



PHSDSBC

PUBLIC HEALTH AND SOCIAL DEVELOPMENT
SECTORAL BARGAINING COUNCIL

ARBITRATION AWARD

Case Number: PSHS138-14/15
Commissioner: Gerald Jacobs
Date of Award: 25 September 2014

In the ARBITRATION between

SAMA obo Selfridge W J

(Union/Applicant)

and

Department of Health- Free State

(Respondent)

Union/Employee's representative: Mr Simon Buthelezi

Union/Applicant's address: _____

Telephone: _____

fax: _____

E-mail: _____

Employer's representative: Ms M Mpholo

Respondent's address: 2nd Floor, A West Bophelo House

Private Bag x 20660

Bloemfontein

9300

Telephone: 051-4081757

fax: 051-4081993

E-mail: _____

Details of hearing and representation

- [1] An arbitration was set down on 3 September 2014 at 9h00 and held at the Boardroom of the Dihlabeng Hospital in Bethlehem.
- [2] The applicant (referring party) was the South African Medical Association trade union (“SAMA”) on behalf of Dr W.J Selfridge and the Free State Department of Health, the respondent. The arbitration was held under the auspices of the Public Health and Social Development Sectoral Bargaining Council (“the Bargaining Council”) in terms of section 24 of the Labour Relations Act, 1996 as amended (the “Act”) and issued in terms of section 138(7) of the Act.
- [3] The applicant was represented by Mr Simon Buthelezi an official of SAMA. The respondent was represented by Ms M Mpholo, its Labour Relations Officer.
- [4] Prior to the commencement of the proceedings parties agreed that the matter should be determined on written submissions. Resultantly, the arbitration proceeding was not electronically recorded. It was further agreed that the closing date for submissions was on 10 September 2014, however the respondent representative was prevented from submitting her submissions on the agreed date due to illness and provided a medical certificate. The respondent’s written submissions reached the Bargaining Council two days later, on 12 September 2014.

Issue to be decided

- [5] I am required to determine whether the respondent had breached the Collective Agreement (Resolution 01 of 2002 which regulates the payment of acting allowances) by ceasing the payment of the applicant’s allowance for acting in the position of Clinical Manager for the period 1 June 2013 – 31 October 2013 and requesting the applicant to reimburse the respondent for allowance paid to him while acting in the position for the period from 1 February 2012 until 31 May 2013.
- [6] The applicant seeks an order for the respondent to pay his acting allowance and that the respondent immediately refrain from taking back the monies already paid to him.

Background to the issue

- [7] Based on the papers filed by parties the following facts was found to be common cause. The applicant in this matter, Dr W J Selfridge is a Medical Doctor stationed at the Dihlabeng Regional Hospital. It was common cause that in 2011, the appointed Clinical Manager, Dr S J Kearns was requested to act as Chief Executive Officer (CEO) at Dihlabeng Regional Hospital which she accepted. The letter confirming her appointment as acting CEO reads as follows;

“In terms of the provisions of Section 32 of the Public Service Act (Act no 103 of 1994), I wish to inform you that you have been appointed to act as the Chief executive Officer: Dihlabeng Regional Hospital from 7 November 2011 until the issue of the CEO of Dihlabeng is resolved.

Your willingness to perform these duties is appreciated.

Yours sincerely”.

[8] In February 2012 the applicant was appointed to act in Dr S J Kearns position as Clinical Manager since she was then acting in the CEO position. The applicant's appointment was confirmed in writing and was for the period 1 February 2012 to 31 July 2012. Four months later the applicant was appointed again to act for the month of December 2012.

[9] In January the following year, the applicant was once again called upon to act as Clinical Manager. He was requested to act in the position again in June 2013 and his acting tenure was extended (in writing) until 31 October 2013.

[10] The applicant received payment for the period he was acting in 2012 which amounted to R173.932.94. However, he did not receive his acting allowance for 1 June 2013 to 31 October 2013. The applicant lodged a claim with the Human Resources Department for payment of the unpaid acting allowance. His claim was approved by the acting CEO and it was recommended that he be granted the payment for the period 1 August to 30 September 2013. However, in a subsequent letter the applicant was advised that he would not be paid the acting allowance. The letter states the following reasons for the non-payment;

"After investigations it was found that you were erroneously paid an acting allowance.

