



ARBITRATION AWARD

Panelist/s: Advocate Ronnie Bracks
Case No.: PSHS357-11/12
Date of Award: 8th May 2012

In the ARBITRATION between:

M.E. Zwane

(Employee)

and

Department of Health and Social Development- Gauteng

(1st Respondent)

Employee Representative: M.E. Zwane

Employee's address: Chris Hani Baragwanath Academic Hospital

P.O. Bertsham

2013

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Company/Employer representative: Department of Health and Social - Gauteng

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DETAILS OF HEARING AND REPRESENTATION

- A. The Arbitration was scheduled for hearing on the 30th April 2012 at the offices of the Respondent in the VIP Boardroom on the 9th Floor at *Chris Hani Baragwanath Academic Hospital*.
- B. The Applicant was unrepresented. Kidebone Maphunye the Labour Relations Officer represented the Respondent. The proceedings were recorded both manually and electronically.

ISSUE TO BE DECIDED

- C. Whether or not the Respondent committed an unfair labour practice by failing to pay the Applicant an acting allowance.

BACKGROUND TO THE ISSUE

- D The Applicant was appointed as Assistant Director in 2007 on level 9. He acted as Deputy Director from 1st August until November 2007; 15th November – 31st December 2008; May – June 2009 and July to August 2009. On all these occasions he had an appointment letter to act and signed acceptance letters. He was paid an acting allowance for these periods.
- E The surgical unit and the Central Hospital were re-merged. The Applicant alleged that he was appointed to act from November 2009 to March 2010. The Respondent denied this stating that when the re-merging took place there was no need for the Applicant to act. A Deputy Director was appointed in April 2010.

SURVEY OF EVIDENCE AND ARGUMENT

EVIDENCE

Documentary

- F Bundles of documents marked "A" and "B" were submitted by the parties as well as a copy of the Pre-arb minute dated 30th April 2012.

Employee's Evidence:

The Applicant, Mlungisi Zwane after being sworn in testified as follows:

- G He was appointed to act in 2007. He alternated with one Demakatso Mangezi whose term ended in October 2009. The Applicant continued to act until March 2010 when a Deputy Director was appointed. During the time he was acting he attended management and exco meetings. He was responsible for the approval and obtaining of finances. He also assisted in the appointment of staff. At the end of his acting period (March 2010) he was told to write a motivation letter which he did. It was supported by Prof. Ramokgopa and Dr. Lesia. However, the request was rejected by Mr. Mbalati and Ms. J. More.

- H He expected to be paid at the end of the term but instead he was asked to write a letter of motivation. In the past he had not been expected to do this.
- I the relief he is seeking is that the Respondent should pay him his acting allowance for November 2009 to March 2010.
- J Under cross-examination the Applicant stated that in the past he was given appointment letters which he signed accepting the position. When there was a need for him act he would be told verbally and this would be followed by a letter. He conceded that on this occasion there was no letter. He only became aware of this when it was queried since in the past the letter would be given to him only at the end of the acting period. Nothing further of significance emerged from the cross-examination.

The Applicant called one witness who testified after being duly sworn in:

Martin Derrick Smith testified as follows:

- K During the time in question he was on sabbatical and his evidence would be based on a reasonable assumption that the systems would have remained the same as when the pilot project was started. He explained in detail the responsibilities given to him at the start of the project. Many undertakings were made with regard to the appointment of staff. He had requested that this be put to him in writing. He was not aware that the Human Resource delegations presented to him were in dispute. However, in January 2010 he was informed that the project had been terminated.
- L According to him he was in consultation with the Surgical Unit and he always understood that the position of the Applicant still existed. He did not have any knowledge that the position no longer existed therefore the Applicant would have had a reasonable expectation to be paid an allowance. As previously stated he was told in January 2010 of the termination of the project.
- M Under cross-examination the witness said he went on sabbatical from August 2009 until August 2010. As a result he would not be able to state what happened during that period as he was not in charge of the unit at that time. He was however, apprised of developments from time to time. He could also not say whether or not the Applicant had received an appointment letter. He explained the structure of the project.

Employer's Evidence

The Respondent called one witness who testified after being duly sworn in:

Johanna More testified as follows:

- N She has been the CEO since January 2010. Amongst her responsibilities was to manage the resources of the hospital which included the finances. She also explained how the surgical project came about and how the structure was made up. The Director of Finance reported to her. During the period under review she was not at all aware that the Applicant was acting until she was requested to sign the motivation. She refused to recommend the motivation as she was responsible for salaries. If they wanted the Applicant to act it should

have been recommended to her because the person acting needed to get a letter from the CEO. This was not done.

- O She was referred to B5 which is the policy on acting. She gave a detailed explanation as to how the policy worked and said that not all acting positions were paid positions. She said she should have approved the appointment as she was responsible for managing the budget.
- P Under cross-examination the witness denied that there was a separation of the surgical project and the Central Hospital. She said the project had always been contentious issue as the hospital budget was being used for the project. Smith was told that Mr. Lesedi should have been the person in charge. There were no letters of delegation. She had told Smith to dismantle the unit and hence the reason for his sabbatical.

ANALYSIS OF EVIDENCE AND ARGUMENT

- 1 The unfair labour practice is defined by section 186(2)(a), inter alia to mean an unfair act that arises between an employer and an employee involving-
“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.”
- 2 It is acceptable labour jurisprudence that in cases of unfair labour practice the onus rests with the employee to show that the employer had in fact acted in an unfair manner.
- 3 I have considered the evidence of the Applicant that he had acted without being paid the acting allowance from November 2009 to March 2010. From the evidence presented it is common cause that the Applicant had acted for various periods between 2007 and 2009 together with Mangezi. According to the Applicant's evidence Mangezi stopped acting in 2009. If that was the case the Applicant did not present any communication that requested him to continue acting in the position. If it is considered that he and Mangezi alternated in acting, what would the basis have been for the Applicant to act on his own? One would have expected the Respondent to inform him. Further evidence is that the Applicant was paid for this period.
- 4 In fact Smith who appointed the Applicant and who testified for the Applicant stated that he was on sabbatical from August 2009 until August 2010. It therefore begs the question who would have appointed the Applicant to continue acting after October 2009 when Mangezi left. No documentation was presented to support the Applicant's contention that he was appointed to act from November 2009 to March 2010 and that he had accepted the appointment as was the practice in the past.
- 5 Furthermore, Smith's evidence was that in January 2010 he was advised that the project was terminated. It therefore begs the question how the Applicant could have acted until March 2010. At best, even if I found in the Applicant's favour he would only be entitled to payment for two months.
- 6 Having said this, in terms of the Policy on Acting Allowance for Personnel on salary levels 1 – 12 it is clear that an employee could only be appointed in writing as clause 4 states: “An employee appointed in writing to act in a higher post duly authorized shall be paid an acting allowance provided that ...” Clause 6 further states: “An employee must accept the acting appointment in writing before the acting allowance is payable.”

- 7 The Applicant could not present any evidence to show that he was indeed appointed by a person duly authorized and that he had accepted. In fact the person who initially appointed the Applicant was on sabbatical. In any case his authority to duly appoint was challenged.
- 8 In the light of the above it is my view that the Applicant had failed to discharge the onus to show that he should have been paid for November 2009 to March 2010.

AWARD

The case against the Respondent is dismissed.


Adv. **RONNIE BRACKS**

PSHSBC Panelist