PHSDSBC

PUBLIC HEALTH AND SOCIAL DEVELOPMENT SECTORAL BARGAINING COUNCIL

ARBITRATION AWARD

Case No: **PSHS310-17/18**

Commissioner: **Suria van Wyk**

Date of award: **4 September 2017**

In the matter between:

PSA obo RA Watkins (Union/ Applicant)

and

Department of Health-Free State (Respondent)

DETAILS OF HEARING AND REPRESENTATION

1. The arbitration hearing convened on 11 August 2017 at Bophelo House in Bloemfontein.

2. The Mr J Greeff from PSA represented the applicant and Mr DL Mapena appeared on behalf of the respondent.

3. Parties agreed to argue the matter in writing, hence no recording of the hearing was made.

ISSUE TO BE DECIDED

4. The issue to be decided is whether the applicant's interpretation of the collective agreement was correct and whether he was entitled to receive the acting allowance.

5. The applicant sought payment of an acting allowance from 1 February 2017 – 30 April 2017.

BACKGROUND TO THE ISSUE

6. The applicant was employed by the respondent as an Assistant Director: Fraud and Anti-Corruption (Level 9). This was the same unit as the acting position. The applicant received a letter appointing him as Acting Deputy Director – Fraud & Anti-Corruption unit: Free State Health (Level 11) from 1 February 2017 – 30 April 2017. The letter was dated 30 January 2017 and signed by his HOD, Mr Motau and the applicant signed acceptance thereof on 31 January 2017. The acting position was higher than the position he held.

SURVEY OF EVIDENCE AND ARGUMENT

7. At the outset, I must indicate that only relevant evidence (pertaining to the issue in dispute) will be referred to. Parties argued the matter in writing and the written submissions form part of the official record.

Applicant's Case:

8. The applicant submitted that in terms of the PHSDSBC 01 of 2002, clause 3.1.1 (a) and (b), he was entitled to an acting allowance for the period of 1 February 2017 – 30 April 2017. Clause 3.1. of the Collective Agreement stated that: *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 shall be paid an acting allowance to act in vacant posts provided that:

a. *The post is a vacant and funded post;*
b. *The acting period is longer than 6 weeks;*
c. *The appointing authority is a level higher than the acting appointee*
d. *The employee must accept the acting appointment.*

9. Approval for the appointment of an Acting Deputy Director Fraud and Anti-Corruption Unit was sought and obtained for the 2016/2017 financial year.[1]

10. Advocate SA Moshodi was appointed as a Director: Labour Relations (Level 13) in 2014 and according to his service record he was still on a Level 13 post and relocated to the Fraud & Anti-Corruption Unit on 1 February 2017. The officials in the unit was not aware of this appointment and the position of Deputy Director Fraud and Anti-Corruption Unit was that of a Level 11.

11. There was never any letter to the applicant informing him that the period of acting would be shortened and that he would no longer be required to act for the period specified in the appointment letter. The documents submitted by the respondent further lacked in substance as it did not contain the approval from the accounting officer to transfer Advocate SA Moshodi to the Fraud & Anti-Corruption unit. The documents simply indicated an acceptance of a transfer with no indication from which post to what post he was being transferred.

12. The applicants colleague, Ms Malephane, who was also appointed to act in the position was paid the acting allowance. The respondent was very unfair and inconsistent with the application of the collective agreement.

Respondent's Case:

13. It was the respondent's case that it was common cause that the applicant received an acting letter. It was submitted that this was done on a rotational basis

[1] Annexure C of the applicant's documents.

which became a trend, in actual fact that was an arrangement in the Unit. There had also been discussions within the respondent's terrain to fill the vacant post and that discussions resulted in the post been filled on the 01 February 2017 to date.

14. The post was not vacant and the period of acting was interrupted by the appointment of the official (Advocate SA Moshodi) in that post. Documentation indicated that Advocate SA Moshodi was relocated to the Fraud and Anti-Corruption unit on 1 February 2017 and the authorisation thereof was done on 6 February 2017.

15. The applicant did not qualify to be paid the acting allowance, hence it was interrupted and filled.

ANALYSIS OF EVIDENCE AND ARGUMENT

16. Arbitration is a new hearing (*de novo).* The arbitrator determines the dispute in the light of the evidence admitted at arbitration. The standard of proof is that of a balance of probabilities. If, in this analysis, certain evidence is not referred to, this does not imply it had not been considered.

17. The applicant referred a dispute in terms of section 24 of the Labour Relations Act, 66 of 1995 relating to the interpretation and application of a collective agreement.

