



ARBITRATION AWARD

Case Number: **PSHS151-13/14**

Panelist: **Khaya Mqugo**

Date of Award: **08 September 2014**

In the matter between:

NEHAWU obo Mangali NV

Applicant

and

Department of Health – Eastern Cape

Respondent

Details of the hearing and representation:

1. An Arbitration hearing took place under the Auspices of the Public Health and Social Development Sectoral Bargaining Council at Frere Hospital, in East London on the 18 July and 26 August 2014
2. The Applicant, Mrs Nomagcisa Veronica Mangali, was represented by Mr Soloyise Mkiva, NEHAWU Shopsteward.
3. The Respondent, Department of Health-Eastern Cape, was represented by Mr Phelisile Melane, Labour Relations Assistant Director.

4. The proceedings were conducted in English therefore the services of an interpreter were not required.
5. The parties requested to file closing arguments in writing due to the complication of the matter and filed closing arguments on 2 September 2014.
6. Handwritten notes were kept and the proceedings were electronically recorded.

Issue to be decided:

7. I am required to determine whether the failure by the Respondent to pay the Applicant acting allowance constituted an Unfair Labour Practice and if yes what appropriate remedy is the Applicant entitled to.

The background to the dispute:

8. The Applicant commenced employment with the Respondent on the 1 October 1992 as a Professional Nurse. She is qualified in Psychiatry, General Midwifery, Community Nursing and BCur.

Survey of evidence and argument:

9. I have considered all the evidence and arguments, but because Section 138 (7) of the Labour Relations Act 66 of 1995 requires brief reasons, I have only referred to the evidence and arguments that I regard as necessary to substantiate my findings and the determination of the dispute.

The Applicant's evidence:

10. The Applicant, Mrs Mangali commenced employment with the Respondent on the 01 October 1992. She is a Professional Nurse and is also qualified in Psychiatry, General Midwifery, Community Nursing and BCur.
11. She is based in Ward C8 at Frere Hospital, East London.
12. She performed duties of an Operational Manager/Sister in charge of the Department for 2 years without any remuneration whereas the post was a higher post.

13. She was allocated to the post by Mrs Millie who has since died.
14. She stated that Mrs Mathew, the Acting Manager and Mrs Mguli, Nursing Services Manager knew about her acting as an Operational Manager.
15. She could not refuse to act as an Operational Manger for two reasons, namely: had she refused she could have been charged; also nursing involves death and should she refused that would result in the death of many people.
16. She was allocated to the acting post due to her performance, knowledge and skill. Sister Millie followed the same practice which was followed in allocating acting posts to other Nurses.
17. She differentiated between allocation to the post and appointment to the post as follows: "When allocated the Nurse is verbally told to perform certain duties; when appointed there is an appointment letter which needs to be signed."
18. Her predecessor, Mrs Xhamane was also not appointed in that post, she was allocated and as such she did not have an appointment letter.
19. She referred to Exhibit E: Change list dated January 2013 which showed that she was in charge for Ward C8 since November 2011.
20. She referred to an Arbitration award involving PHSDSBC and 6 Workers Unions where in the following provision was agreed upon as appears in point 3.4, "Translation of Unit Managers not formally appointed to posts of Sister in Charge and subsequent advertisement of their posts in the OSD. All Nurses who were performing duties of the Unit Managers duly appointed or not must translate automatically as Operational Managers and be placed according to the streams applicable e.g. Specialty or General."
21. The Arbitration Award went further and stated that "Parties agree that all Nurses that meet the requirements of the OSD must translate to the OSD based on the duties they performed as at 30 June 2007."

22. The Applicant is demanding payment for the period she acted as an Operational Manager.
23. Under cross examination she conceded that she lodged a grievance which was scheduled to take place on 16 May 2013. However, that meeting failed to resolve the dispute hence she referred her dispute the Bargaining Council.
24. She was referred to Exhibit L: Acting Allowance Policy, Page 2 of this Policy provides: "Documents required for the appointment of an employee into an acting position in the Department is included in this Policy as the following:
 - Letter confirming appointment to acting position and acting allowance details.
 - Acting Position Form.
25. She was referred to Page 4 of Policy which provides that, "HR Department should ensure that a copy the appointment to acting letter, signed by the employee, is placed on the employees personnel file."
26. She was referred to Point 5.4, page 6 which provides that, "The employees must accept the acting appointment in writing before the acting allowance is payable."
27. She stated that she acted on the post from November 2011 up until May 2014 and on the 01 June 2014 somebody was appointed to that post.
28. Mrs Nokwanda Ngantweni a Professional Nurse working as a General Nurse at OPD, testified that Sister in charge became Operational Manager in 2008 at the introduction of OSD.
29. She stated that all Sisters in charge were allocated Operational Manager's posts without letters approving them to occupy those posts.
30. The procedure in allocating is different to the one used in appointing in that when allocating, the Manager instructs the Sister to perform duties without any appointment letter.