Chapter1, Part VII, B5.1 of the Public Service Regulations 2001, indicates that a Head of Department may only compensate an employee for acting in a higher post.

As the post is not vacant in which you are currently acting, we regret to inform you that you did not qualify for the payment of an acting allowance.

The overpayment of the acting allowance that was paid to you for the period from 1 February 2012 until 31 May 2013, amounting to R173.932.94. This amount will be recovered from you.

The department apologise for any inconvenience caused by the overpayment".

[11] In the meantime, Dr S J Kearns wrote a letter addressed to Dr T D Moji, DDG: Clinical Cluster Free State Department of Health dated 28 October 2013 that reads as follows;

"I have been acting as CEO for Dhlalabeng Regional Hospital since November 2011. During May 2013 I wrote a letter to Me Sondiyazi regarding my position as acting CEO stating that I cannot continue with this any longer. I didn't receive any feedback regarding this.

At the moment due to worsening staff shortages in November, no one can continue to assist with clinical manager duties and I have to be more operational to ensure patients are receiving best treatment. It is therefore impossible for me to continue with the duties as CEO.

Due to certain personal issues it is also very difficult for me to be frequently out of town.

I will appreciate it if you can appoint someone to act as CEO for Dhlalabeng Regional Hospital as from 1 November 2013.

I want to thank you for the confidence you've put in me to take up this position. I have learnt a lot.

I am looking forward to serving the institution as clinical manager for many more years to come.

Regards."

[12] The applicant, SAMA on behalf of the Selfridge referred a dispute to the Bargaining Council. The dispute was referred in terms of section 24 (2) and section 24(5) of the Labour Relations Act (the LRA), concerning the interpretation and/or application of the Public Health and Welfare Sector Bargaining Council , Resolution 1 of 2002, Collective Agreement under the Public Health and Sectoral Development Sectoral Bargaining Council. The applicant complained that the respondent had failed to comply with or apply the provisions of clause 3 of the Resolution relating to acting allowance. Clause 3 reads as follows:

“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 (here-after 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.

.....”

[13] The interpretation and application of these words was what ultimately gave rise to the dispute.

Submissions received from the applicant

[14] The applicant’s case was that his entitled for the payment of an acting allowance because the position was vacant. He based his argument on the fact that Dr Kearns vacated her post as Clinical Manager to act as the CEO of the hospital, and as such the post of Clinical Manager was vacant during the period the applicant acted in the position. The applicant also relied on Dr Kearns letter confirming her appointment as acting CEO and argued that it does not make any mention of her continuing with the duties of Clinical Manager whilst performing her acting duties as CEO. Contrary to Dr Kearns letter the applicant’s appointment letter states that *“in addition to your duties you will also act as a Clinical Manager”*.

[15] The applicant further argued that he satisfied all the criteria set out in clause 3 of the Resolution, because his appointment was in writing; he accepted the acting appointment; the position he was required to act was funded and vacant; he acted for longer than six weeks (February 2012 to October 2013) and the position he was appointed into was higher than the position he was employed as by the respondent. The respondent erred in not paying the applicant his acting allowance as well as its request to pay back the amount of R173.832.94. In fact the applicant should be paid the outstanding acting allowance of R56 372.50 for the five months period 1 June 2013 until 31 October 2013.

Submissions received from the respondent

[16] The respondent argued that the applicant was not entitled to any allowance whatsoever, notwithstanding that it was common cause that the applicant was appointed in the acting position, and that this acting appointment was confirmed in writing and was accepted by the applicant. The respondent’s main line of argument was that the position was not vacant as the position was occupied by Dr SJ Kearns whilst she

was the acting CEO of Dhlabeng Hospital. The applicant therefore did not meet the requirements of clause 3 of the Resolution because it requires that the post must be vacant. The respondent also relied on the fact that the period 1 February 2012 to 9 February 2012 and 1 October 2013 to 31 October 2013 were both not longer than 6 weeks and therefore he was not entitled to the allowance since it's a prerequisite that the acting period should be longer than 6 weeks.

