



PHSDSBC

PUBLIC HEALTH AND SOCIAL DEVELOPMENT
SECTORAL BARGAINING COUNCIL

ARBITRATION AWARD

Case No: **PSHS193-18/19**

Commissioner: **Gerald Jacobs**

Date of award: **28 September 2018**

In the matter between:

PSA obo LC Diergaardt

(Applicant/ Union)

and

Department of Health - Northern Cape

(Respondent)

Details of hearing and representation

1. This is the award in the arbitration between the applicant (referring party) the trade union Public Servants Association of South Africa on behalf of Mrs L C Driegaardt and the respondent the Department of Health- Northern Cape.
2. 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(2), 24(5) (interpretation or application of a collective agreement) of the Labour Relations Act, 1996 as amended (the “Act”) and issued in terms of section 138(7) of the Act.
3. The matter was initially heard on 8 August 2018, at the Dr Harry Surtie Hospital in Upington. Mr F Jantjies an official of the applicant’s trade union appeared before me on behalf of the applicant. The respondent was represented by Mr Kammies, its labour relations officer. At the start of the hearing, the parties exchanged papers. By the time that opening statements were concluded, there was a dispute of fact in regard to the

appointment of the applicant to act, as well as, whether the position was vacant and funded. However, due to the respondent's witnesses not being available to testify the hearing was adjourned by agreement between the parties, to reconvene on 7 September 2018.

4. On 7 September 2018, the hearing continued. After leading evidence, it was agreed to dispense with oral arguments and that the parties will file written arguments on or before 14 September 2018. The respondent representative filed its closing arguments in time, however, the applicant's arguments were only filed with the Council on Friday 21 September 2018, seven days after the date it was supposed to have been filed. At any rate, the 14-days' time period will be calculated from this date.

Background to the dispute

5. The applicant had been in the employ of the respondent since 8 March 1995. At the time of this dispute, she was employed as a Production Revenue Clerk and earned R16 2891.00 per annum on salary level 6. Her duties as a Production Level Clerk entailed supervising the revenue unit, receiving cash, doing banking, working with the patients' medical aids, and dealing with all public queries amongst others. It was common cause that the then Acting Chief Executive Officer, by the name of Mr Richard Edward Du Plessis, requested the applicant in writing to take care of the duties of the Food Service Manager in a memo dated 17 May 2016 (page 25 of the bundle). The position was two levels higher, on level 8. It is important to quote the main paragraph of the memo. It reads as follows;

“ This memo serves to confirm that Ms L Diergaardt will be taking care of the duties of the food service manager as from 23rd May 2016 for the next three months. Acting allowance will be applied for her period of acting.

Hope you find this in order.”

6. The applicant was again requested to “take care” of the position in a memo dated 01st September 2016 (page 24 of the bundle) that reads as follows;

“This memo serves to confirm that Ms L Diergaardt will be taking care of the duties of the food service manager as from 01st September 2016 for the next 6 months. Acting allowance will be applied for her period of acting.”

7. Its further common cause that she accepted the appointment and performed the duties. This dispute is a sequel to the respondent's failure to pay the applicant acting allowance,

following a period of 14 months' of performing the duties on the ground that she did not qualify for the allowance. The applicant consequently lodged a grievance on or about 22 March 2018. It reads,

“In April 2016 het Mnr E du Plessis (Acting CEO) my gevra om die kombuis te manage. In die gesprek van ons, ek en Mnr E Du Plessis, het hy genoem dat ek “Acting Allowance” sal bertaal word vir die tydperk. Volgens hom wou hy gehad het ek moet al sommer daardie tyd begin in kombuis waar ek gese het dat ek eers n brief wil he voor ek dit doen. Mnr Du Plessis het toe opskrif vir my alles gestipuleer en op so manier het ek ingestem. Elke keer het ek navraag gedoen oor die geld en Me. Q Hinana, HR Manager, het elke keer geantwoord dat hulle besig is met submission. Die submission was nou al Kimberley toe en terug, en niemand het my gese Mnr. Du Plessis mag nie so n brief gee nie. Ek het onlangs eers uitgevind by Me. G Witbooi, Acting CEO van die hospitaal dat Mnr Du Plessis nie so n brief aan enigiemand mag gee nie. Met n besoek van die MEC, Mnr Mothlaping en Mnr R Jones vroeer die jaar, was ek voorgestel date ek Act in die posisie as Food Service Manager. Hulle was tot in die kombuis waar ek as Food Service Manager voorgestel was. Ek myself het ook aan die mense, die MEC en Mr Jones het nog genoem dat hy die submission gesien het van my acting allowance. Hyt nie genoem date ek nie kwalifiseer nie. Ek voel die bestuur van die Hospitaal het my onder n wanindruk geplaas, end it het my emosioneel afgetakel. Geen person sal gelukkig wees as hy/sy so behandel word”.

