

# ARBITRATION AWARD

Panellist: Elsabè Skinner

Case No.: PSHS1228-16/17

Date of award: 8 June 2017

In the matter between:

**NEHAWU obo GE Maqala**

(Union / Applicant)

and

**Department of Health – Free State**

(Respondent)

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## DETAILS OF HEARING AND REPRESENTATION

1. The matter was scheduled for arbitration on the 25<sup>th</sup> of May 2017 at Bophelo House in Bloemfontein. The parties filed written heads of argument on the 1<sup>st</sup> of June 2017.
2. The Applicant was represented by Mr Jwayi, an official of NEHAWU. The Respondent was represented by Mr Majola, the Employee Relations Officer of the Respondent.
3. The proceedings were mechanically recorded. No interpreter was used.
4. The Applicant presented a bundle of documents which was marked A. The Respondent presented no documents. I have considered the documents as part of the evidence placed before me.

## BACKGROUND TO THE DISPUTE

5. The parties agreed during the narrowing of the issues as follows:
  - 5.1 The Applicant was working as a Supply Chain Clerk (Level 5).
  - 5.2 He acted in the position of a Transport Officer (Level 7) from March 2015 until June 2015 and again from 27 August 2015 to date.
  - 5.3 Resolution 1 of 2002 applied to the Applicant.
  - 5.4 The parties agreed that the Applicant met the requirement as set out in paragraph 3.1 of the Resolution.
  - 5.5 The Applicant acted in 2 post levels higher than his current position as there were good cause shown by the appointing authority.
  
6. During the narrowing of the issues it was established that the Applicant was alleging that he was entitled to an acting allowance since he started to act in 2015. The Applicant referred an interpretation and application of a collective agreement dispute to the Council on the 17<sup>th</sup> of January 2017. In the case **HOSPERSA obo Tshambi v Department of Health Kwazulu-Natal (Case DA1/2015 delivered on the 24<sup>th</sup> of March 2016)** the Court held that where there is no fixed period prescribed for a category of dispute, the case must be referred within a reasonable period. The determination of what constitutes a reasonable time is a fact-specific enquiry. In **Weder v MEC for the Department of Health, Western Cape (2013) 34 ILJ 1315 (LC)** the Court had held that anything more than six weeks should at least trigger an application for condonation where the Act does not stipulate a time limit. However, during the proceedings the parties had agreed that the Applicant was still acting in the position and whilst he was still acting in the position he would be entitled to refer the dispute. I am satisfied that I have jurisdiction to deal with the matter.

## ISSUE TO BE DECIDED

7. I must determine whether the Applicant was entitled to his acting allowance as regulated by Resolution 1 of 2002 in terms of section 24 of the Labour Relations Act 66 of 1995 (hereafter called the Act).

## SURVEY OF EVIDENCE AND ARGUMENTS BY THE PARTIES

### Evidence by the parties

8. None of the parties led any evidence during the arbitration. The parties requested the opportunity to deal with the matter by filing written heads of arguments. I explained that in light of recent case law I can only allow them to deal with the dispute by filing written heads of argument if the parties had agreed on facts (a stated case) and if there were no disputes of facts amongst them (**Public Servants Association and others v Minister of Correctional Service and others (2017) 4 BLLR 371 (LAC)**). The parties then reached an agreement regarding certain facts as stipulated in paragraph 5. They filed written heads of argument on the 1<sup>st</sup> of June 2017.

### Arguments by the parties

#### Argument by the Applicant's representative:

9. The Applicant's representative wrote that the Respondent had failed to pay the Applicant his acting allowance in terms of Resolution 1 of 2002 which was signed by the Respondent and employees falling within the registered scope of the Bargaining Council.
10. The Applicant acted in a higher post. He was duly appointed in writing to act by an officer senior to him. The Applicant adhered to all the requisites of the agreement in sections 3.1 and 3.2. His situation fits squarely into section 3.4 of the agreement. The Applicant brought the matter to the attention of the Respondent, but it was not resolved, until a grievance was lodged. The Applicant started acting in the post on the 11<sup>th</sup> of March 2015. He was appointed by the General Manager of the Mangaung Metro District Office which was a Director Level Post in the Department of Health. He was authorized to appoint the Applicant.
11. The Applicant lodged a grievance regarding his acting allowance. The Acting Deputy Director wrote a letter to the Director Labour Relations regarding the grievance. She advised that the Applicant should be paid his acting allowance as he met all the requirements (page 12 bundle A).
12. He wrote that the Applicant met all the requirements as set out in section 3.1 of the Resolution except that there was no official letter of acceptance by the Applicant. He relied on the judgement in **Henry v General Public Service Bargaining Council and others (C314/205) ZALC [2006] ZALC164; [2006] 85 (5 September 2006)** which held as follows: "Insofar as the argument of the written acceptance is

concerned, the arbitrator held that it was only necessary for “record purposes” and not a prerequisite for payment”.

13. The Court also held in **Madoda Irvin Nofemele and Minister of Defence and others Case No 12670/07 (12 December 2008)** as follows:

“Even if I am wrong as to the legality of applicant’s rights to be paid the allowance, the question that arises is whether the non-payment as an unfair labour practice as stipulated in section 23 of the Bill of Rights. Counsel was in agreement that what took place was clearly unfair in that applicant performed the duties without the concomitant remuneration”.

14. The collective agreement was drafted to avert any violation of the rights of employees in terms of section 23 of the Bill of Rights. The Respondent violated the Applicant’s rights regarding his acting allowance which was covered by Resolution 1 of 2002.
15. He was seeking an order that the Respondent should pay the Applicant his acting allowance from 10 March 2015 to date.

Argument by the Respondent’s representative:

16. The Respondent’s representative wrote that the question to be determined was whether the Respondent had failed to interpret and apply the collective agreement, Resolution 1 of 2002, by failing to pay the Applicant his acting allowance as stipulated in the Resolution.
17. The parties had agreed during the hearing regarding the following facts:
  - 17.1 The Applicant was appointed to act in the higher post as the Supply Chain Clerk.
  - 17.2 The Applicant acted in the post from 10 March 2015 to the 10<sup>th</sup> of June 2015. He was appointed from the 11<sup>th</sup> of September 2015 until the post was filled. The submission was not approved by the Department to pay his acting allowance.
18. The Human Resource Management wrote a submission for the approval of payment of the acting allowance, but the submission was not approved by the Acting Chief Financial Officer of the Department due to the late submission of the request. The request was submitted on the 8<sup>th</sup> of November 2016 whilst the Applicant was appointed to act from 10 March 2015 which was during the previous financial year.

19. He wrote that the Applicant was alleging that the request was submitted on time, but it was misplaced at the Human Resource Provincial offices of the Department.
20. He requested an order in favour of the Respondent as it was the Respondent's prerogative to approve the payment. The Department was under financial constraints and it would be regarded as irregular expenditure as the acting was done during the 2015 financial year.

## **ANALYSIS OF THE EVIDENCE AND ARGUMENTS**

21. The Applicant referred an interpretation and application of a collective agreement dispute in terms of section 24 of the Act to the Council.
22. The parties agreed during the narrowing of the issues that the collective agreement which regulated the payment of acting allowances, Resolution 1 of 2002 applied to the Applicant.
23. It was common cause that the Applicant acted in a position that was higher than his appointed position.
24. The parties further agreed that the Applicant met the requirements as set out in sections 3.1 and 3.2 of the Resolution. It reads as follows:

"Paragraph 3:

- 3.1 An EMPLOYEE appointed in writing to act in a post of a higher grade than the grade of the employee by the Head of Department or his/her delegate at provincial or national level (hereafter 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.
- 3.2 An EMPLOYEE may only be appointed to act in a higher post that is one post level higher than her/his current position.

3.3 The provisions of paragraph 3.2 above may be deviated from on good cause shown by the appointing authority”.

25. The parties had agreed during the narrowing of the issues that the Applicant met the requirements in section 3.1 and that there were good cause shown for him acting in two post levels higher than his current position.
26. The Respondent’s representative wrote that the Respondent were under financial constraints and were not able to pay it as the acting was done in 2015.
27. I studied the collective agreement. The Resolution made no mention of any time limits during which such a claim had to be submitted. In fact, section 3.1 reads that the Employee **shall be paid** his/her acting allowance provided that the other requirements were met (my emphasis). The Applicant’s representative raised the issue of “acceptance” in his heads of argument. However, this issue was not raised by the Respondent’s representative and the parties had agreed that the Applicant met the requirements in section 3.1.
28. The Acting Deputy Director, Ms Mtshayi wrote as follows to the Director regarding the Applicant’s grievance about his acting allowance (page 12 bundle A):

“3. It was further revealed that a submission was made for approval at treasury but it was not approved as it was *ex post facto* and there are no reasons why the submission was *ex post facto*. The documents at this offices disposal approves that the acting allowance documents of Mr Maqala were submitted from the District Office: Mangaung Metro to HR Bophelo House on the 17/06/2015. The reasons for the said delay should have been provide to the CFO: Health by the HR office (See attached).

4. It is the advice of this office that the payment for the said acting allowance should be paid as the official has performed the duties he was appointed to perform and for the submission to be *ex post facto* was not the fault of the said official. The department does not have prospects of winning this case should this official declare a dispute.

5. The Director: HRM is advised to take disciplinary steps action against the officials who are responsible for the submissions of acting allowance who failed to process the submission for acting allowance of Mr Maqala timeously....”

29. In light of the above, I am satisfied that the Applicant is entitled to be paid his acting allowance since he started to act in the post. The Applicant's representative gave two dates in his heads of argument namely 10 and 11 March 2015. The parties had agreed that the Applicant started to act during March 2015.
30. I have to add, in passing, that section 3.6 of the Resolution stipulated that no employee was allowed to act in a higher vacant post for an uninterrupted period exceeding twelve months. It was clear that the Applicant was acting for a period of more than 12 months. The Resolution made no mention of any consequences during such an occurrence. Neither of the parties raised this issue as well. I am therefore not attaching any weight to this.

### THE AWARD

31. In light of the above, I make the following order:
- 31.1 The Applicant is entitled to his acting allowance as stipulated in Resolution 1 of 2002. The Respondent is ordered to pay the Applicant his acting allowance since March 2015 on or before the 31<sup>st</sup> of August 2017.
- 31.2 I make no order as to costs.

Signature: \_\_\_\_\_



Panellist: **Elsabè Skinner**