



ARBITRATION AWARD

Panelist/s: Shiraz Mahomed Osman
Case No.: PSHS332-11/12
Date of Award: 18-Apr-2012

In the ARBITRATION between:

PSA obo Lamprecht, L
(Union / Applicant)

and

Department of Correctional Service - Northern Cape
(Respondent)

Union/Applicant's representative: _____
Union/Applicant's address: _____

Telephone: _____
Telefax: _____

Respondent's representative: _____
Respondent's address: _____

Telephone: _____
Telefax: _____

DETAILS OF HEARING AND REPRESENTATION

1. The present dispute between PSA obo Lamprecht L (hereinafter referred to as the applicant) and The Department of Correctional Services (hereinafter referred to as the respondent) was referred to Arbitration in terms of Section 24 (5) of Act no 66 of 1995, as amended (the Act). At the Arbitration hearing which was held at the Boardroom of the respondent in Kuruman on 15 March 2012, the applicant was represented by Ms S du Plessis and the respondent was represent.
2. The parties were afforded an opportunity to submit written arguments. The applicant was to file her founding argument by no later than 22 March 2012. The respondent was to submit his answer by no later than 29 March 2012. Should the applicant wished to reply then such reply was to reach Council by no later than 5 April 2012, hence being the last date of the arbitration.
3. A pre arbitration meeting was concluded and a pre arbitration minute was handed up.
4. The applicant handed up a bundle of documents and were accepted to be what they purported to be.

ISSUE TO BE DECIDED

5. The issue to be decided pertains to whether the applicant is entitled to OSD in terms of Resolution 1 of 2009.

SURVEY OF ARGUMENTS

APPLICANT'S ARGUMENT

6. The applicant submitted that she registered as a Social Worker with the SACSSP. She worked at the respondent since 1998. On 25 April 2008 she was appointed as Supervisor with effect from 1 May 2008. She had been acting as Supervisor prior to her appointment and was qualified to hold such position.
7. The Occupational Specific Dispensation (OSD) Resolution 1 of 2009, a collective agreement entered into at the Council between the State as employer and the Trade Unions admitted to the PHSDSBC. The OSD took effect on 1 April 2008 and makes provision for Social Workers to be included in the application of the OSD. The applicant has not benefitted from the OSD though she complies with the requirement. She had instituted a formal grievance and received three responses from different levels of authority. Two of which indicated that a Social Work Supervisor position be created.

8. The third response was that of LFJ du Preez which mentioned that the applicant was employed in an acting position. This was the only submission that the applicant had been appointed in an acting capacity. He was the same person who had handed the applicant her appointment notification in 2008. There was no mention in the appointment letter that the applicant was appointed in an acting capacity nor was there an acceptance of the acting position as there should have been. She argued that even if she had been appointed in an acting position, she would still be entitled to compensation equal to her acting position.
9. Further to the above the applicant's appointment letter stated that the appointment coincided with the retention of her current post grading and salary notch. She conceded that the 3% increment is being paid to the applicant however not at the correct salary notch. The OSD was to be implemented in two phases. Phase 2 entitles the applicant to be paid on the level of Social Work Supervisor Grade 1 whilst the applicant is paid OSD as Social Worker Grade 2. The applicant argued that she had complied with all the requirements on the date of implementation of the OSD.
10. The applicant had previously supervised two social workers whilst she currently supervises a social worker. The same person who had recommended that the applicant be appointed into the supervisory position was the same person who had handed the applicant her appointment letter. The applicant had forwarded a memo to the respondent stipulating the problems and difficulties she had experienced since no supervisor was appointed. She nonetheless argued that there was absolutely no reason why the applicant should not be translated into a Supervisor Social Work Grade 1 position as she complied with and is currently fulfilling the position as Supervisor. She performs the function of Supervisor in that she supervised newly qualified students who had no practical experience. Section 15 (2) of the Social Service Professions Act 110 of 1978 stipulates that practical training of students must take place under the supervision of a Social Worker.
11. She argued that in the arbitration between ***PSA obo Muller & The Department of Correctional Services- Western Cape*** in which the same facts were considered and the applicant in that instance had been translated to a Social Work Supervisor Grade 1. She sought the same in this instance.

RESPONDENT'S ARGUMENT

12. The respondent either admitted or noted most of the applicant's submission. For the purposes of this award I will list only which was disputed by the respondent .
13. The respondent contended that the applicant's salary was R 201 297.00 per annum which is the 5th notch of a Social worker Grade 2. He contended that the Area Commissioner had not had authority to create any post that does not exist on the organogram of a particular centre. If that was done, then it

would have been *ultra vires* and any extra salary that would have been paid to the applicant would have to be recovered in terms of Section 38 of the Public Service Act.