18. In the matter of ***HOSPERSA obo TS Tshambi v Department of Health, KwaZulu Natal*** **(DA1/2015)** delivered on 24 March 2016 the Labour Appeal Court dealt with issue of the correct categorization of the dispute. The Court stated that: "*An arbitrator is required to determine the true dispute between the parties. To that end, it is necessary to establish the relevant facts and construe the category of dispute correctly. An arbitrator must make an objective finding about what is the dispute to be determined……The Constitutional Court disposed of this issue in* ***CUSA v Tao Ying Industries and Others*** **(2008) 29** ***ILJ*** **2461 (CC)** *at para*

66:" A commissioner must, as the LRA requires, 'deal with the substantial merits of the dispute'. This can only be done by ascertaining the real dispute between the parties. In deciding what the real dispute between the parties is, a commissioner is not necessarily bound by what the legal representatives say the dispute is. The labels that parties attach to a dispute cannot change its underlying nature. A commissioner is required to take all the facts into consideration including the description of the nature of the dispute, the outcome requested by the union and the evidence presented during the arbitration……The informal nature of the arbitration process permits a commissioner to determine what the real dispute between the parties is on a consideration of all the facts. The dispute between the parties may only emerge once all the evidence is in." The approach has been reaffirmed by this Court in NUMSA (Sinuko) v Powertech Transformers (DPM) and Others (2014) 35 ILJ 954 (LAC) at [16] – [21] per Coppin JA."

19. In ***HOSPERSA obo TS Tshambi v Department of Health, KwaZulu Natal*** (DA1/2015) the Labour Appeal Court went further and stated:" *What is a "dispute" per se, and how one is to recognize it, demands scrutiny. Logically, a dispute requires, at minimum, a difference of opinion about a question. A dispute about the interpretation of a collective agreement requires, at minimum, a difference of opinion about what a provision of the agreement means. A dispute about the application of a collective agreement requires, at minimum, a difference of opinion about whether it can be invoked. What is signally absent from the record is any clue that the respondent disputes that the collective agreement provides that an employee on suspension is entitled to full pay. Indeed, on the basis of the allusions in the ruling, that fact seems to be common cause. Similarly, there is no clue that the respondent disputes that the collective agreement binds itself and the appellant. What then, can possibly be the dispute about the application of the collective agreement?" The critical facts put before the arbitrator were that an employee was suspended without pay…..The characterization of such a dispute is manifestly an unfair suspension dispute within the purview of section 186(2)(b) of the LRA. The mere fact that an express right to be paid during suspension can be derived from a statute or an individual contract or from a collective agreement is not a critical dimension of the dispute; rather it is simply evidence of the right.*

20. The Court went further and explained that:" *The idea that the breach of a right that derives from a collective agreement is automatically a dispute contemplated by section 24 is wrong. Section 23, which provides for the enforceability of collective agreements and section 24 need to be read together. Together they create the legal edifice for the legal effect of collective agreements and certain disputes which take place about them. Sections 23 and 24 are located in chapter III of the LRA. That chapter deals with collective bargaining. Part A of chapter III addresses organizational rights, and Part B addresses collective agreements. Section 23 and 24 are in part B. Parts C and D address bargaining councils. It is plain that section 24 is a procedure to oil the wheels of the collective bargaining process and an efficient resolution of disputes about collective agreements…..In my view, the phrase "interpretation or application" are not disjunctive terms, and ought to be read as being related; i.e., disputes about what the agreement means and what it is applicable to. This fits appropriately with an understanding of the section as a device which is ancillary to collective bargaining. A not dissimilar matter was dealt with in PSA (Hohne) v Department of Social Development, Free State* (2008) *JOL* 21640 (PSCBNC), *there, the bone of contention was whether an employer had timeously responded to a request to consider special medical leave for an employee. The collective agreement was the source of the entitlement. The arbitrator examined the facts put forward, purportedly to substantiate an allegation of a section 24 dispute. The arbitrator correctly recognized the true dispute was an unfair labour practice dispute.* ***Arend and Others v SALGBC (2015) 36 ILJ 1200 (LAC)*** *illustrates an attempt to disguise a dispute about the grading of employees preparatory to a migration to a new pay structure as a section 24 dispute which was unmasked as misdirected because the gravamen of the controversy did not turn on the interpretation or application of the collective agreement……There is accordingly no need nor any justification to understand section 24 in a sense so broad that any alleged breach of a term of a collective agreement means the dispute automatically falls within section 24. In the result, the arbitrator misdirected himself by not determining objectively the true dispute and had he done so he would have found that the true dispute was one contemplated by section 186(2)(b) of the LRA….Accordingly, it must follow*

that the order of the Labour Court, setting the award aside and finding that the dispute is an unfair suspension dispute, should be upheld.

21. In evaluating the arguments raised by the parties there was no disagreement about the interpretation of the content of clause 3.1. Clause 3.1. of the Collective Agreement stated that: *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 shall be paid an acting allowance to act in vacant posts provided that:*

a. The post is a vacant and funded post;
b. The acting period is longer than 6 weeks;
c. The appointing authority is a level higher than the acting appointee
d. The employee must accept the acting appointment.

22. There is no determination to be made on how clause 3.1. should be interpreted as the understanding thereof between parties are in fact common cause.

23. The question and argument was rather whether or not the respondent acted unfairly by not paying the applicant the acting allowance and intertwined in this argument was the question as to whether Advocate SA Moshodi was appointed into the position (resulting in the position not being vacant) and whether the respondent's failure to withdraw the appointment letter had affected the applicant's right to receive and acting allowance for the period specified in the appointment letter.

24. In this regard, I considered the judgment in ***Department of the Premier, Western Cape v Sam Plaatjies NO and others*** **[2013] 7 BLLR 668 (LC).** In the matter the respondents, all state or senior state legal advisors employed by the applicant, were "translated" to higher grades pursuant to an "occupation specific dispensation" collective agreement, they referred a dispute to the respondent bargaining council, claiming that the applicant had committed an unfair labour practice by not applying the agreement properly. They sought an order that they be translated to a higher grade. The Court noted that the

employees had not taken issue with the content of the agreement. Their complaint was that the employer had incorrectly interpreted or applied it when effecting their translation. Although the referral was rather imprecisely formulated, the employees the main claim concerned the interpretation of the collective agreement. If that was the true nature of the dispute, the bargaining council had jurisdiction. But if the effect of the application of the agreement was unfair to the employees that was a consequence of a bargain their union had struck with the employer, and its members had to live with the consequences. A collective agreement is binding on all members of the union parties. Even when a party has referred an interpretation or application dispute, the arbitrator is bound to determine the true issue. In this case, the main dispute was about the application of the collective agreement. The council had jurisdiction to determine that dispute, but not over the alternative unfair labour practice claim. All the council could do was to determine whether the agreement had been applied correctly. If the agreement was found to have been correctly applied, that would have been the end of the matter. The council could not determine whether the agreement had been fairly applied. The arbitrator's award was set aside and replaced with an order declaring that the council had jurisdiction to entertain the interpretation/application dispute, but lacked jurisdiction to entertain the alternative unfair labour practice claim.

25. Cognizance was also taken of the judgement in ***Public Servants Association obo Strauss and others v Minister of Public Works N0 and others*** **[2013] 7 BLLR 710 (LC).** The individual applicants, all employed by the respondent as Chief Construction Project Managers, were "translated" to grade A in terms of a collective agreement termed the Occupation Specific Dispensation for Engineers. They complained that they were treated unfairly because their subordinates had also been translated to grade A, and that their seniority should have been recognized by translating them to the (higher) grade B of the respondent's salary scale. The applicants referred an unfair labour practice dispute to the respondent bargaining council. The respondent arbitrator ruled that the council lacked jurisdiction to entertain

the matter because it concerned, not an unfair labour practice, but the alleged unfair implementation of the collective agreement. The applicants contended on review that the Council had jurisdiction to arbitrate under section 24 of the LRA. The Court noted that while the party had jurisdiction to entertain disputes concerning the interpretation or application of collective agreements, this was not the dispute that had been referred. The Commissioner had correctly found that the true dispute was about the fairness of the impact the implementation of the resolution had on them. The arbitrator lacked jurisdiction to deal with the unintended consequence of the resolution. When dealing with referrals for the interpretation or application of collective agreements, arbitrators are required to identify the true dispute between the parties. The Commissioner had done so.

26. I was however ultimately guided by the Labour Appeal Court judgement in ***HOSPERSA obo TS Tshambi v Department of Health, KwaZulu Natal*** **(DA1/2015)** delivered on 24 March 2016. I therefore find that the true dispute between the parties is not one of the interpretation and application of a collective agreement as envisaged in section 24 of the Labour Relations Act, 66 of 1995, but that of an unfair labour practice in terms of section 186 (2) of the Labour Relations Act, 66 of 1995.

AWARD

27. The dispute referred by the applicant does not fall within the ambit of section 24 of the Labour Relations Act, 66 of 1995.

28. There is no order as to costs.

Signature: 

Commissioner: ***Suria van Wyk***

Sector: **Public Health**