ARBITRATION AWARD

IN THE PUBLIC HEALTH AND SOCIAL DEVELPOMENT SECTORAL BARGAINING COUNCIL HELD AT BLOEMFONTEIN

COMMISSIONER: C L DICKENS
CASE NO. : PSHS 404-11/12
DATE OF AWARD: 13 January 2012

In the Arbitration between:

NEHAWU obo KEKETSO NAPHTALY KENNY NTLHARE APPLICANT

and

DEPARTMENT OF SOCIAL DEVELOPMENT: FREE STATE RESPONDENT

ARBITRATION AWARD

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1. DETAILS OF HEARING AND REPRESENTATION:

1.1 An Arbitration hearing was scheduled for the 10th of January 2012 at the Department of Social Development, Liberty Life Building, St. Andrew Street, Bloemfontein.

1.2 The Applicant, Mr. Ntlhare, was represented by Mr. Jwayi of NEHAWU. The Respondent, Department of Social Development, was represented by Adv. Mene, on instructions of the State Attorneys.

1.3 The Arbitration proceedings were digitally recorded.

2. ISSUE TO BE DECIDED:

2.1 The Applicant has referred a dispute relating to the interpretation or application of a Collective Agreement, being Resolution 1 of 2002. I am required to determine whether the Applicant was supposed to be acting in the post of Manager: Labour Relations and if so, whether he would be entitled to any compensation.

3. BACKGROUND TO THE ISSUE:

3.1 It is common cause that the Applicant is currently employed as Assistant Manager, Labour Relations.

3.2 It is further common cause that the post of Manager: Labour Relations was vacant at the time and that it was funded.

4. SURVEY OF EVIDENCE AND ARGUMENT:

4.1 SUBMISSIONS ON BEHALF OF THE APPLICANT:

4.1.1 *Mr. Jwayi* **argued that the dispute is about the interpretation and application of a Collective Agreement signed under the auspices of the PHSDSBC which is called Resolution No 1 of 2002.**

4.1.2 He held that the purpose of the Collective Agreement was to determine a policy on acting allowances and compensation to be paid to an employee appointed to act in a higher post.

4.1.3 He argued that on the 20th of July 2010 a request was made by Adv. Tsotetsi, Senior Manager: Legal Services, for the Applicant to act in the post of Manager: Labour Relations. This request was made after the post became vacant.

4.1.4 He argued that this request is set out on Page 1 of Bundle A. This letter was addressed to the Senior Manager: Human Resources Management. He held that the request was set out on pages 2 till page 4 of the Bundle. He held that page 5 was a letter from the MEC: Social Development, Ms. S H Ntombela, to Mr. Ntlhare notifying him of the interim appointment. He confirmed that they do not have a

signed copy of the documents. He held that they are in possession of proof to the effect that the documents were sent to the MEC's office.

4.1.5 He stated that the register of Mrs. Botha indicates that a document was issued which was titled: "Submission – approval for appointment of K.N.K Ntlhare in acting capacity post of Manager: Labour Relations".

4.1.6 A further submission was then submitted to appoint Mr. Mahlaba to act in this position. This submission was approved and the necessary documentation was signed. He argued that this submission was made and approved, notwithstanding the fact that approval had been granted for Mr. Ntlhare to act in the said position. He held that Mr. Mahlaba then submitted an acceptance letter.

4.1.7 Mr. Jwayi argued that the appointment of an outside person caused instability in the Department. He held that it was not possible for the Applicant to accept the appointment as it was never given to him.

4.1.8 He argued that the Applicant never received the letter giving him the green light to act. He stated that the Applicant could only get hold of an unsigned copy of the letter.

4.1.9 In reply Mr. Jwayi held that Human Resources are the ones who make the submissions to the MEC's offices. He held that Page 1 of the Bundle is clear that it was Adv. Tsotetsi who made the submission to have appointed Mr. Ntlhare to act. He stated that the documentation was retrieved from the computer of Mr. Crawford.

4.1.10 He stated that based on what was submitted the Commissioner should make a finding as to whether she has the jurisdiction to grant the order as requested.

4.2 <u>SUBMISSIONS ON BEHALF OF THE RESPONDENT:</u>

4.2.1 ***Mr. Mene*** argued that the onus rests on the Applicant to prove that Adv. Tsotetsi made a submission to the effect that approval should be submitted that the Applicant should act. He held that the Applicant failed in proving this. He held that the Respondent admits that there was a request, but no submission was made by Adv. Tsotetsi. He held that the submission on pages 2 to 4 of Bundle A are

unsigned. He held that the document was not signed by Adv. Tsotetsi or anyone else.

4.2.2 Mr. Mene held that on the Applicant's own version the incorrect protocol was followed as the documentation should have been sent and approved by the Senior Manager prior to it having been sent to the HOD and the MEC.