8. The respondent averred that it never received this letter. The applicant also said that she did not receive a response to her grievance. The respondent having failed to respond to the applicant's grievance led to her to approach this Bargaining Council to have the matter disposed of by arbitration.

The issue to be determined

9. The issue in dispute that needs to be determined is whether the respondent had breached the collective agreement (Resolution 01 of 2002 which regulates the payment of acting allowances) by not paying the applicant an allowance for allegedly acting in the position of Food Service Manager within the respondent's Food Service Unit.
10. In the event, I find that the respondent was indeed in breach of the agreement the applicant seeks to direct compliance therewith, by making payment to the applicant of

an acting allowance for the period between May-August 2016 and September 2016 until 23 July 2018, (14 months) being R220 545.00.

Survey of evidence and arguments

Documentary evidence

The parties submitted an agreed bundle of documents in evidence, marked Bundle A.

The applicant's evidence

11. The applicant testified that the Chief Dietician, Mrs Loubser was the person who previously acted in the position. Mrs Loubser refused to perform the acting duties when she was told that the Department will not pay her an acting allowance for performing the duties. Mr Du Plessis, the then Chief Executive Officer approached her for the position. Mr Du Plessis said that he had discussed her appointment with the then Assistant Human Resources Manager, Mrs Hinana and the then Chief Financial Officer (CFO). They were of the opinion that she would be the ideal candidate for the position due to her years of service in the Department. She did not accept the position immediately and requested that Mr Du Plessis record the acting appointment in writing. He did so (page 25 of the bundle) and she verbally accepted the position. She acted in the position for three months and performed the duties of the Food Service Manager within the framework of the Food Service Unit. She undertook such tasks as given to her from time to time by her manager one, Mr Riaan Van Wyk. She was also introduced to the staff as the Acting Food Manager when the high-level delegation from the Premier office visited the hospital. Thereafter, her acting appointment was extended in September 2016 (page 24 of the bundle) for a further six months, in writing.
12. She testified further that Mr Du Plessis did not tell her that she would be taking care of the position and that he was not duly authorised to appoint her in an acting capacity, either. Mr Du Plessis said that he filed the submissions with the provincial office to pay her the acting allowance and assured her that she would be paid. However, on numerous occasions, she enquired as to the payment of the acting allowance and was told that the Department was still busy processing the submissions for payment.
13. She testified that she continued to perform the duties after the six months acting tenure ended despite not having an appointment letter. She said she loved the job and knew that she would not be paid an allowance for that period.

14. When the new Chief Executive Officer, one Gladys Witbooi was appointed in 2017 she asked to record the extension of the acting period in writing. When this did not materialise she withdrawn herself from the position in July 2018.

Cross-examination

15. Mr Kammies for the respondent sought to discredit the applicant's claim for acting allowance as a non-starter; because she was not given additional duties to the Production Revenue Clerk position. The applicant said that she was released from her duties of Revenue Clerk when she was given the acting position because she could not hold both positions.

16. It was put to the applicant that since she had not accepted the acting appointment in writing, she was not entitled to the allowance since written acceptance of the appointment was a prerequisite. The applicant's reply was that she verbally accepted the acting position. It was further put to the applicant that there was no evidentiary proof produce that she actually performed the duties of the Food Service Manager position. The applicant agreed.

The respondent's evidence

Mr Richard Edward Du Plessis

17. He was the Acting Chief Executive Officer until 2016, at the Dr Harry Surtie Hospital where the applicant is stationed. The witness testified that previously Mrs Loubser performed the duties of the Food Service Manager position. He was under the impression that she acted in the position. When she left, he thought that the position became vacant. At the same time, an incident occurred between the applicant and a male co-worker. After carefully weighing up all the possibilities to remedy the situation between the applicant and the co-worker, as well as, the position that was left vacant by Mrs Loubser. He decided to remove the applicant from her position she held at the time and offer her the position of Food Service Manager. He approached the applicant and put forward his plan for her consideration. He told her that he was not authorised to grant anyone an acting allowance and payment thereof was not automatic. He still has to file a submission with the Provincial Department for approval. The applicant accepted to perform the duties on that basis and according to him, she acted for a period of nine months. That was from May-August 2016 and then from September 2016 for a further six months.