Analysis of submissions received

- [17] The Public Health and Welfare Sector Bargaining Council Resolution No 1 of 2002, provides that an employee be appointed in writing, to act in a higher post, by a person who is duly authorised, shall be paid an acting allowance provided that the post is vacant and funded, and that the period of acting is uninterrupted and longer than six weeks. In this present matter, it was common cause that the applicant was appointed in writing and he accepted the appointment. The respondent did not produce any evidence that the position the applicant was required to act was not higher than the position he held and that the person who appointed him was not duly authorised to do so. Similarly, no evidence was placed before me that the position was not funded. The evidence placed before me shows that the applicant has acted in the position of Clinical Manager in February 2012 to July 2012 and was appointed again to act for the month of December 2012 and in January 2013. After that he acted in the position in 1 June 2013 until 31 October 2013. The evidence further shows that the period of acting in February 2012 to July 2012 and 1 December until 31 January 2013 and 1 June 2013 until 31 October 2013 was uninterrupted and longer than six weeks.
- [18] The argument of the respondent was that the acting position was not vacant and for that reason the applicant did not satisfy the requirements and was not entitled to receive the acting allowance. The respondent based the argument on the fact that the position was occupied by the acting CEO. I do not agree with this argument for the following reasons.
- [19] Dr Kearns was appointed as acting "Chief Executive Officer" (CEO) at Dhlabeng Regional Hospital from 7 November 2011. The respondent has not put before me any concrete facts to show that Dr Kearns performed the duties of CEO and at the same time the duties of the Clinical Manager. However, it was not disputed that she performed the duties of CEO. As a result, it's apparent that there was no one performing the duties of the Clinical Manager which was unoccupied at that stage. As a consequence, the applicant was then appointed to act in the unoccupied Clinical Manager position. It was never in dispute that the applicant performed the required duties of the Clinical Manager position. Moreover, Dr Kearns' reason for relinquishing her acting duties as CEO as stated in her letter dated 28 October 2013 was because there was no one that could perform the duties of Clinical Manager. This corresponds with the time the applicant's appointment came to an end and he was advised that he would not be paid the acting allowance.
- [20] What's more, if the position was not vacant as the respondent claims, what was the reason for appointing the applicant to act in the position in the first place? The respondent could have removed the applicant or

not appoint anyone to act in the position if it was still being occupied by the acting CEO at the time. It did not do so. I find it absurd for an employer to appoint an employee in an acting position, but wants to escapes payment of the higher remuneration simply because the person who previously occupied the position (the position the employee was requested to act in) was acting in another position. There's no provision in the Resolution that supports such a proposition.

- [21] In the circumstances, I reject the respondent's argument that the position was not vacant and for the abovementioned reasons, I conclude that the acting position was vacant. I further find that the applicant met the requirements as set out in Resolution 1 of 2002 and the respondent was indeed in breach of the Resolution. I further find that the applicant was entitled to payment of the acting allowance for the period from 1 February 2012 until July 2012 and 1 December to 31 January 2013, amounting to R173.932.94 which he received and for the period from 1 June 2013 until 31 October 2013 which he did not receive payment. I accordingly make the following award.

Award

- [22] The respondent breached the Public Health and Welfare Sector Bargaining Council, Resolution 1 of 2002, Collective Agreement by not paying the applicant allowance for acting in the position of Clinical Manager for the period 1 June 2013 – 31 October 2013.
- [23] The respondent is hereby directed to comply with the Resolution 1 of 2002 by making payment to the applicant of an acting allowance for the period 1 June 2013 – 31 October 2013, being R56 372.50 (Fifty Six Thousand Three Hundred and Seventy Two Rand and Fifty Cents) equivalent to five months acting allowance (R11 274.50 acting allowance per month x 5 months = R56 372.50).
- [24] The amount due, minus statutory deductions, must be paid to the applicant by no later than 15 October 2014.
- [25] The applicant is further not required to reimburse the respondent for payment he received for acting in the position that amounted to R173.932.94 which he was entitled by law to receive.



Signature:

Gerald Jacobs

Commissioner:
