



PHSDSBC

PUBLIC HEALTH AND SOCIAL DEVELOPMENT
SECTORAL BARGAINING COUNCIL

ARBITRATION AWARD

Case No: **PSHS289-18/19**

Commissioner: **Zuko Macingwane**

Date of award: **5 February 2019**

In the matter between

PSA obo Rossouw van Niekerk

APPLICANT

and

DEPARTMENT OF HEALTH- FREE STATE

RESPONDENT

Details of the parties and representation

1. The matter was set down for arbitration on 23 January 2019 and scheduled to commence at 10:00AM at the Respondent's offices at Lesedi Community Health Centre in Kroonstad. The applicant, Mr. Rossouw van Niekerk was present and represented by Mr. Clement Fandie, the union official with the Public Servants Association (PSA).
2. The respondent, the Provincial Department of Health in Free State was represented by Mr. M Nhlapho, its Labour Relations Officer. The proceedings were digitally recorded. The applicant submitted its bundle of documents, the said documents were marked as "A1", "A2" and "A3". The parties were given an opportunity to submit closing arguments in writing as follows: The respondent was required to submit its closing arguments on 25 January 2019 while the applicant was required to submit on 28 January 2019. I received the closing arguments on 28 January 2019.

Issues to be decided

3. I am to determine whether or not the applicant is entitled to grade progression in terms of clause 4.1.10 and sub clause 4.1.10.2 of Resolution 3 of 2009 (a Collective Agreement concluded under the auspices of the Council).

Background and opening statements

4. At the time of the dispute, the applicant was employed by the Provincial Department of Health, the respondent as a Pharmacist: Grade 1 at Lesedi Community Health Centre in Kroonstad. The applicant is still in this position. The applicant started working for the respondent on 2 January 2012.
5. In the opening statements, the applicant's contention was that the respondent ought to have moved / translated the applicant to the next grade as the applicant progressed in line with Resolution 1 of 2010, which is an addendum on PHSDSBC Resolution 3 of 2009 which deals with the Occupation Specific Dispensation (OSD) for Medical Officers, Dentists and Pharmacists as reflecting in bundle "A1" submitted by the applicant. The applicant stated that it would rely in clause 4.1.10 which deals with grade progression as per Resolution 3 of 2009, accompanied by Annexure A2 regarding requirements for grade progression at column 2.3 to prove that the applicant qualifies for grade progression.
6. The applicant sought a relief of being progressed with effect from January 2017 to a position of Pharmacist Grade 2 and be moved from his current notch of R625 185 to R673 494 for purposes of progression as per the updated salary scale. The applicant would also lead evidence on Performance Management Development System (PMDS) which would have moved the applicant.
7. The respondent contends that a task team has been appointed to investigate matters relating to grade progression including the matter of the applicant. The respondent could neither allude to what has been presented by the applicant, nor comment on whether those were actual facts and could not commit on correctness. The respondent stated that it can only rely on the task team as Mr Magema, the Assistant Director: HR Section informed it that there is a task team appointed. There was a meeting which took place

but the respondent did not have minutes of that meeting on the date of arbitration and could not get hold of Mr. Mgema. The respondent did not produce any documents to that effect on the date of arbitration. The respondent further assured that what is due to the applicant will be implemented.

Survey of evidence and arguments

8. It is not the purpose or the intention of this award to provide a detailed transcription of all evidence placed before me at arbitration, even though all evidence was considered. I have however summarized the portions of evidence that are relevant to me in making a determination in this dispute.

Applicant's case

9. The applicant testified under oath that he was employed by the Department of Health-Free State as a Grade 1 Pharmacist on 2 January 2012, the applicant referred to the payslip dated 15 June 2018. The applicant stated that he is currently working as a Pharmacist: Grade 1 with a notch of R625 185 and referred to the 2018 update of the salary scale in bundle "A3". The applicant's evidence was that he is registered with South African Pharmacy Council (SAPC), which is a professional body of Pharmacists. He has been registered with the SAPC as from 2010 when he was doing his internship and he would not have been appointed by the Department of Health if he was not registered with SAPC because such is a requirement.

10. The applicant testified that his workplace is Lesedi Community Health Centre in Kroonstad and he did his community service in Lesedi in 2011 then started in his position as a Grade 1 Pharmacist in 2012. He has been in this position for 7 years. The applicant's evidence was that he completed 5 years in this position in January 2017, so he would have received his Grade 2 progression in January 2017. The applicant testified that he was not told the reason why he did not receive his grade progression, the only thing he was told was that it is in process. The applicant stated that he would like to move from Pharmacist Grade 1 to Pharmacist Grade 2 as soon as possible. The applicant read into record clause 4.1.10 and sub-clause 4.1.10.2 of the resolution, which dealt with grade progression as well as clause 2.3 that deals with the appointment requirements.

The applicant testified that he has been performing well and has been above average in performance appraisals up until 2018.

11. Under cross-examination, Mr van Niekerk testified that he will be submitting his Performance Management Development System (PMDS) forms and the Human Resource (HR) Department should have the said documents.
12. During re-examination, the applicant clarified that after he had been assessed, the said forms used to be sent to the HR so that they can be adjusted. He also stated that he never received the forms after submission, which is the reason why he did not bring the forms to the arbitration.

Respondent's case

13. The respondent opted not to lead evidence.

Respondent's closing Arguments

14. The respondent in its closing arguments submitted a copy of the agenda of a meeting dated 30 January 2019 stating that item 5.1 and 5.2 of the said meeting dealt with OSD Implementation Task Team report- Resolution 1 of 2007, outstanding grade progression as well as Monitoring and Implementation of clause 3.3 of Resolution 1 of 2009. The respondent further argued that this dispute is premature because parties are still engaging at a chamber level to find a solution about this matter as the task team has been appointed to investigate all grade progression disputes including the applicant's matter. This issue does not only affect the applicant but all the officials of the Department of Health in Free State.

Applicant's closing arguments

15. The applicant rejected the above submission of the respondent and further stated in its arguments that it finds it odd that the respondent would rely on the task team established without attaching evidence to that effect, either in a form of progress made by these task teams or proof about members of the task team and its composition. The applicant

further argued that it is clear that the said agenda items do not speak to the dispute before the council and therefore cannot be considered as a fact and they do not clarify the specifics. The respondent failed to dispute evidence of the applicant as it did not lead evidence during arbitration. In fact, the respondent submitted that it does not dispute the applicant's evidence.

Analysis of evidence and argument

16. Resolution 1 of 2010, which is an addendum on PHSDSBC Resolution 3 of 2009 deals with Occupation Specific Dispensation (OSD) for Medical Officers, Dentists and Pharmacists. Clause 4.1.10 and in particular sub-clause 4.1.10.2 of Resolution 3 of 2009 provides that progression to the next salary grade (scale) attached to the post, provided that candidates meet all requirements to progress to the relevant higher grades as indicated in Annexures A1, A2 and A3. As per annexure 2, grade progression from Pharmacist Grade 1 to Pharmacist Grade 2 as reflecting in grade progression / post promotion, the requirements are that there must be a combination of 5 years actual service and / or recognisable after registration with the SAPC as Pharmacist, grade progression shall become effective from the 1st day of the month following the date on which the official met all the requirements.

17. I have considered the documents submitted, all the evidence led and the closing arguments of the parties.

18. I am mindful of the fact that the respondent opted not to lead evidence.

19. It is common cause that the applicant has met and exceeded the requirement for progression which is of a combination of 5 years actual service and / or recognisable after registration with the SAPC as a Pharmacist as mentioned in clause 16 above. Such is so because the applicant has been a Grade 1 Pharmacist for more than 5 years and is registered with the SAPC. It is also common cause that the applicant is currently a Grade 1 Pharmacist and has been working as such as from 2 January 2012. It is also common cause that the applicant has not been progressed to a Grade 2 Pharmacist.