Cross-examination

18. The witness testified under cross-examination that he had to deal with the mess in the hospital's kitchen, and simultaneously responding to the problem between the applicant and the male co-worker. He made a managerial decision based upon the matters at hand and approached the applicant.
19. He explained the procedure that needs to follow when one appoints an employee to act in any position. He explained that the CFO must first confirm whether there is funding to pay the acting allowance. Thereafter, a submission signed by both the Human Resources Manager and the Chief Financial Officer must be filed with the MEC' office for approval. When the submission has been approved a letter requesting the employee to act in the position signed by the Head of Department and the Corporate Service Manager will be issued to the employee. The employee, in turn, must express his or her acceptance in writing. This process was, however, not followed when he placed the applicant in the position of Food Service Manager. It was an oversight on his part, he said. He was also not authorised to have issued the acting letters and appoint the applicant to act in the position. But the decision was brought about by the urgency of the situation he faced at that time.
20. He further testified that he discussed the appointment of the applicant with the Deputy Director of Finance, Mr Bakula and the Human Resources Manager, Mrs Hinana and they both agreed. At that stage, he was under the impression that the position exists and was vacant. The applicant gave her acceptance verbally and he was under the impression that the submission would be approved.

Mrs Queensible Hinana

21. She began employment with the respondent on 1 April 2013, as the Assistant Manager within the Human Resources Unit. She moved through the ranks and is currently employed as the Deputy Director, in the Human Resources Development Unit.
22. She explained the process that needs to be followed when an employee is requested to act. She stated that a submission must first be prepared and submitted to the MEC's office. Upon the approval of the submission, the employee will then be authorised to act in the position. Thereafter, a standardised acting letter signed by the Head of Department would be issued to the employee. The employee would then sign the letter which serves

as acceptance to act in the position. The letter will be returned to the Human Resources Department and the acting allowance would then be approved. She said that the process was to ensure that the acting appointment was in line with the Collective Agreement and that the position was funded and vacant before the appointment. An example of such a standardised letter was handed in evidence (Annexure 3) and the witness said that only upon receipt and signing of this letter the acting allowance would be approved.

23. She testified that the letters given to the applicant by the Chief Executive Officer cannot serve as approval to receive an acting allowance because the authority was not vested with him but with the Head of Department.

24. She testified further that the position of Food Service Manager does not exist anymore. When she joined the Department, Mrs Loubser stood in as manager and because the Department delay in appointing her permanently in the position, Mrs Loubser withdrew her services. The position had been abolished subsequent to Mrs Loubser, which was about five years ago. There's currently a plan by the Human Resource Department to have the position back on the establishment.

Cross-examination

25. She testified under cross-examination that she was aware that the Chief Executive Officer requested the applicant to perform the duties of the Food Service Manager position and advised him on the process that must be followed before the acting letter could be issued to the applicant. He intentionally ignored her advice. The kitchen was a mess he said, and he has to give accelerated attention to the matter at hand. He said that he discussed the situation with the applicant and she agreed to help sort out the mess until she's permanently appointed in the position.

Closing arguments

Applicant's arguments

26. Mr Jantjies argued on behalf of the applicant that she was entitled to an allowance, notwithstanding that the applicant accepted the appointment in the acting position, and that this acting appointment was confirmed in writing. He submitted that in September 2016 the applicant's acting tenure was extended (in writing) for a further 6 months and that the respondent acknowledged this appointment in writing. The applicant acted in the position with the expectation that she would receive the acting allowance. In both letters from the Department (appointing the applicant in the acting position and the one extending the duration of the acting position) the applicant was not advised that she would not be paid an acting allowance. If this was communicated to the applicant, or the Department told her that she would not receive the acting allowance. She would have been faced with two choices. First, to continue to perform the duties of the Food Service Manager, knowing very well that she would be assisting the respondent in a critical post without expecting any monetary gain for her services. Second, decline the offer to act as Food Service Manager.

27. The respondent witness, Mrs Hinana was aware that the CEO appointed the applicant as acting Food Service Manager, but did not inform her that she will not be paid for the period she was acting. Instead, the Department informed the applicant on numerous occasions that it was busy with the submission to the Provincial Office for the payment of her acting allowance. This shows that the respondent was content with the applicant performing the duties without paying her for the service.

28. As to whether the position was funded, Mr Jantjies submitted that *"it is not foreign practice for funds to be shifted around by the Department to address critical needs such as to pay an acting allowance for critical tasks to be performed by the employee, especially when it is done, in this case, in the interest for the patients. This is exactly why the CEO stated in the acting appointment letters to Miss Diergaardt that "Acting allowance will be applied for her period of acting"*.

29. He submitted that the appointing authority, in this case, was Mr Du Plessis. He was on a higher level than the applicant (the acting appointee) which clause 3.1.3 in the Collective Agreement requires.

30. He referred to the Labour Court case in “*Gauteng Department of Local Government and Housing and I A Sirkhot N.O vs The General Public Service Sector Bargaining Council and the Public Servants Association, Case No: JR408/2012*” and state that “*the judge of the Labour Court of South Africa, Johannesburg, upheld the ruling of the Commissioner in Case No: GPBC1958/2011 because the Judge held that the Applicant for review, the Gauteng Department of Local Government had benefited from the acting service of Mr De Beer. The judge also held in paragraph 33.5 that non-compliance with clause 3.1.1 of Resolution 1/2002 did not mean that Mr De Beer was not entitled to an acting allowance. In paragraph 33.2 Judge Leppan A.J further held that the view of the Gauteng Department of Local Government could not be condoned, which views are that Mr De Beer was aware that he could not be entitled to an acting allowance if he continues to act for the 3 months period had expired, because the Applicant of the review matter had done nothing to stop Mr De Beer’s acting role when they could have done so. Paragraph 24 supra directly speaks to Miss Diergaardt, in that she is most definitely entitled to be paid her acting allowance and because the remarks of Judge Leppan is entirely applicable to her.*”

31. He argued further that the respondent should not be allowed to enrich itself and to defraud applicant and her family by allowing the respondent not to pay the applicant the acting allowance owed to her from 23 May 2016 to 23 July 2018.

Respondent’s arguments

32. Mr Kammies contended on behalf of the respondent that it is imperative for an official of a government department in a supervisory possession to make an accurate decision in each and every case, in accordance with the law within the public service.

33. He states further that in this case not all these requirements in terms of Resolution I of 2002 clause 3 were met nor were they proven. It was clear from the testimony of Mr Du Plessis that he did not have any authority to appoint the applicant, notwithstanding that the move from the Finance Unit to the kitchen was a remedy to correct a personal dispute of the applicant within the unit. This move was not added duties, but total new duties, as testified by both the applicant and Mr Du Plessis. It, therefore, dismiss the requirement of an employee taking on extra work given by his/her employer. Due to lack of supervision within the kitchen, he took an uninformed decision to move the applicant to the kitchen to take care of this area. Thus, this was not an authoritative decision as per

requirement of Resolution 1 of 2002 and that the letters submitted by the applicant as proof do not qualify as authoritative acting letters.

34. He submitted further that the applicant was moved to a new workstation, not getting add-on responsibilities but total new responsibilities. She got a letter requesting her to take care of the kitchen unit. This letter was an uninformed decision from the Acting CEO, which constitutes an unauthoritative document with regards to acting allowance. This allowance claimed by the applicant was a matter of impossibility and constitute an administrative error made which was done by the sole discretion of the Acting CEO.
35. The position was also not vacant and funded which renders payment of acting allowance impossible. This impossibility resulted in the realisation of a possible administrative error and rendered any approval null and void. It was also a requirement stipulated by Resolution I of 2002 that a post should be vacant and funded for acting allowance to materialise. The Promotion of Administrative Justice act (act no.3 of 2000) allow the correction of an administrative error within an organisation. The Constitution provides supremacy to legislation and strict adherence thereto is prescribe.
36. He submitted further that the implementation of acting allowance would imply that the employer would need to treat one employee different from the entire public servants corps, which such differentiation is not a justifiable, reasonable or fair administrative action within the public sector, as prescribed by the Promotion of administrative justice act (act no. 3 of 2000).

Analysis of evidence and arguments

37. The applicant's case was that her employer and the respondent herein had breached the collective agreement (Resolution 01 of 2002 which regulates the payment of acting allowances) by not paying her an allowance for acting in the position of Food Service Manager. A dispute arose between the applicant and the respondent regarding the proper application of the provisions of clause 3 of the Collective Agreement, more particularly the proper application of clauses 3.1 thereof.

The relevant Collective Agreement

38. On 8 May 2002, a Collective Agreement as per Resolution No 1 of 2002 was concluded between the Department of Health and Department of Social Development as employers, and various other trade unions, representing employees employed by the

Department of Health and Social Development. The Collective Agreement Resolution No. 1 of 2002 is known as the “Agreement on acting allowances”.