31. Undercross examination she stated that no payment was made by the Respondent to Professional Nurses who were made by the Respondent to Professional Nurses who were allocated to be Sister in charge.

The Respondent's evidence:

32. Mrs Thembeke Mguli, Nursing Manager at Frere Hospital testified that she was involved in resolving the Applicant's grievance.

33. At the time the Applicant was acting, the CEO was Dr Kotze who told Nurses that there would be no acting allowance due to Budget constraints.

34. Mrs Mguli advised Nurses to occupy those vacant posts so that when a particular post is being advertised they possess the required skill which they acquired when they were acting.

35. Under cross examination she conceded that the Applicant performed well when she was acting as an Operational Manager.

36. Thembeke Nqumashe, Acting HR Manger testified that she was also part of Management task to resolve Applicant's grievance.

37. She stated that employees were being prepared to get exposure in Senior Posts which had been vacated.

38. To qualify for an acting allowance the Manager identifies a person who will act in a certain position. The Manager will inform HR in writing about this employee who will be acting in a certain post.

39. The CEO/SG approves the letter and thereafter HR writes a letter to the employee and the employee is expected to sign the letter.

40. In Applicant's case this process was never followed and at some point the post the Applicant acted in was abolished.

41. The Applicant's closing arguments included an Appointment letter appointing the Applicant to act as an Operational Manager.
42. There was no evidence led regarding this appointment letter and infact the evidence before me is that the Applicant was never appointed, she was allocated to the post.
43. It could neither ignore nor consider the letter as it is the crux of the dispute but the predicament was caused by the time the appointment letter was submitted.
44. On the 9 September 2014 at Mquqo Attorneys, No 4 Zanempilo Health Centre, Corner Oxford and Commissioner Street, I met the Applicant and Respondent representatives to make submissions in respect of the appointment letter.

Analysis of evidence and arguments:

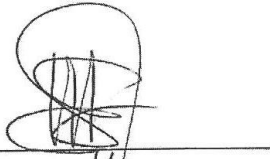
45. This appointment letter is dated 12 July 2013 and was signed on the 18 July 2013.
46. It is common cause that Ms Mathews who signed the letter was just a Manager and not the CEO and therefore did not have authority to sign the letter.
47. It is common cause that the said post was abolished in June 2012 and it follows that there could not be an appointment to an abolished post.
48. The appointment letter was written by Ms Siyasanga Nkumbi, HR Clerk, as per the letter head and was directed to Ms Mathews.
49. The CEO was never involved in the drafting and signing of a letter.
50. Based on these submissions I am not convinced that the Applicant was appointed as she herself throughout testified that she was never appointed but was allocated to the post.
51. In therefore rule that the Applicant was never appointed to act as Operational Manager.

52. In Northern Cape Provincial Administration v Commissioner Hambidge NO and Others (1999) 20 ILJ 1910 (LC) the Court viewed and set aside a CCMA arbitration award which held that the employer had committed an unfair labour practice by not paying the Nurse the salary normally attached to the post in which she had acted.
53. In the above case a Nurse claimed compensation equal to the difference between the salary she received and the salary she claimed she should have received while acting.
54. In Hospersa and another v Northern Cape Provincial Administration (2000) 21 ILJ 1066 (LAC) the Court clarified this position by stating as follows: "Employees acting in vacant posts above their normal positions either to fill in for incumbents who are temporary absent or while the employer waits to make a fulltime appointment are not entitled in fairness to an acting allowance and the temporary employment does not give rise to an enforceable claim to the post when it is ultimately filled."
55. There is no basis whatsoever upon which I could justifiably come to the conclusion that the Respondent had acted unfairly and had therefore committed an unfair labour practice against the Applicant in this matter.
56. It follows therefore that The Respondent's failure to pay the Applicant an acting allowance does not amount to unfair labour practice as contemplated in the LRA.
57. I therefore make the following award:

Award:

58. The Respondent's failure to pay the Applicant an acting allowance does not amount to an unfair labour practice.

59. The Applicant is not entitled to any relief.

Signature 
Panelist: 