



ARBITRATION AWARD

Case No: **PSHS1321-17/18**

Commissioner: **Lungile Matshaka**

Date of award: **11 March 2019**

In the matter between:

M J M Kenoshi

Applicant

and

Department of Health- Gauteng

Respondent

DETAILS OF REPRESENTATION AND BACKGROUND

1. The matter was set down for arbitration hearing in terms of section 186(2) (a) of the Labour Relations Act 66 of 1995, as amended, on 21 February 2019 at the Respondent's Offices at SJ Lourens Nursing College located in Pretoria. Adv. M Molapo, instructed by Mohulatsi Attorneys represented the Applicant, while Mr Z Shange, Labour Relations Officer, represented the Respondent.
2. The proceedings were digitally recorded and witnesses gave evidence under oath. The parties asked and were granted to submit closing arguments within seven (7) days. Both complied.

ISSUE TO BE DETERMINED

3. I am required to determine whether or not the conduct of the Respondent constituted an unfair labour practice when, after an audit finding, that the Applicant's Trauma and

Emergency Nursing Qualification is 6 months instead of 1 year post-basic qualification, lowered her rank from PN-B4 to PN-A7, and if so, to determine an appropriate remedy.

BACKGROUND TO THE ISSUE

4. The Kalafong Tertiary Hospital advertised the post of an Assistant Manager for Trauma and Emergency Unit, PN-P4 instead of PN-B4, for which the Applicant applied. The latter was interviewed and subsequently appointed by the Respondent in Kalafong Tertiary hospital into a speciality post.
5. According to the Respondent, Trauma and Emergency unit is a specialized unit where a post-basic qualification is an inherent requirement to perform the duties attached to the post. It has turned out that the Applicant does not have the required post-basic qualification but only a six month's certificate.
6. The Respondent brought to light that the advert had obvious errors in terms of classification i.e. PN-A7 instead of PN-B4 and that it did not specify requirements as directed by the Collective Agreement (***PHSDSBC Resolution 3 of 2007- OSD for Nurses***). The Respondent further submits that this made the advert to defective and deceptive.
7. On the other hand, the Applicant noted with concern that the Respondent treated her like a person who defrauded it, when she applied for the job. The requirements stated in the advert were very clear and she correctly responded to them.
8. Further, the Applicant earned the salary after the promotion appointment. She further performed the duties according to the advert and was paid the correct salary range, level and scale of the said position.
9. The Applicant's prayer is that the Respondent reinstates her to the position of Assistant Manager (PN-B4) effective from 1 April 2018 on the same terms and conditions as they applied prior to her demotion without loss of applicable benefits.

SURVEY OF THE EVIDENCE AND ARGUMENTS

Applicant's case

10. The Applicant testified that the in November 2017 Respondent formally brought to her attention that, following its audit finding, it has noted that her Trauma and Emergency Nursing Qualification is 6 months instead of 1-year post-basic qualification. As result she has been overpaid since 1 February 2009 when she was promoted to PN-B4 Assistant Manager Nursing's post (Speciality Unit). According to their records it was found that she did not have 1-year post-basic qualification for Trauma and Emergency Nursing.
11. The Applicant in turn drew my attention to the fact that, although she had formally approached the Respondent to produce a copy of the abovementioned audit report upon which the intended or deduction is based. This was to no avail.
12. She further confirmed her 6 (six) months Trauma and Emergency Nursing certificate that she successfully completed on 31 July 1996 and has passed in the examination in Midwifery.
13. She also confirmed her registration with the South African Council as a registered nurse and midwife. In accordance with the Resolution 3 of 2007 she applied for the post advertised of an Assistant Manager (Emergency) PN-B4. She was interviewed and after being successful she was appointed to the post.
14. She further stated that she never received any Labour Court Review Application regarding her appointment to be set aside. She further confirmed that on assuming her new position of an Assistant Manager, a promotional post, her salary changed. She also confirmed that her salary has now been reduced without her consent. She also pointed out that even her performance bonus in 2018 was in respect of the lower position of post PN-P4.
15. She further pointed out that she was never referred to the specific prescripts, i.e. Public Service Act (PSA) and OSD (Occupational Specific Dispensation) with regards to

lowering and / reduction of her salary. As relief she is therefore seeking to be re-instated into her former promotional position of an Assistant Manager.

16. Under cross-examination the Applicant confirmed that she started working for the Respondent in 1989. At the time she was the Chief Professional Nurse. She confirmed that she was familiar with the two (2) streams i.e. Speciality and General. She admitted that she applied for a post in speciality nursing and at the time she was in the general nursing in terms of OSD. She further confirmed that she has been a manager since 2009.

17. She conceded that the advert reflected the post she applied for as an Assistant Manager (Emergency) PN-P4 was a speciality stream.

18. She further conceded that the appointment requirements are a minimum of 10 years appropriate / recognisable experience in nursing after registration as Professional with SANC in General Nursing. At least 6 years of the period referred to above must be appropriate / recognisable experience after obtaining the 1-year post-basic qualification in the relevant speciality.

19. She further conceded that she did not have a one (1) year post basic qualification requirement which is an inherent requirement of the speciality stream of an assistant manager's post she previously occupied or appointed to according to OSD.

20. It was put to the Applicant that the advert which she responded to did not comply with the requirements of the OSD. It was erroneous and her appointment was based on an erroneous advert. No direct or meaningful response was forthcoming from the Applicant. Further, she did not dispute the Respondent's version.

21. In re-examination the Applicant confirmed that the closing dates for the filling of two (2) Assistant Manager Posts was 20 May 2008. She further confirmed that posts in Speciality Nursing refer to those positions where a post-basic qualification listed in Government Notice R212, as amended, is an inherent requirement to perform the duties attached to the post. This also includes similar post-basic qualifications with

duration of at least one year in the relevant speciality recognised by the SANC (South African Nursing Council) prior to the publishing of Government Notice R212.

22. The Applicant further confirmed that the scope of the OSD as it relates to those categories of nurses defined in the scope of practice as determined by the SANC and where it is an inherent requirement of the post to continuously maintain such registration with the SANC.

Respondent's case

23. The Respondent's witness, Ms Zodwa Mdluli, testified to the effect that:

23.1 She confirmed her position as a Deputy Director: Recruitment & Placement in the HR Department. She pointed out that when a position became vacant HR is requested to advertise the post through DPSA (Department of Public Service & Administration) as well as Government Central Services.

23.2 After the advert has been closed, the applications received are processed for shortlisting and interviewing of the shortlisted candidates.

23.3 The purpose of shortlisting is to check the applicants if they meet the requirements of the advert.

23.4 She knows the Applicant as an employee working at the Emergency and Trauma Unit. She is well aware of the fact that OSD provides speciality and general streams. She confirmed that the advert was for a speciality post at the Emergency and Trauma Unit.

23.5 In making to reference to a Clause entitled Differentiation in Salary Scales under Paragraph 4 of PSCBC Resolution 1 of 2007, she mentioned that posts in Speciality Nursing refer to those positions where a post-basic qualification listed in Government Notice R212, as amended, is an inherent requirement to perform the duties attached to the post. This also includes similar post-basic qualifications

with of at least one year in the relevant speciality recognized by the SANC prior to the publishing of Government Notice R212.

23.6 She further went on to confirm that the post in the advert is not in the OSD document. This therefore meant that the advert was defective. She further confirmed that the Applicant as per her documentation included in her bundle the basic requirement of 1 (one) year in Trauma and Emergency Nursing as a Speciality requirement is absent. If an error has been identified, it has to be corrected as per the Respondent's letter dated 30 November 2017. The purpose of the letter was to make the Applicant aware of the overpayment.

23.7 She made the point that if the salary is being corrected, this does not constitute demotion.

23.8 Under cross-examination the witness confirmed that she only got involved in the appointment of the Applicant in its processing and in accordance of with the recommendation of the interviewing panel. She further confirmed the appointment of the Applicant to a speciality post.

23.9 She further confirmed that she drafted the Overpayment Letter. She pointed out that the purpose of OSD is a retention strategy of the Respondent that was implemented effectively from 2007.

23.10 She further confirmed that only one application was received for the Emergency Unit post.

23.11 Of significance under re-examination Ms Mdluli confirmed that Applicant's appointment in light of the Resolution was erroneous and had to be in line with it.