14. He suggested that there would have been no acting appointment letter as there was no financed position at the level at which the applicant seeks to be remunerated. In fact he argued that the applicant would need to have been promoted to the post before she could be remunerated at that level. The process would involve advertising the post before it could be filled. The department did not have such a post.
15. He argued that before the applicant could be paid an acting allowance, the post in which the applicant was acting would need to have to be financed. The post of Supervisor Social work does not exist in the post establishment. Therefore it could not be financed.
16. He insisted that the applicant was on the correct OSD salary scale and that the applicant was paid the 3% pay progression on a correct salary scale as per the OSD. He disputed that the applicant was entitled any pay more or less than she is already paid.
17. He argued that the applicant by her own admission conceded that there was no Supervisor at the centre.
18. He insisted that the dispute was only in respect to the interpretation and application of the collective agreement and cited **SAPS v PSCBC & Others 2008 17 LC** and argued that it would be *ultra vires* should I order any amount to be paid to the applicant.

ANALYSIS OF ARGUMENTS

19. I am persuaded towards the version of the applicant even though she contradicted herself in her submission. The applicant argued that she was appointed into the position of Supervisor Social Work Services as per the letter on page 7 in April 2008 with effect from 1 May 2008 and later suggested that she had sent a memo to the respondent relating to the challenges she experienced in the absence of a Supervisor. I am satisfied from the applicant's submission that she indeed was appointed in terms of the letter dated 25 April 2008 in a Supervisory position. I am of the opinion that the applicant had not acted in the said position as an acting position requires that it be a funded; vacant position and is for a limited period only. There indeed has to be acceptance by the employee.
20. There is no suggestion that the applicant had acted in this position after 1 May 2008 when she had in fact been appointed into the said position as per 1 May 2008. The letter on page 7 dated 25 April 2008 confirms her appointment irrespective if the position was not advertised as per the provisions of the respondent's recruitment policy. It is indeed plausible that the applicant had acted in the Supervisory position prior to 1 May 2008 hence her appointment into the position on 1 May 2008.
21. I am not inclined towards the approach of the respondent that her appointment was an act of an *ultra vires* act on behalf of the Area Commissioner. I am of the opinion that the Area Commissioner is

indeed representative of the respondent at the centre and his/her exercise of control and or decisions is representative of the respondent and subsequently binds the respondent accordingly.

22. In view of the brief reasons above I am persuaded that the applicant was indeed appointed into the position of Supervisor Social Work on 1 May 2008 and therefore is entitled to OSD on the salary scale as a Supervisor. Though it was common cause in the pre arbitration minute in Clause 3 that indeed the applicant had been appointed as a Supervisor since 1 May 2008 I cannot understand why the applicant chose to argue same.
23. The only material contention by the respondent is in respect of the monetary award and that I am not able to award the OSD quantum as is sought by the applicant and that such act would be *ultra vires*. I am not convinced with the respondent's argument as indeed the matter in respect of **SAPS v PSCBC & Others 2008 17 LC** related to the instance where a Commissioner had awarded compensation in respect of a Collective Agreement dispute whilst Section 193 of the act only allows for remedies of compensation in the event of an unfair dismissal or an unfair labour practice.
24. I am not inclined to award compensation but indeed award the quantum of the OSD amount which the applicant is entitled to as a result of her appointment from 1 May 2008 as a Supervisor. In any event Clause 8 of the pre arbitration minute as entered into between parties requires me to award the amount that the applicant sought as OSD from 1 May 2008 till end March 2012. It was also agreed between parties that the applicant be placed on the correct scale.
25. The applicant had failed to submit the quantum of relief sought but instead submitted an amount calculated at the difference in salary level between that of a Social worker and that of a Supervisor. I am not mandated to award the amount sought by the applicant since I am not mandated to do as per the pre arbitration minute nor is it within the scope of my jurisdiction since the dispute is in respect to the interpretation and application of the Collective Agreement in Resolution 1 of 2009 in respect of the OSD and is not in respect of a salary adjustment to that of a Supervisor.
26. Seemingly and in all probability the applicant's dispute is in respect to being paid on the incorrect salary level and not one of OSD.

AWARD

27. The applicant is entitled to OSD as per Resolution 1 of 2009.
28. The respondent is indeed paying the applicant OSD on her current salary scale.
29. There is no order as to costs.

Signed at Kimberley on this 18th day of April 2012.

Shiraz Osman

PHSDSBC PANELLIST

SHIRAZ MAHOMED OSMAN