



# ARBITRATION AWARD

Commissioner: Elsabè Skinner

Case No: PSHS390-18/19

Date of award: 3 May 2019

In the matter between:

**PSA obo Atella Hattingh**

(Union/ Applicant)

and

**Department of Health- Free State**

(Respondent)

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## DETAILS OF HEARING AND REPRESENTATION

1. The matter was set down for arbitration on 6 December 2018 and 21 February 2019 at Stoffel Coetzee District Hospital in Smithfield. On the 25<sup>th</sup> of April 2019 the matter was heard at Bophelo House in Bloemfontein.
2. The Applicant was represented by Mr. Fandie, an official of the union. The Respondent was represented by Mr. Gumede, the Senior Employee Relations Officer of the Respondent.
3. The proceedings were mechanically recorded. No interpreter was used.
4. The Respondent presented bundles of documents which were marked A and E. The Respondent presented bundles of documents which were marked B, C and D.

## **BACKGROUND TO THE DISPUTE**

5. It was agreed during the narrowing of the issues that the Applicant was employed by the Respondent on the 1<sup>st</sup> of January 2009. She worked as an Obstetric Ultra Sound Radiographer Grade 1 and earned R327 417.00 per year (page 3 bundle A).
6. Both parties agreed that the dispute was regulated by clauses 4.1.10 and 4.1.10.2 of the Collective Agreement, Resolution 2 of 2010.

### **Jurisdictional point**

7. The Respondent's representative raised a point *in limine* that the dispute was referred late. Both parties addressed me on the issue. However, during the proceedings the parties had agreed that the dispute was an ongoing dispute relating to the Applicant's grade progression which affect her monthly salary. The Respondent's representative then withdrew his point *in limine*.

## **ISSUE TO BE DECIDED**

8. I must determine whether the Collective Agreement, Resolution 2 of 2010, applies to the Applicant and whether she should be grade progressed to Grade 2 in terms of the Collective Agreement.
9. The Applicant was seeking an order that she be grade progressed to Grade 2 in terms of the Resolution.

## **SURVEY OF EVIDENCE AND ARGUMENTS BY THE PARTIES:**

### **Evidence by the Applicant**

10. **Mrs Atella Hattingh**, the Applicant, testified under oath and her evidence was, in essence, as follows:

11. She was based at Stoffel Coetzee Hospital in Smithfield where she worked as the only Senior Radiographer Grade 1. She was entitled to grade progress to grade 2 in terms of the Collective Agreement as she met the requirements as set out in the Collective Agreement.
12. She had been working in the post for the past 10 years. She had to be scored above average during performance assessment for 4 years to grade progress to grade 2 (page 2 bundle D). She worked on a supervisory level where she was running the department on her own. She was doing the cost center and quality control of the Department, she did management meetings, infection control and health and safety. She did the outreach program, the quality assurance program of the Department as well as the maintenance. She had to arrange for maintenance and did the quality control tests of the machines. She did the added work of a Chief Radiographer as a Senior Radiographer was only doing x-rays of patients and doing radiographer services. A Senior Radiographer was not doing the admin of a Department with the additional responsibilities of the meetings of the outreach program.
13. The PDMS documents did not reflect that she was performing her services above average as her post was going to be translated from Senior to Chief and the Respondent had financial constraints as she was informed by her Supervisor, Gerda O'Neill. Her Supervisor told her that they were verbally instructed by the CEO to score employees as average due to the financial constraints of the Department. During cross-examination she explained that she was not satisfied with the average score as she was not an average worker. She was referred to page 3 bundle E in the performance agreement where it was stated and where she had signed "I hereby agree with the annual end of cycle performance". It was pointed out to her that she was contradicting herself. She answered that she was under the impression that it was the maximum that she could get due to financial constraints. She was asked why she could not have indicated that she was not happy. It was pointed out to her that she was not doing the work of a Chief Radiographer. She responded that she was doing that work. She did not have proof at the arbitration, but she was able to get it. It was pointed out to her that she took the duties upon herself if she was saying this. She disagreed and answered that she was instructed to do it by the CEO and Mrs O'Neill, her Supervisor in Zastron, whose current position was a Chief Director.

14. She referred to the PDMS documents for the end of year cycle assessment for 2012 – 2013 where her Supervisor gave her a score of above average. She explained that she did additional work in the Maintenance Department of the Hospital; work which had to be done by a Chief Radiographer. During cross-examination it was pointed out to her that the Respondent was still having financial constraints then. She agreed but added that she was under the impression that it was because she was doing the additional duties of another Department and her Supervisor had to give her more then. It was pointed out to her that her assessments were not influenced by the financial situation of the Respondent. She further testified that she got an average the following year as she was not doing maintenance anymore.
15. She had never lodged a grievance about her PDMS ratings as she thought that she was not allowed to get a rating of more than average. She agreed that the document stated that “there were no outstanding disagreements” and that she had signed it. She had accepted what was explained to her. She realized now that she should have asked for evidence. She agreed with the assessment as her post was going to be translated to a Chief Post. She could not get a “5” when she was doing duties that she was supposed to be doing.
16. She only became aware of the Resolution now that she had been working for 10 years and she had realized that she could have been grade progressed if she was scored correctly.
17. **Ms. Gertruida O’Neill** testified during the arbitration as follows:
18. She was a Radiographer in Zastron. Her current position was Assistant Director and she was the Supervisor of the Applicant. She had assessed the Applicant’s performance bi-annually since 2010. The Applicant’s work was above average as she was also doing the work of a Chief Radiographer as she was responsible for the maintenance of the machines, the budget and other responsibilities since 2010.
19. She scored the Applicant as average during the year that the instruction was given by Mrs Mgoqi, the CEO of the institution. The instruction was that all employees should be scored as average even though they performed above average. The instruction as only for the one year. During cross-examination, she testified that she could not

remember which year the instruction was given, and she did not bring the minutes of the meeting with her to the arbitration. She agreed that the instruction was unfair, but it was clear, and she had to follow it. She was aware that it was an unreasonable instruction and that she was wrong to follow it, but she had given her reasons. She further agreed that she would not follow an instruction which instructed her to violate the state vehicle policy but added that it was not comparable to the case at hand. She scored the Applicant above average during 2012/2013 as she was doing above average work.