23.12 I will reflect on both parties' closing arguments in my analysis of the evidence and arguments hereunder.

ANALYSIS OF EVIDENCE AND ARGUMENTS

24. As a point of departure, section 186(2) (a) provides that “‘*Unfair labour practice*’ means any unfair act or omission that arises between an employer and an employee involving an unfair conduct by the employer relating to promotion, demotion, probation or training of an employee ...”
25. Turning to the present case, on the one hand, the Applicant is contesting her demotion or lowering of her rank from PN-B4 to PN-A7 leading to reduction of her salary from R596 976.00 to R546 315.00. The implication is that she has to refund the Respondent difference of R303 740.50 as at September 2017. On the other hand, the Respondent submits that the Applicant was appointed erroneously into an Assistant Manager’s post: PN-B4 (Speciality) without having a required a one (1) year post-basic qualification which is an inherent requirement. Therefore, according to the Respondent, she has not been demoted but correctly placed to a post of an Assistant Manager: PN-A7 (General) which is a post she qualifies to occupy.
26. In terms of PHSDSBC Resolution 3 of 2007 to be an Assistant Manager in a specialised area, one needs to have a basic qualification accredited with SANC in terms of Government notice R425 or equivalent qualification that allows registration with SANC as a professional nurse. In addition, one should have a post basic nursing qualification with duration of at least 1 year accredited with SANC in terms of Government notice No R212 in the relevant speciality.
27. On the other hand, the Applicant’s representative has argued that the Applicant in the present case did not earn remuneration that was wrongly granted as highlighted by the title of section 38 of the PSA. He further argued that it is not the Respondent’s case that the Applicant was wrongly promoted on the basis that she did not have a 1-year post-basic qualification, but a 6 months’ one. So, the issue is not about an employee who was wrongly paid but one who was wrongly promoted.
28. Further, the Applicant’s argument is that the Respondent in its defence failed to demonstrate that the executive authority’s powers in section 38(1) (a) of the PSA was

at the time of the conduct delegated authority. All that the Respondent's defence relates to is reliance on section 38(1) (a) of the PSA. But it failed to lay a legal basis for the reliance in so far as the written delegated authority of the MEC's statutory powers conferred by section 38(10)(a) of the PSA to the CEO is concerned.

29. The Applicant has further argued that section 38(1) (a) does not refer to wrongly granted promotions, but only to wrongly granted salary, salary level or scale or reward that is a result of the finance section of the department making an error in paying an employee who is not in a particular salary range, salary level or scale than what he or she entitled to receive.
30. It is view of the Applicant that she has been demoted not because an error has occurred in the calculation of her actual salary range, level or scale, but allegedly because of not having a post-basic 1 (one) year qualification as required by OSD Resolution, but a 6 (six) months qualification. The Applicant makes the point that logically and legally, once the Respondent lowered her existing position, that conduct does not constitute the correction of a wrongly granted remuneration, but a demotion. It is therefore submitted that it was not an incorrect salary level or scale as envisaged in section 138(1) (a) of the PSA.
31. According to the Applicant section 138(1) would only apply if she was paid the salary, salary level or scale higher than that of an Assistant Manager PN-B4.
32. It is therefore the Applicant's submission that she has proven her case on a balance of probabilities that she was promoted by the authority that had the power to do so and that her lowering from PN-B4 to PN-A7 was demotion and not a correction of a salary range level or scale.
33. The Respondent submits that it is worth noting that a Collective Agreement is binding on the employer and on employees of the employer. This clearly enforces compliance and thus requires all appointments to be audited in order to ensure that all provisions of any law including the Collective Agreement which is regulating appointments in the Public Service are complied with.

34. I have noted that it is common cause that there is no dispute about the appointment of the Applicant as an Assistant Manager PN-B4 in a speciality post. Reference is made to clause 3.1.3.2 of the Resolution 3 of 2007 which unambiguously states that: *“Posts in Speciality” refer to those positions where a post-basic qualification listed in Government Notice R212, as amended, is an inherent requirement to perform duties attached to the post.*”
35. The Respondent draws my attention to the fact that the clause referred to above, makes no exception, but emphasizes that any incumbent of the speciality post is required to be in possession of a basic qualification which is an inherent requirement to perform the duties attached to the post. It is further the Respondent’s submission that it is not in dispute that the Applicant does not have a required post-basic qualification to occupy a post in speciality.
36. The Respondent further confirms that the Applicant was appointed in terms of section nine (9) of the Public Service Act No 103 of 1997, as amended. Section 138(1) (a) provides that ***“If an incorrect salary, salary level, salary scale or reward is awarded to an employee, the relevant executing authority shall correct it with effect from the date on which it commenced.”***
37. Paragraph (b) of the above section provides that: ***“Paragraph (a) shall apply notwithstanding the fact that the employee was unaware that an error had been made in the case where the correction amounts to a reduction of his or her salary.”***
38. I have noted that the Applicant was made aware that an error had been made and therefore her salary will be corrected which will result in the reduction of her post and her salary.
39. I have also noted the Applicant’s argument regarding the Labour Court judgement which was confirmed by the Constitutional Court in the matter between **Public**

Servants Association of SA (PSA) obo Ulufunmilayo Itunu Obogu and Department of Health (Gauteng), case no: J2185/2016.

40. The Respondent avers that the Applicant's argument is not relevant in the present matter. The court's judgement was based on section 38(2) (b) (i) which specifically deals with recovery of overpayment as a result of an error. I have also noted that the Applicant's legal representative stated on record that the issue of deductions is not part of the dispute as there is no money deducted from the Applicant as yet.
41. The Respondent further pointed out that the court never commented on section 38(1) (a) and (b) which instructs the executive to correct the salary, salary level, salary scale or reward even in the case where the correction amounts to a reduction of the employee's salary, let alone making a declaration on it. It is therefore the Respondent's submission that in the absence of any court order, declaring section 38(1) (a) and (b) of PSA unconstitutional, remains in force and the Respondent was correct to act as directed by the section 38(1) (a) and (b).
42. In conclusion it is the Respondent's submission that the Applicant was appointed erroneously into Assistant Manager post: PN-B4 (Speciality) without having a required one-year post-basic qualification which is an inherent requirement and therefore she has not been demoted but correctly placed to a post of an Assistant Manager: PN-A7, which is a post she qualifies to occupy.
43. What is clear is an obvious litany of errors that has characterised the appointment of the Applicant.
44. Firstly, the advert reflects the post correctly as Assistant Manager (Emergency) but wrongly giving the code as PN-P4, instead of PN-B4.
45. Secondly, only registration with SANC as a registered nurse and midwife, Diploma/Degree and 3 to 5 years in Emergency Department are mentioned as requirements. Yet this is a post in Speciality Nursing where a post-basic qualification listed in Government Notice R212 is an inherent requirement to perform the duties

attached to the post. This also includes similar post-basic qualifications with duration of at least one (1) year in the relevant speciality recognized by the SANC. Why such important information was omitted from the advert baffles me to say the least.

46. Thirdly, the appointment letter of the Applicant dated 11 December 2008 reflects: **“Application for a Post of Assistant Manager PN-B4”** and not **“PN-P4”**.

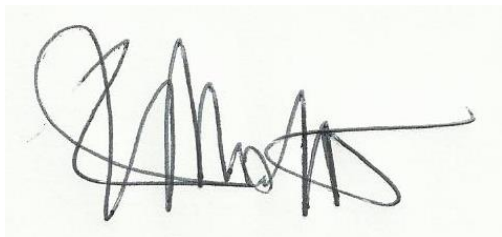
47. It was only after audit in November 2017, 30 that the Respondent discovered that the Applicant has a six (6) months Trauma and Emergency Nursing Qualification instead of one (1) year post-basic qualification, when her rank was lowered from PN-B4 to PN-A7 resulting into the reduction of her salary from R596 976.00 to R546 315.00.

48. I therefore have to accept the Respondent's submission that the Applicant was appointed erroneously into the Assistant Manager's Post: PN-B4 (Speciality) without having a required one (1) year post-basic qualification which is an inherent requirement and therefore she has not been demoted but has been correctly placed to a post of an Assistant Manager: PN-A7, which is a post she qualifies for.

AWARD

49. I find that the conduct of the Respondent did not constitute an unfair labour practice by lowering the rank of the Applicant from PN-B4 to PN-A7 resulting in the reduction of her salary from R596 976.00 to R546 315.00.

50. The matter is accordingly dismissed.

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

Lungile Matshaka