS**

**PHSDSBC**

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**C L DICKENS**

**PHSDSBC COMMISSIONER**