39. The respondent is a party to and bound by the Collective Agreement. The purpose of this agreement is to determine a policy on acting allowance and compensation to be paid to an employee appointed to act in a higher post. The relevant provisions of clause 3.1 of the Collective Agreement read as follows:

“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 delegates 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

40. In this matter, the issue to determine concerns a dispute concerning the application of the Public Health and Welfare Sector Bargaining Council, which is embodied in Resolution 1 of 2002, more particularly the proper application of clauses 3.1 thereof (whether all requirements set out in Clause 3.1 had been met). Resolution 01 of 2002. provides that an employee who had been 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.

41. It is common cause that the applicant had been appointed in writing. Mr Kammies argued on behalf of the respondent that Mr Du Plessis did not have any authority to appoint the applicant in an acting capacity. What basically happened, according to the respondent was that Mr Du Plessis moved the applicant from the position she held to the kitchen in an attempt to remedy a personal dispute between the applicant and a co-worker. I agree. Neither Mr Du Plessis nor the applicant wanted to divulge the nature of the problem. Mr Du Plessis only went as far as to say that he made a managerial decision to remove the applicant from the position she held at the time and offer her the position left vacant by Mrs Loubser. The applicant was also not comfortable when her representative insisted that Mr Du Plessis divulge the issue between her and the co-worker. If the issue were

divulged it would have given credibility to the respondent claim that she was moved to the position and did not act in the position. I say the applicant in her own words said that she was aware that Mrs Loubser did not receive an acting allowance which was the reason she withdrew her services. In view of this, it was therefore unlikely that she would have formed a reasonable expectation that she would receive an acting allowance when she knew that the Mrs Loubser who performed the duties previously did not receive an acting allowance. As I see it, she had more than a hope than an expectation that she would receive an acting allowance. It was more likely that she accepted the move to get away from the problem she had with the male co-worker which was the reason she continued to perform the duties without having an appointment letter in her possession.

42. What was also clear in this case, before an employee can be appointed in an acting position the respondent has to follow an in-house procedure before an employee was allowed to act. The procedure conforms with the requirements as it is envisaged in Clause 3.1 of the Collective Agreement. Mrs Hinana in her testimony outlined this procedure which was also confirm by Mr Du Plessis in his testimony. There was no challenge placed against their evidence. Similarly, the testimony of Mr Du Plessis that he did not have the vested authority to issue the appointment letters and that it was not in line with the procedure that needed to follow before he sought the applicant's consent to perform the duties was left unchallenged. Rather, Mr Jantjies argued on behalf of the applicant that Mrs Hinana was aware that Mr Du Plessis appointed the applicant as acting Food Service Manager but both failed to inform her that she will not be paid for the period she was acting. He argued further that Mr Du Plessis also failed to inform the applicant during their consultation that he was not authorised to grant anyone an acting allowance. This was an attempt to justify the claim that she was entitled to an acting allowance. Clearly, what Mr Jantjies suggests that should have happened was that they ought not to have allowed the applicant to perform the duties. Be that as it may, what needs to be determined is whether Mr Du Plessis had the authority to issue the letters and appoint the applicant for the purpose of Clause 3.1 of the Collective Agreement.

43. In the normal cause of things, the letter appointing an employee in an acting capacity derives its authority from the Head of Department. Only upon the approval of the submission by the MEC's office and a letter signed by the Head of Department would the applicant be authorised to act in the position. In the absence any such approval, I, therefore, hold that Mr Du Plessis was not duly authorised to appoint the applicant in an

acting capacity and issue her with letters to such effect, notwithstanding his belief that she would be paid the acting allowance. The letters issued by Mr Du Plessis further fortifies that she was informed that the payment of the acting allowance was not guaranteed.

44. As to whether the post was vacant and funded, Mr Jantjies argument on the issue was bare. The applicant bears the onus to prove that the position was vacant and funded. Evidently, nothing in the evidence produced by the applicant touched on the issue that the position was vacant and funded. Furthermore, the evidence that the position had been abolished five years ago and not on the organisational structure was not challenged. I, therefore, find that the position was not vacant and funded.

45. In the totality of the evidence, I find the applicant has failed to show that all the requirements stipulated in clause 3.1 were met.

46. In conclusion, I wish to comment at this stage, that the case quoted by the applicant in its written submission is distinct from this case before me. The facts are not similar and cannot serve as authority to be applicable to this case. In the quoted case the applicant acted in the position whereas in this present matter the applicant failed to prove that she served in an acting capacity.

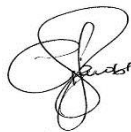
47. In the circumstances, I make the following award.

Award

48. The applicant failed to prove that all the requirements stipulated in clause 3.1 were met. That being the case, I find that the respondent had not breached the Collective Agreement by not paying the applicant an allowance.

49. The applicant's case is dismissed.

Signature:



Gerald Jacobs

Commissioner: