ARBITRATION AWARD

Case No: **PSHS291-17/18**

Commissioner: **Gerald Jacobs**

Date of award: **6 April 2018**

In the matter between:

NEHAWU obo Moncho T (Union/ Applicant)

and

Department of Health - Northern Cape (Respondent)

Introduction

1. This is the award in the arbitration the National Education Health and Allied Workers Union (NEHAWU) on behalf of Thapelo Moncho, the applicant and the Department of Health- Northern Cape, the respondent.
2. The arbitration was held under the auspices of the Public Health and Social Development Sectoral Bargaining Council (PHSDSBC) in terms of section 186(2) (a) of the Labour Relations Act, 1995 as amended (the "Act") and issued in terms of section 138(7) of the Act.
3. This case is one of those that unfortunately, had been protracted by the parties. The matter was first heard on 5 September 2017 at Connie Vorster Memorial Hospital. The applicant was represented by Mr Ricardo Cronje an official of the trade union NEHAWU. The respondent was represented by Mr Junaid Tswaile, its Labour Relations Practitioner. On that day, after opening statements and narrowing the issues, Mr Cronje stated that he will call two witnesses in support of its case. The main witness was one Ms Cathi

Muron the personal assistant of the Head of Department. He would also have submitted an audio recording and minutes of the National Council of Health meeting where the chairperson, one Dr P Matsoso gave a directive that the applicant's salary level should be corrected retrospectively. On the other hand, Mr Tswaile said he will call a representative of DPSA to testify in defence of the respondent case. It was late in the afternoon and I adjourned the matter to reconvened on a later date.

4. The matter resumed on 6 September 2017, and at the start of the proceeding, Mr Cronje said that he will no longer call his witnesses. He would also not submit the minutes and audio recording of the National Council of Health meeting. He further said that after the first sitting, he subpoenaed certain documents from the respondent which was of crucial importance in relation to the success of the applicant's case. However, Mr Tswaile refused to provide the documents stating that it was confidential. At this stage, Mr Cronje was not sure whether to continue with the case. He said that he would only be able to make that decision after perusal of the documentation he subpoenaed. Mr Tswaile, after a discussion on the relevance of the documents then agreed that he will release the documentation. It was then agreed that Tswaile would inform the Bargaining Council in writing on whether he released the documentation and in turn, Mr Cronje would inform both the Bargaining Council and the respondent whether he intends not to proceed with the matter. This would have been done after receiving the documentation. This was not done and instead, on 17 November 2017, Mr Cronje and Mr Tswaile filed their respective closing arguments with the Bargaining Council.
5. At that stage, it was not clear to me whether Mr Cronje received the documents he subpoenaed. His written arguments were also not accompanied by the documents he said the case relied upon. This was what has led to the matter being re-enrolled on 20 March 2018.

<u>Background to the dispute</u>

6. Before I proceed to consider the dispute, it is convenient to begin by outlining the material facts relevant to the determination of the case. The applicant was employed as the Chief Executive Officer of the respondent at the Connie Voster District Hospital in March 2013. The applicant was appointed on salary level 11. As part of his terms and conditions of employment, the applicant is entitled to receive various benefits such as medical aid, pension fund, housing subsidy, annual bonuses, MMS allowance and car allowance.
7. This entitlement is specifically provided for in the terms and conditions of service of the applicant employed in the Department of Health.

8. The National Department of Health prepared a policy document on management of hospitals pertaining to the reclassification of hospitals; appointments of skilled managers at hospitals; the creation of a standard and uniform policy for appointment and job descriptions for Chief Executive Officers. At that time, the management of the respondent face challenges such as the lack of appropriate policies and legislation, competency levels of hospital CEO's, proper training strategic support, and capacity to deal with small operational issues. The objective is to ensure implementation of applicable legislation and policies to improve the functionality of hospitals, appointment of competent and skilled hospital managers; provide the development of accountability frameworks; and ensure training of managers in leadership, management and governance.
9. Under the heading classification of hospitals and district hospital then reads:
   "The package of services provided at district hospitals includes trauma and emergency care, out-patient visits and paediatric and obstetric care. A limited number of level 2 services can also be provided by the larger district hospitals to improve access and to facilitate easy reference to level 2 hospitals. The services are provided by family physicians, general practitioners, and clinical nurse practitioners(PHC). These hospitals only employ specialists in the form of family physicians, paediatricians, obstetrician/gynaecologists, and general surgery. The level of the post for the management of a District Hospital will be level 12".
10. It is apparent that continuous engagement took place between the applicant and his colleagues working as hospital CEO's within the Northern Cape over the implementation of the policy that "*the level of the post for management of District Hospital will be level 12*". In January 2017, submissions by Ms Z Botha within the Human Resources Administration of the respondent was filed with the Member of Executive Council (MEC) to obtain approval for the correction of the District Hospital CEO's salary packages from salary level 11 to salary level 12 within the Northern Cape Department of Health. The MEC approved the submission on correction of the District Hospital CEO's to level 12 but opted not to pay to the affected CEO's, the reimbursement of the difference in salary they had lost due to budgetary constraints.
11. Thereafter, Ms Botha address a letter to the applicant dated 13 March 2017, pertaining to the upgrading of his salary that reads;
    *"I have pleasure of informing you that the upgrading of your salary level as per the **national policy on the management of hospitals** with effect from 1 April 2017 has been approved according to the particulars as indicated below*
    Your salary particulars as on 31 March 2017 are as follows:

- *Job Title : Chief executive Officer*
- *Salary Level : 11*
- *Salary per annum : R711210.00*
- *Date of entry into rank : 01 March 2013*

Your salary particulars on upgrading of salary as per the Act are as follows:

- *Date effect : 01 April 2017*
- *Job Title : Chief Executive Officer*
- *Salary Level : 12*
- *Salary per annum: R726 276.00*

Your attention is drawn to the following:

In terms of section 38 of the Public Service Act. 1994, as amended, any overpayment /underpayment in salary allowances and other monetary awards contained in this letter, will be rectified (recovered/reimbursed) as soon as it is discovered, irrespective of the cause of such an error.

12. The applicant then made attempts to secure the reimbursement of loss of salary as a result of the salary correction. In this process, he lodged a grievance in April 2017 wherein he addressed his concerns and the desired outcomes he required. In his grievance, the applicant alleged that the Director-General: Dr P Matsoso gave a clear directive that the salary level of Northern Cape District Hospital CEO's must be corrected retrospectively from the date of appointment. This was also, according to the applicant, recorded by the Head of Department Mrs G Matlaopane, her personal assistant Mrs Cathi Muron, contained in the minutes of the National Health Department Council and on the audio recording. He expressed the view that the policy became law in March 2011 and his salary should be corrected retrospectively. He was also aggrieved that the directive given by the Director-General was not implemented.
13. The failure to resolve the grievance led to a dispute between the applicant and the respondent regarding the retrospective implementation of the policy from date of implementation which according to the applicant came into effect in March 2012. The applicant referred the dispute to the Bargaining Council for conciliation. It described the dispute as one of unfair labour practice pertaining to benefits as envisaged in section 186 (2) (a) of the Labour Relations Act 66 of 1995. The dispute was not capable of a resolution at conciliation, whereafter it was referred to arbitration.
14. At the arbitration proceedings on 20 March 2018, Mr Cronje stated that he received the documents he subpoenaed but will not rely on those documents to prove its case. He opted to dispose of with the case on the written arguments he filed on 20 November 2017

despite being repeatedly warned on the consequences. Mr Tswaile requested to submit his written argument afresh which was received on 28 March 2018. The 14-day time period would be calculated from that date.

The issue to be decided

15. The issues to be decided whether or not the Bargaining Council had jurisdiction to entertain the dispute, if so, whether the failure by the respondent to pay benefits retrospectively amounted to unfair labour practice as envisaged in section 186 (2) (a) of the Labour Relations Act 66 of 1995 ("the Act").
16. The applicant sought an order compelling the respondent to pay to him, the monetary value of the benefits he had lost.

Jurisdiction

17. Mr Tswaile raised a point in limine, namely, that the Bargaining Council lacks jurisdiction to hear the matter as it is a salary dispute based on a salary level. He further contends that the applicant classified and confirmed this in his grievance wherein he addressed his concern as an upgrade of salary level. At no stage in his grievance does the applicant make reference to non-provision of benefit. The applicant's grievance was motivated by the fact that he was placed on the same salary level and notch together with other CEO's when according to him he was supposed to have been placed on the higher notch of salary level 12.
18. He submitted that an unfair labour practice means an unfair act or omission that arises between an employer and an employee involving the unfair conduct of the employer relating to the promotion, demotion or training of an employee or relating to the provision of benefits to an employee. According to the Concise Oxford Dictionary, the meaning of the benefit is defined as an advantage or an allowance to which a person is entitled under insurance or social security [sickness, unemployment, supplementary, benefits] or as a member of benefit club or society.
19. Remuneration is different from benefits; a benefit is something extra apart from remuneration. Remuneration is always a term and condition of the employment contract.
20. According to Sithole v Nogwaza NO & others [1999] 12 BLLR 1348 [LC] benefit means material benefits such as pension, medical aid, housing and insurance subsidies, i.e. must have monetary value for the employee and be a cost of the employer. It is further recorded in this case that there can be no better exposition on the question of what constitutes a benefit that the one by Commissioners Hutchinson in SA chemical workers

union v Longmile/ Unitred [1999] 20 ILJ 244 [CCMA] which has been cited with approval by the court in Northern Cape Provincial Administration v Hambidge NO &Other According to Northern Cape Provincial Administration v Hambidge NO & Others [1999] 7 BLLR 696 [LC] benefit supplementary advantage conferred on an employee for which no work is required, employee's claim to higher salary not amounting to claim for benefits as defined. Claim for a higher salary is a matter of mutual interest the salary of an employee is determined by the hours worked and other factors determined by the employer. The access to benefit by an employee flows from the contract of employment and is available to all employees. The contention of the union obo applicant is misplaced and the dispute doesn't qualify to be classified under benefits.

21. In response, Mr Cronje for the applicant submitted that the Bargaining Council derives its jurisdiction to determine unfair labour practice from the provisions of section 185 read with section 186(2) of the LRA. In terms of section 185(b) of the LRA, every employee has the right not to be subjected to unfair labour practice. The unfair labour practice concept is defined in section 186(2) of the LRA reads as follows:

    (2) 'Unfair labour practice' means an unfair act or omission that arises between an employer and an *employee* involving -

    (a) unfair conduct by the employer relating to the promotion, demotion, probation (excluding *disputes* about dismissals for a reason relating to probation) or training of an *employee* or relating to the provision of benefits to an *employee'.*

22. According to him, this dispute was one of right, the right to the benefits of the applicant that is derived from the policy on the management of hospitals. Specifically, the paragraph that states "*The level of the post for the management of a district Hospital will be level 12*". He submitted that the issue in question relates to the unfair conduct by the respondent for not implementing the policy retrospectively and as such the applicant did not receive his benefits that he was rightfully entitled to get from the date he started as a CEO in Hartswater. The benefits entail the annual bonuses, medical aid, pension, MMS allowance and car allowance.

23. He relied on the case Apollo Tyres case, where the court stated that what constitutes a "benefit" in terms of the LRA means existing advantages or privileges to which an employee has entitled ex contractu or ex-lege or granted in terms of a policy or practise subject to the employer's discretion.

Analysis

24. The record of the arbitration hearing will show that parties deliberated only on whether or not the Bargaining Council had jurisdiction to entertain the dispute between them. The respondent took a lead in presenting its case because it was the one that raised the jurisdictional issue. However, after the submissions, the applicant representative placed it on record that it wishes to submit arguments on the merits of the dispute, in writing. It was difficult to understand why the parties, and more so after the applicant and his representative was warned that documents do not speak for themselves insisted to submit written arguments. The consequence was that no evidence was led on how the respondent committed an unfair labour practice against the applicant. I could only rely on the written closing submissions they made together with those documents which the parties presented during their opening addresses and the arguments they made in relation to the issue of jurisdiction.
25. I have considered the parties submissions on jurisdiction and the applicant's claim relates to the retrospective payment of the annual bonuses, medical aid, pension, MMS allowance and car allowance. While the dispute appears to have elements of both remuneration and benefits, I am persuaded that it's more a dispute around employee benefits (in the traditional meaning of the term benefits), as it goes further than mere remuneration.
26. Therefore, I find that the Bargaining Council has jurisdiction to arbitrate the dispute as the dispute concerns an allegation of unfair labour practice in relation to benefits.

Whether the respondent committed an unfair labour practice

Submissions received

Documentary Evidence

By agreement, although reluctantly by the respondent representative no oral evidence was adduced by either party. A bundle of documents was handed in by the applicant marked Bundle A and some documents were handed in by the respondent marked Bundle B.

Applicant's submissions

27. Mr Cronje for the applicant contended that the respondent committed an unfair labour practice by failing to implement the national policy on the management of hospitals retrospectively. The policy came into effect in 2012 and provides that the level of the post for the management of a District Hospital will be on level 12. He contends that while it may be correct that the applicant's salary was upgraded from level 11 to level 12 that was however not implement correctly. Ms Botha recommended in her request for the approval of the correction of the District Hospital CEO's salary package from salary level 11 to salary level 12 under paragraph 9 that "*funds are not available but this is a legislative imperative which has to be accommodated"* and the recommendation was that "*the upgrade be done going forward and no back pay as funds are not available*". He consequently submitted that the implementation of the policy was a legislative imperative and the respondent had to comply by paying the benefits retrospective from the date the policy came into effect.
28. Furthermore, the applicant contends that the appointment letters of Mr Sebesho position as CEO was advertised on level 11 in 23 November 2015 but he was appointed on level 12 on the 14 July 2016.The appointment letter of Ms Sesing indicates that the offer of employment was on level 12 and she gained one notch on promotion to the post for Kuruman Hospital. The appointment of Mr Shebesho on level 12 was in line with the policy which substantiates the contention that the applicant was entitled to be placed on level 12 retrospectively. The respondent complied with the policy when it appointed Mr Sebesho on level 12 on the 14 July 2016.
29. At the arbitration hearing, Mr Cronje tendered into evidence the pay slip of the applicant. From this pay slip, he argued that it was apparent that the applicant would have received a substantial loss of benefits such as bonuses, MMS allowance, car allowance, pension and medical aid during the period the policy came into effect and the implementation of the policy. His request that the respondent pays the difference in the monetary value of the benefits he received on salary level 11 and salary level 12. In the alternatively,

compensate the applicant for the respondent's failure to pay the applicant's benefits retrospectively as per the policy and the recommendations of the HR official.

Respondent Submissions

30. Mr Tswaile submitted that the applicant seeks to make a comparison to the appointment letters of Mr DM Sebesho, Mr AT Sejake and Ms A Sesing who were appointed CEO's at district hospitals at different dates. Mr AT Sejake was on salary level 12 when he was transferred from the North West to the Northern Cape Department of Health on (Annexure marked ''1 & 2'' i.e. service record and N/W administration). Furthermore, Ms Sesing was promoted to the position of CEO for Kuruman District Hospital but retained her salary level 12 which she was on since relocation in 2010. (Annexure marked ''4 & 5''). Mr DM Sebesho was re-appointed on1 August 2016 at salary Level 12 based on the terms and conditions contained in the advert and he was appointed on an already benchmarked and job evaluated post in line with the DPSA. (Annexure marked ''6, 7 & 8''). The applicant failed to call any witness to collaborate its contention on the appointment of Mr Sebesho and it just remains untested baseless allegations.
31. The applicant also conveniently omits to mention that at the time of his appointment as CEO at Conney Voster District Hospital, the facility did not meet the standard contained in the Nation Hospital Management Policy. The applicant was not appointed in terms of the Nation Hospital Management Policy and is a policy document formulated by the National Health Department and not the respondent (NCDO) that seeks to overhaul the Provincial Health systems in the country. The clause the applicant based its case on envisaged (imagine or expect something in future) to overhaul health systems in hospitals. At no stage does this policy burdens state the implementation dates of appointment of CEO's at salary level 12. The DPSA guidelines highlight two imperative aspects of how this can be achieved or implemented namely: organizational and budgetary provisions.
32. The Policy on the Management of Hospitals document needs to be read and understood in its entirety and not selective as was the attempt made by the applicant; this approach can be view as myopic, selective and opportunistic. The (Policy on the Management of Hospitals) on page 41 reads "*This policy on the Management of Hospitals is aimed at ensuring the department delivers on the strategic point number 4 in the 10 Point Plan which refers to overhauling the health care system and improving its management. It is envisaged that the objectives outlined in this policy will go a long way in creating a culture underpinned by the principles of equity, efficiency, effectiveness, transparency and openness.*'' Salary level upgrades in the public service need to go through processes of

benchmarking, job evaluations which fall within the capacity of DPSA and not NCDOH per se.

33. He submitted that the applicant cannot claim entitlement to a backdated salary level 12 under the disguise of ULP benefits. The applicant was appointed on salary level 11 with due benefits and furthermore accepted the offer on those terms and conditions prior to being upgraded to level 12 with benefits. The respondent committed no unfairness by upgrading all CEO to the same level on the same month. Furthermore, at no stage had the respondent refused provisions of benefits or let alone deducted benefits from the applicant.

Analysis

34. Section 23(1) of the Constitution of the Republic of South Africa, Act, 1996, entrenches the right of every person to fair labour practices. Section 1(a) of the Act states that one of the primary objects is to give effect to and regulate the fundamental rights conferred by the Constitution. In terms of section 10(a) of the Act, a party who alleges that a right or protection conferred by the Act, and hence by the Constitution, has been infringed, must prove the facts of the conduct in question. It is, consequently, incumbent on the applicant to prove on a balance of probabilities that the conduct of the respondent was unreasonable, capricious and an unfair labour practice as contemplated by section 186(2) (a) of the Act.

35. None of the parties led any evidence at the arbitration hearing. The applicant's representative relied on the documents which he produced. One such document produced by the applicant was the policy on the management of hospitals intended to show the applicant was entitled to benefits he said was due to him retrospectively. The respondent representative objected to the admission of that document in the absence of its author and on the basis that it did not purport to be a correct reflection of the intention of the clause relied upon by the applicant.

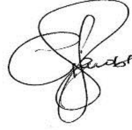
36. On reading the policy document it becomes apparent that the respondent drafted a policy which was a proposed action plan with the objective to standardise the regulation of the salary level of the post for management of District, Regional, Tertiary, Central and Specialised hospitals as it did not have a uniform policy to regulate the issue. The objective was further to overhaul health systems in hospitals. It has always been common cause between the parties that the policy was not a collective agreement concluded between the parties that regulate whether the applicant was entitled to be appointed on the salary level with retrospective effect.

37. The applicant did not dispute that the salary level upgrades had to go through processes of benchmarking, job evaluations which fall within the competence of DPSA and not the Northern Cape Department of Health. It was further not disputed that the DPSA guidelines highlight two imperative aspects of how this can be achieved or implemented namely: organizational and budgetary provisions. Its common cause that the reason advanced by the respondent for not upgrading the applicant salary level retrospectively was budgetary constraints which I find was justifiable. Surely, having no budget to pay all CEO's whose salary had been upgraded would have a prejudicial effect on the operations of the hospitals. If the respondent had to pay money to CEO's it did not have, the hospitals might not even have money to operate, to tender its critical services to the public.
38. The applicant also claims unfairness on the basis that the respondent acted inconsistently in its appointments of CEO's in the province. The applicant submitted that Mr Sebesho was appointed to a position as CEO on level 12 on the 14 July 2016, Ms Sesing, as well as, Mr Shebesho on level 12 which was in line with the policy but fail to appoint the applicant on the same level. With regard to the inconsistency, the applicant bears the onus to show that the conduct of the respondent was without justification and unfair. The respondent representative in his written submissions did not dispute the appointments, however, provided reasons to distinguish between the applicant's appointment and that of his colleagues. He submitted that Ms A Sesing was promoted to the position of CEO for Kuruman District Hospital and retained her salary level 12. Mr DM Sebesho was re-appointed on1 August 2016 at salary Level 12 based on the terms and conditions contained in the advert and he was appointed on an already benchmarked and job evaluated post in line with the DPSA. He provided documentary evidence to prove his contention. I, therefore, find that the respondent representative proved that the appointments were distinguishable from that of the applicant appoint even though it was on the same level. The circumstances surrounding each appointment was different and I'm of the view that the respondent provided a good reason for the difference in the appointments. I am also further of the view that the impact of the allegation of inconsistent treatment has no bearing on the alleged commission of the unfair labour practice in this matter. The applicant has not shown anything which made it an unfair labour practice for the appointing the abovementioned employees on level 12 as compared to him. I am accordingly in agreement with the third respondent that the applicant has not shown how the respondent committed an unfair labour practice.
39. Based on the above analysis I make the following award.

Award

40. The applicant failed to prove on a balance of probabilities that the respondent committed an unfair labour practice in terms of section 186(2) (a) of the Labour Relations Act, by its failure to pay the benefits retrospectively creating.
41. The case is dismissed.

Signature:



Commissioner: ***Gerald Jacobs***