20. During cross-examination she testified that she scored the Applicant above average for the years that was her Supervisor. It was pointed out to her that she had not brought proof of this, if she had, they would not have been sitting in an arbitration with this case.

### **Evidence by the Respondent**

21. **Mr. Maqala Januarie Gumede** testified under oath as follows:

22. He read the Collective Agreement, Resolution 2 of 2010, into the record and testified that the Applicant did not meet the requirements. He agreed during cross-examination that the Respondent had financial constraints since 2010 but added that it should not influence an employee's performance appraisals.

23. At the end of the hearing the parties addressed me by closing arguments.

- 20.1 The Applicant's representative argued that in order to grade progress in terms of the Collective Agreement the Applicant had to meet the requirements. Evidence was led to proof that there was an interference with the assessment of the Applicant. The Resolution is clear that if evidence is provided that an employee had performed above average then he/she should be grade progressed. The Applicant's Supervisor had testified that the Applicant had performed above average as she was doing the work of a Chief Radiographer. He asked the question why the Respondent was allowing someone to do the work of a Chief Radiographer and then say she was an average performer. She was unreasonably rated as an average performer. The Applicant did not file a grievance against her average appraisals as she was informed that she was going to be absorbed in the functions of a Chief Radiographer.

20.2 The Respondent's representative argued that the Resolution is clear. The Applicant is supposed to produce 4 annual assessments for 4 years. The Applicant failed to provide the documents. There is no evidence to substantiate the instruction. Even if the year in which the instruction was allegedly given, is subtracted, the Applicant still had 8 years to be scored above average which was not done. The Applicant's Supervisor who testified during the arbitration was the very same person who scored the Applicant an average score. The Applicant did not file any grievance regarding this. The matter should be dismissed.

24. I have not repeated all the evidence before me but concentrated on those that assisted me on arriving at my final decision.

## **ANALYSIS OF EVIDENCE AND ARGUMENT**

25. The Applicant referred an interpretation and application of a Collective Agreement namely Resolution 2 of 2010 in terms of section 24 of the Act to the Council.

26. The parties agreed, during the narrowing of the issues, that the dispute was regulated by clauses 4.1.10 and 4.1.10.2 of the Collective Agreement, Resolution 2 of 2010. The Collective Agreement reads that the requirements for an Ultrasound Radiographer Grade 1 to grade progress is 5 years actual service and recognizable experience after compliance with the appointment requirements in the grade with at last 4 annual assessment ratings of outstanding performance or performance significantly above expectations in grade 1. The dispute before me is whether the Applicant meets the requirement of 4 annual assessment ratings of outstanding or above average.

27. The onus is on the Applicant to prove that the requirements of the Collective Agreement is met, that it applies to her and that she is entitled to grade progress in terms of the Collective Agreement. The Applicant's version is that her work was above average, but she was scored average due to an instruction that was given to her Supervisor, Mrs O'Neill. The Applicant presented documentation to proof that she was scored above average for the financial year 2012/2013. No other documentation was submitted to proof that she was scored above average. The Applicant's Supervisor came to testify, and her version was that the instruction was only for one year and not all the other years.

The evidence before me was that Mrs O'Neill was the Applicant's supervisor for the past 9 years. The Supervisor's verbal testimony is not corroborated by any documentation. I must agree with the Respondent's representative that there are no minutes of the meeting where the CEO instructed that employees should only be scored average although their work was above average. There is no corroboration for Mrs O'Neill's testimony that such an instruction was issued. However, it still leaves a period of 8 years in which the Applicant could have been scored above average, where the instruction was not an issue. The evidence before me was that she was only scored above average during the period 2012/2013. The performance documentation clearly states, and parties had to sign that they agreed with the ratings and that there was no dispute about the ratings. Both Mrs O'Neill and the Applicant had acknowledged that they had signed the performance assessment documents. It makes no sense to me why an employee would accept the ratings and sign for it and not lodge a grievance when she is not satisfied. The Applicant's version was that she was informed that her position would later be changed to Chief Radiographer which was the reason why she had not lodged a grievance or complained. I can accept that she would have believed this for a year or two, but not for 9 years. In light of the above, I am not satisfied that the Applicant meets the requirements of the Collective Agreement. Both witnesses testified that her work was above average; no proof of this was provided except for the performance assessment documents of 2012/2013. It is unfortunate, in my view, that they had completed the documents to reflect average ratings. The Applicant and her Supervisor, with all due respect, are the authors of the Applicant's own misfortune.

**AWARD**

28. In light of the above, I make the following award:

29. The Applicant does not meet the requirements of the Collective Agreement and is therefore not entitled to be grade progressed.

30. The application is dismissed.

31. I make no order as to costs.



Signature: \_\_\_\_\_

**Elsabè Skinner**