



ARBITRATION AWARD

Case No: **PSHS1233-17/18**

Commissioner: **Lungile Mtshaka**

Date of award: **14 November 2018**

In the matter between:

HOSPERSA obo Sebotja

Applicant

and

Department of Health- Gauteng

Respondent

DETAILS OF HEARING AND REPRESENTATION

1. The matter was set down for arbitration for hearing as part-heard in terms of section 186(2)(a) of the Labour Relations Act 66 of 1995, as amended, on 4 September 2018 at the Offices of Department located at Lisbon Building in Johannesburg. Mr Gabela, union official of HOSPERSA, represented the Applicant, while Mr J Motlhabane, represented the Respondent.
2. The initial hearing was held on 30 May 2018 2018 and due to the fact that the Respondent's witnesses were not available the proceedings had to be adjourned. The parties asked and were enabled to submit closing arguments in writing.

ISSUE TO BE DECIDED

3. I am required to decide whether or not the Respondent's conduct constituted an unfair labour practice by demoting the Applicant to a Human Resources Officer's position, if so, to consider an appropriate remedy.

BACKGROUND TO THE ISSUE

4. The Applicant was appointed as a Chief Personnel Officer in 2008 serving as a Training Coordinator for the whole hospital in terms of skill audit and performance management. She was reporting to the HR Manager.
5. She applied to do a bridging course known as a Diploma in General Nursing Science which enables one to qualify as a Professional Nurse. The then HR Manager, Mr D Netshilindi, approved her study leave for duration of 2 years. An agreement was entered into and between the HR Manager, Mr Netshindili, and the Applicant that upon return she will go back to her position as a Training Coordinator. According to the Applicant, the Manager agreed. However, at the end of the initial period, she failed a major course and could not qualify as a Professional Nurse. The Respondent unlawfully translated her as PN Grade 2 (Professional Nurse).
6. Upon her return she was instructed to report at Ward 6 as PN Grade 2, regardless of the agreement she had made with her line Supervisor, Mr Netshilindi. A dispute arose and grievance was lodged, but the matter remained unresolved. The matter is now before the Council for arbitration.
7. The Respondent made the point that the Applicant is a trained professional nurse as she has completed and passed the course. Therefore, as things stands now, she is a trained professional nurse. The Respondent stands by that position.

SURVEY OF EVIDENCE AND ARGUMENTS

Applicants' evidence

8. The Applicant in her testimony under oath confirmed that as per approval and agreement with her line Supervisor and HR Manager, Mr D Netshindili, applied for a study leave to do a bridging course known as a Diploma in General Nursing Science in 2014/15. However, she could not finish the said course, as she failed a major course which she completed later.
9. On returning back to the institution i.e. Thelle Mogoerane Hospital, and she was instructed to report at Ward 6 on the basis that she had qualified as a Professional Nurse. However, as already alluded to above, at that stage, she still had to pass a major course.
10. The Applicant confirmed that she did re-register to write the course on her own and that she passed this time. She made it clear that when she returned to the institution after initially failing, that she had to return to HR position as a Training Coordinator. She has suddenly found herself being HR Officer (level 8) contrary to what she did before she went on study leave.
11. In cross-examination the Applicant confirmed that in 2016 she was supposed to have completed the Diploma in General Nursing Science. Although the decision was taken in her absence, she conceded that as per the document included in her bundle, on 22 June 2016 Mr Netshindili confirmed that the EXCO had a standing decision concerning the completion and placement of nurses returning from nursing college.
12. Nothing came out of re-examination that changed the Applicant's evidence led to this point.
13. The Applicant's witness, Ms N R Kubheka, confirmed her position as the Clinical Coordinator in the institution as the time. She was aware of the Applicant's approval to study for a study for a Diploma in General Science, generally known as a bridging course for those who already had nursing qualification as a Staff Nurse. She also fitted in that category.

14. She further confirmed that if one fails the course, she is taken back in his or her initially position. This did not happen in the Applicant's case.

Respondent's case

15. The Respondent's first witness, Ms Flora Skosana, testified to the fact that she has been working as an Acting Nursing Services Manager since October 2017. Prior to this period, she occupied an Assistant Nursing Services Manager's post for six (6) years.

16. She enlightened the forum about the bridging course that takes two (2) years if one wants to be a professional nurse. However, if one fails the course, one is taken back to one's position.

17. In cross-examination, of significance Ms Skosana confirmed that once has qualified as professional nurse, she must serve as a nurse.

18. The second witness, Mr Thomas Mhlongo, confirmed that he is currently working at the institution as an Acting Manager since 1 July 2016 supervising all those below his rank.

19. He confirmed that the Applicant before she left for study leave, she was the Training Coordinator and one Hazel Mthembu from HR was to assist with training. He made the point that, until the results confirmed that she had passed the bridging course and registered with the Nursing Council the Applicant could not be translated on the system and be enabled to work or practise as a nurse.

20. In cross-examination Mr Mhlongo confirmed that if a person fails, he or she goes back to his or her old position.

ANALYSIS OF EVIDENCE AND ARGUMENTS

21. As a point of departure, section 186 (2) (a) of the LRA “*Unfair labour practice’ means that an unfair act or omission that arises between an employer and an employee involving unfair conduct by the employer relating to the promotion, demotion, probation or training of an employee ...’*
22. Of relevance in the present case is the issue of demotion. The context of the dispute reveals that following an approval for the Applicant to go for study leave to do a bridging course generally known as a Diploma in General Nursing Science, the initial results did not enable her to qualify as a professional nurse. The only outstanding course that she had to rewrite was a major. It is common cause that she passed it. She therefore qualified and graduated as a professional nurse.
23. There is no evidence which supports the Applicant’s position that when she failed the relevant major course, she immediately went back to the institution to resume her duties as a Chief Personnel Officer / Training Coordinator. This supposition makes sense, as it is unlikely that she would have translated to the new status and directed to commence duties in ward 6, as it has turned out
24. However, what is clear she was able to write the outstanding course and passed it. It is therefore common cause that this enabled her to qualify as a professional nurse and be in a position to be appointed accordingly.
25. I have noted that the results obtained by the institution as at 18 September 2017 confirmed that she had passed. Further, the translation letter under the heading of Gauteng Province, Health Department, confirming her translation could only have happened after confirmation of her successful results. Whether or not they were released at that point does not have any bearing now, as her success in qualifying to be a professional nurse is common cause.
26. I have also taken note of an agreement between the Applicant and the late Mr Netshindili who was the HR Manager at the time. However, that the minutes of a

meeting held between the Applicant, Mr T Mhlongo (Acting HR Manager now), Mr Netshindili and Mr T Madiba on 22 June 2016 on matter arising *in paragraph (c)* the following statement attributable to Mr Netshindili is significantly relevant and clarifies the Respondent's position:

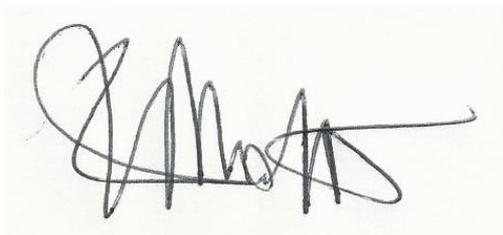
“Although I have taken a decision that she should go back to HR. I was wrong as the HR Manager and at the same time an EXCO member who was well aware that there was a standing decision taken by EXCO concerning the completion and placement of nurses returning from nursing college.”

27. The above statement seems to confirm that the Applicant did not have an option to go back to her initial HR position after her completion of the course. In the same breath it also confirms that there was an agreement between her and the late Mr. Netshindili, the HR Manager.

AWARD

28. I therefore find that the conduct of the Respondent did not constitute an unfair labour practice in so far as the Applicant's translation after obtaining her qualification in nursing in terms of the resolution that was taken by EXCO of Thelle Mogoerane Regional Hospital.

29. The matter is hereby dismissed.

A handwritten signature in black ink on a light green background. The signature is stylized and appears to read 'Lungile Matshaka'.

Lungile Matshaka