



# ARBITRATION AWARD

Panellist/s: Colin Rani  
Case No.: PSHS130-10/11  
Date of Award: 16-Apr-2012

In the ARBITRATION between:

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DENOSA obo Du Toit, G.J. others

(Union / Applicant)

And

Department of Health: Western Cape

(Respondent)

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### **Details of hearing and representation**

1. The arbitration hearing was held at the offices of Eben Donges Hospital in Worcester on 14 March, 2012.
2. Ms. Lene Macnab, from Channels Albertyn Attorneys, represented DENOSA's members, G du Toit and others. Mr. NA Liebenberg represented the respondent party, the Department of Health in the Western Cape. The parties agreed on a set of material and common cause facts.

### **Issues to be decided**

3. Whether the respondent's action was in accordance with paragraph 3.2 of the Collective Agreement Resolution 3 of 2007 (OSD Agreement) or not.

### **Background**

4. The dispute is about the interpretation and application of a national collective agreement, known as Resolution 3 of 2007 (hereinafter referred to as the "Agreement"), which is an agreement for the implantation of an occupational specific dispensation for nurses. The dispute is whether the Respondent's HOD has the authority to draft and/or issue circulars on how to interpret certain provisions of the agreement.
5. It is a common cause that the Applicant's members are individual nursing professionals who at the effective date of the Agreement were employed by the respondent as heads of nursing/matrons in the health facilities across the Cape Winelands/Overberg Districts. It is common cause that the applicant's members were in charge in Level 1 hospitals and were in possession of the required minimum professional qualification.

### **Summary of evidence and arguments**

6. Although I have considered all the submissions and arguments, because section 138(7) of the Labour Relations Act requires that the reasons for my decision be stated briefly, I will refer only to the submissions and arguments that I regard as necessary to substantiate my finding and the determination of the dispute.
7. The parties agreed to the admission into evidence of a bundle of documents, including the Resolution 3 of 2007 (OSD for Nurses), DPSA Implementation Directive, Public Services Regulations, Departmental Circular and Translation Letters. Neither party disputed the validity of these documents.

### **The applicants' case**

8. The Applicant submits that the Respondent incorrectly translated its members to the posts of Assistant Manager: Nursing. This translation was based on the OSD Agreement read with a Directive issued by the Department of Public Service and Administration on 28 September, and a Circular (H123/2007) issued by the Department of Health, Western Cape on 6 November 2007.
  
9. According to the Applicant, the issuing of Circular H123 by the HOD effectively introduced new terms or gave a different interpretation of clause 3.2 of the OSD Collective Agreement (Resolution 3 of 2007). Clause 3.2 of the OSD Collective Agreement reads:

*“to give effect to this agreement, the implementation of the OSD will be a determination and implementation directives issued by the Minister for the Public Service and Administration in terms of section 3(3)(c) of the Public Service Act, 1994, read with Public Service Regulations, 2001, Chapter I, Part I/G.”*

The applicant submits that clause 5 of the OSD Agreement provides that the OSD Agreement may only be amended by a written resolution agreed to by the parties to the PHSDSBC.
  
10. The applicant submits that the Circular H123 issued by the HOD sought to introduce new terms to the OSD Collective Agreement in that:
  - a) In paragraph 2.7.1 of the Circular, the HOD expressed a view that the type and size of a hospital have a direct effect on the number of beds, the size of the nursing establishment as well as the direct span of control and management responsibility of a Head of Nursing Service.
  - b) In paragraph 2.7.2 of the Circular, the HOD expressed a view that based on the said criteria (a, above), the salary scale of Assistant Manager Nursing to be attached to all posts of Heads of Nursing Services at district and TB hospitals smaller than 90 beds. Furthermore, that the salary scale of Deputy Manager Nursing to be attached to all posts of Heads of Nursing Services at district and TB hospital equal to and larger than 90 beds, as well as the regional hospitals.
  
11. It is the applicant's contention that if the agreement is read and interpreted without reference to either the Directive or the Circular in paragraph 10 above, its members ought to have been translated to the post of Deputy Manager: Nursing.

12. The Applicant submits that the Department of health, Western Cape, cannot unilaterally add a material term to a national Collective Agreement without all the parties agreeing to it in writing. Whilst the Minister is authorised to make regulations and determinations to elucidate or supplement a regulation, section 4 of the Public Service Act, 1994 (prior to the 2008 amendment) specifically provides that the Minister may not make any regulation or other enactment, determination or decision, which relates to Collective Agreement concluded by a Bargaining Council established in terms of the Labour Relations Act of 1995.
13. Therefore, the Applicant wants the Respondent to implement the Collective Agreement Resolution 3 of 2007 (OSD Agreement) and translate its members to the posts of Deputy Manager: Nursing respectively, and pay to them back together with interest thereon at prescribed rate to 01 July, 2007.

### **The respondent's case**

14. Ms. Henrietta Peach, who works as the Assistant Director in Compensation Management (OSD Nursing), gave evidence. She testified that she was involved in the negotiations of the OSD Collective Agreement Resolution 3 of 2007. According to Ms Peach, the Department of Public Services and Administration issued a Directive on 28 September, 2007 to facilitate the implementation of the OSD. Circular H123/2007 dated 6 November, 2007 was issued instructing the department to align the departmental post establishments with the post's structure contained in the OSD.
15. Consequently, the department decided, based on said criteria, that the salary scale of the Assistant Manager: Nursing be attached to all posts of Head of Nursing at district and TB hospitals smaller than 90 beds.. Furthermore, that the salary scale of Deputy Manager Nursing be attached to all posts of Heads of Nursing Services at district and TB hospitals equal to a larger than 90 beds, as well as regional hospitals.
16. Ms Peach submitted that the reason for the differentiation in the hospital was that the nursing components, scope of practice and the nursing services rendered at the small district and larger regional hospitals are not the same. The Nursing Manager's responsibility at the small district hospitals is less than at the regional(large) hospitals.
17. According to Ms Peach, the OSD Collective Agreement does not state that the applicant's members should be translated to Deputy Managers: Nursing or contained a specific implementation directive, to that effect.

18. The respondent submits that in terms of the Public Service Regulation, the executive authority (Minister of health) shall determine the department's organisational structure in terms of core and support functions. Hence the executive authority shall provide the HOD with appropriate powers and authority to manage her or his department effectively in terms of Public Service Regulations. The HOD is as a result responsible for alignment of the positions contained in the OSD Collective Agreement.

### **Arguments**

19. The Applicant argued that the Respondent's function does not include the power to unilaterally determine that the number of beds of a health facility in the Western Cape is a criterion for the translation of employees and thereby restricting the translation to Deputy Manager: Nursing to those nursing professionals at health facilities with more than ninety beds.
20. The Respondent's reliance on the Circular to justify its conduct amounts to an unlawful unilateral variation of the Agreement. On the correct interpretation and application of the Agreement, the Applicant's members ought to be translated based on the duties they performed at the respective health facilities as on 30 June 2007.
21. The Applicant argued that the Respondent's conduct is not in accordance with the Agreement. The Respondent's continuous refusal to translate its employees to the correct posts in terms of the Agreement and its vexatious attitude has prejudice Applicant's members for the last four and half years.
22. The respondent argued that the HOD is provided by the executive authority with appropriate powers to manage the department effectively and efficiently as contained in the Public Services Regulations. In a DPSA's directive dated 28 September, 2007 at paragraph 11.7 the departments were instructed to ensure alignment of departmental post establishments with the post structures contained in OSD. Therefore, the applicant's members who are all Nursing Services Managers of hospital with beds smaller than 90 beds were correctly translated to Assistant Manager as contained in the Comprehensive Service Plan and Circular H123/2007.
23. The Respondent argued that the applicant did not prove by virtue of the testimony of witness/witnesses that the department contradicted the OSD agreement. The testimony of the Respondent's witness went unchallenged.

24. The Respondent is asking for cost against the applicants who showed signs of greed, and despite the fact that it was clear from the documentation and the agreement that most nurses have no reasonable claims, they persisted with declaring disputes, which are frivolous and vexatious.

**Analysis of evidence and arguments**

25. In terms of section 213 of the LRA, a 'Collective agreement means a written agreement concerning terms and conditions of employment or any other matter of mutual interest concluded by one or more registered trade unions, on the one hand and, on the other hand-
- (a) One or more employers;
  - (b) One or more employers' organisation; or
  - (c) One or more employers and one or more registered employers' organisations.'
26. In this case, the applicant contends that the respondent acted irregularly in allowing the Head of the Department to issue or draft circular 123 of 2007 that contradicted the terms of the OSD Agreement. According to the applicants, the respondent violated clause 3.2 of the Agreement ( Resolution 3 of 2007). The clause reads as follows:

*'To give effect to this agreement, the implementation of OSD will be a determination and implementation directive issued by the Minister for the Public Service and Administration in terms of section 3(3)(c) of the Public Service Act, 1994, read with Public Services Regulations, 2001, Chapter1 Part 1/G'.*

27. In my view, the wording of paragraph 3.2 of the Agreement is clear and unambiguous. The paragraph states clearly that the implementation of the OSD will be a determination and implementation of a directive issued by the Minister in terms of section 3 (3)(c) of the Public Service, 1994, read with Public Services Regulations, 2001, Chapter 1 Part1/G. It is an established fact that a Directive was issued on 28 September, 2007 to facilitate the implementation of the OSD. This was done in line with the provisions of paragraph 3.2 of the Agreement.
28. The department thereafter issued Circular H123/2007 on 6 November, 2007. The applicant contends that this Circular issued by the HOD contradicted paragraph 3.2 of the agreement in that the Respondent incorrectly translated its members to the posts of Assistant Manager: Nursing. The Applicant argued that its members ought to have been translated, based on the duties they performed at the respective health facilities, to Deputy Manger: Nursing as on 30 June 2007. The Respondent does

not have the power to unilaterally determine that the number of beds of a health facility is a criterion to be applied with respect to the applicants.

29. Surely, if it had been the intention of the parties to restrict and/or interrogate the directives and circulars, they would have added words, to that effect. It is outside my jurisdiction to interpret the Minister's powers conferred upon him in terms of section 3 (3)(c) of the Public Service, 1994, read Public Services Regulations, 2001, Chapter 1 Part1/G.
30. The Respondent argued that the HOD is provided with appropriate powers to manage the department effectively and efficiently as contained in the Public Services Regulations. In this case, the departments were instructed to ensure the alignment of departmental post establishments with the post structures contained in OSD. Therefore, applicant's members who are all Nursing Services Managers of hospital with beds smaller than 90 beds were correctly translated to Assistant Managers as contained in the Comprehensive Service Plan and Circular H123/2007
31. Paragraph 3.2 of the agreement seeks to give effect to the implementation of OSD. This function is clearly allocated to the Minister in terms of the Public Service Act, 1994, read Public Services Regulations, 2001. In my view, the directive and/or circular was issued to re-enforce the interpretation of paragraph 3.2 of the Agreement. Ms Peach's evidence given in this arbitration hearing must carry the same weight. Therefore, the applicant's submission that the respondent unilaterally amended the Agreement is unfounded.
32. The consideration of fairness and equity in line with purposive interpretation of a collective agreement is well ventilated in *South African Municipal Workers Union v South African Local Government Association* (DA06/09) [2011] ZALAC 22. In this case, Circular H123/2007 sought to look at the differentiation in hospitals regarding the nursing components, scope of practice and the nursing services rendered at the small district and larger regional hospitals in translation of the employees in terms of OSD. In my view, this present a practical approach to the interpretation and application of the Agreement.
33. It is not uncommon that in some instances, the employees would be unhappy on how they are translated in terms of OSD Agreement. In *Independent Municipal and Allied Trade Union v Ethekwini Municipality* [2009] LC (D476/09) it is stated that an elementary tenet of collective bargaining is that the constituency is bound by the bargain, good or bad, that its representatives make on its behalf.

34. Regarding the application for cost against the applicant, in my view the applicant's case was not frivolous and vexatious. Moreover, the applicant did not have an opportunity to rebut the application for costs.

**Award:**

35. I find that the respondent's action was in accordance with paragraph 3.2 the Collective Agreement Resolution 3 of 2007 (OSD Agreement)

36. No order for costs is made.

**DONE AND SIGNED IN CAPE TOWN ON THIS 14 TH DAY OF MARCH 2012.**

A handwritten signature in black ink, appearing to read 'Colin Rani', with a large, stylized initial 'C' and 'R'.

**Arbitrator: Colin Rani**