20. At arbitration and in closing arguments, none of the parties produced or submitted any official document or argument suggesting that the applicant is not entitled to grade

progression. The respondent did not deny the entitlement of the applicant to grade progression from being a Pharmacist Grade 1 to be a Pharmacist Grade 2. Considering the undisputed evidence led, it became clear that the applicant would have completed 5 years as a Pharmacist Grade 1 on 2 January 2017, without any evidence to the contrary, I shall accept this as correct. It follows that the applicant would have been entitled to grade progression from being a Pharmacist Grade 1 to Pharmacist Grade 2 as from 2 January 2017. By its own averments and admission as reflected in clause 7 above and on record, the respondent stated that what is due to the applicant will be implemented. The only pronouncement the respondent did not make was when will such be implemented, save to say that the task team has been appointed. Such suggested at face value that the interpretation was not in dispute anymore and to a certain limited extent the respondent conceded on application of the said Resolution, but could not commit on date of payment.

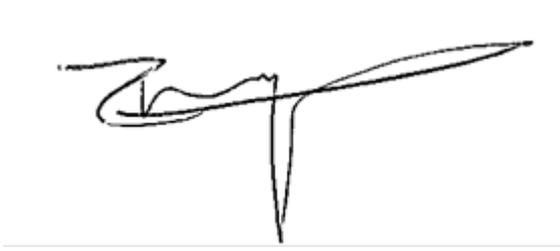
21. I am therefore mindful of the argument by the respondent that a task team has been appointed to investigate all grade progression disputes including the applicant's matter, there are discussions at a chamber level and the chamber has not yet reached a deadlock as they are still engaging to find a solution. I am also mindful of the agenda and the stipulated items attached by the respondent in its closing arguments. However, the standing question is, does such engagements or task team supersedes the expressed terms and conditions of a collective agreement? The courts have pronounced that a collective agreement would always enjoy supremacy.

22. Section 23 (2) of the Labour Relations Act 66 of 1995 (the LRA) provides that a collective agreement binds for the whole period of the collective agreement every person bound in terms of subsection (1)(c). Clause(1)(c) under these circumstances includes an employer. Such is also confirmed specifically about bargaining councils by sections 31 and 32 of the LRA. The resolution does not require a moratorium to be put on compliance by the respondent with grade progression and effecting adjustment on qualifying employees if there is a task team set or appointed to investigate grade progression disputes regardless of what level is such a task team. It only requires as per annexure A2 that grade progression shall become effective from the 1st day of the month following the date on which the official met all the requirements. It is my considered view that "shall" is a commanding word under these circumstances. It follows that such is not discretionary but obligatory or mandatory.

23. The said resolution enjoins the respondent to comply with clause 4.1.10 and sub-clause 4.1.10. in particular read together with annexure “A2”. There is no evidence before me suggesting or indicating that the respondent is not enjoined by such Resolution. The Resolution does not provide for the deviation to the norm.
24. It is indeed my finding that the correct interpretation of Resolution 3 of 2009 is that it does not absolve the respondent from the obligation of implementing and applying the grade progression of the applicant from Pharmacist Grade 1 to Pharmacist Grade 2 as he complied with the said requirements. I accordingly find that the respondent erred in its interpretation and application of the Resolution and its omission by not effecting the grade progression to the applicant was unjustified.
25. I therefore find that the applicant is entitled to the grade progression to a Pharmacist Grade 2 level and to be back paid with effect from 2 January 2017. I find that the respondent did not apply and adhere to the provisions of Resolution 3 of 2009.

Award

26. I find that the respondent did not apply and adhere to the provisions of Resolution 3 of 2009.
27. I therefore find that the applicant is entitled to the grade progression to a Pharmacist Grade 2 level with effect from 2 January 2017.
28. The respondent must pay the applicant the difference in remuneration between Pharmacist Grade 1 and Pharmacist Grade 2 with effect from 2 January 2017 in line with the applicable salary scale on or before 28 February 2019.
29. There is no order as to costs.

A handwritten signature in black ink, appearing to be 'Zuko Macingwane', written on a white background with a thin black border.

Zuko Macingwane