4.2.3 He stated that the Applicant was the author of his own submission and that this was against protocol. Mr. Mene held that the Applicant contravened each procedure and rule in the workplace. He held that from the affidavit of the Applicant submitted in the High Court it is clear that the Applicant failed to follow the correct procedures.

4.2.4 Mr. Mene held that the Applicant is alleging that Mr. Mohutsioa failed to respond to his letters. He Held that this was not true, and that a response can be seen on page 12 of Bundle A. The letter contains an explanation that the Applicant was never issued with an appointment letter to act, nor was there any acceptance letter thereof. In the letter the Applicant was requested to bring forth proof that he had indeed been appointed but that he did not do so.

4.2.5 He held that the Respondent is placing the existence of the signed document in dispute. He held that the Applicant can not succeed in his Application as he carries the onus and has failed to provide the signed appointment letter.

4.2.6 Mr. Mene held that the crux of their case lies with the remedy requested by the Applicant. He held that at the commencement of the proceedings, the Applicant indicated that his remedy is two fold;

- That he was supposed to act as Manager: Labour Relations;
- And that he should be paid for the period during which he should have acted.

4.2.7 He argued that the only order that the Commissioner can give under the circumstances is a finding as to whether the Respondent interpreted Clause 3.1 of the Collective Agreement correctly and whether the Respondent applied the said Clause correctly.

4.2.8 He argued that the order that the Applicant is seeking can not be awarded under the referral as it stands. He argued that the order that is being sought is moot and unenforceable. An order directing the Respondent to allow the Applicant to act would be of no value as the acting period has expired. Subsequent to this the post has been filled. He further argued that an order directing the Respondent to pay the Applicant for the period during which he should have acted would amount to damages. He held that compensation can not be payable in a dispute of this nature.

4.2.9 Mr. Mene referred to the following case law which indicate that where an order is only of academic nature, then the matter should fail:

- *President of the Ordinary Court Martial Lieutenant – Colonel Mardon NO and Others v The Freedom of Expression Institute and Others 1999 (11) BCLR 1219 (CC)*
- *National Coalition for Gay and Lesbian Equality and Others vs Minister of Home Affairs and Others 2000 (1) BCLR 39 (CC)*
- *SATAWU v ADT Security (PTY) Ltd. [2001] 9 BLLR 869 (LAC)*

4.2.10 Mr. Mene argued that the Applicant has failed to comply with the provisions of Section 3.1 of Resolution 1 of 2002. He argued that the Applicant has failed to prove that he was appointed to act in the higher position. He also held that the Applicant has failed to prove that he accepted the acting position. He held that the Applicant failed to prove that he indeed acted in the position. Mr. Mene held that there is no proof that the Respondent interpreted the Resolution incorrectly.

4.2.11 He held that based on the merits of the matter, the case should be dismissed.

5. ANALYSIS OF EVIDENCE AND ARGUMENT:

5.1 The dispute which has been referred to the Bargaining Council relates to Clause 3.1 of Resolution 1 of 2002.

5.2 For ease of reference I will quote the relevant Clause:

"3.1 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 (hereafter the "appointing authority") shall be paid an acting allowance to act in vacant posts provided that:

3.1.1 the post is a vacant and funded post;

3.1.2 the acting period is longer than 6 weeks;

3.1.3 the appointing authority is a level higher than the acting appointee;

3.1.4 The EMPLOYEE must accept the acting appointment."

5.3 It is the Applicant's case that he was appointed in writing to act in the post of Manager: Labour Relations for the period 1 September 2010 until the post was filled on the 1st of May 2011. The Respondent denies that there was a valid appointment relating to the Applicant.

5.4 The first aspect which has to be determined is whether there was a valid appointment. The Applicant held that he was not given the appointment letter and that he obtained the documentation by default from an undisclosed source. The Applicant conceded that they were not in possession of any signed documents. The Respondent denies that the documents which were submitted by the Applicant were authorized and / or approved. It is common cause that the Applicant was never formally requested by the Department to act in the position of Manager: Labour Relations. Taking the abovementioned into consideration, I can not find that there was a valid appointment in writing.

5.5 Should it be that an employer did indeed apply for a specific employee to act in a post, and should it be that the appointment letter was issued and never handed to the employee, I can see no reason why an employer would not be at liberty to withdraw such decision. It would always be in the discretion of the employer.

5.6 In view of the fact that I can not find that there is a valid appointment, the further requirements set out for the appointment will be of academic value only. Be that as it may, I will deal with each aspect briefly.

5.7 Section 3.1.1 deals with the question of whether the post was a vacant and funded post. This aspect was conceded to by both parties and is not in dispute.

5.8 Section 3.1.2 deals with the requirement that the acting period must be longer than 6 (SIX) weeks. Although the Applicant would not agree at the commencement of the proceedings that he did not act in the post, he conceded to this during argument when he said that he should have been appointed to act in the post. It was therefore established that the Applicant did not act in the post at all. The Applicant therefore fails on the second requirement.

5.9 Section 3.1.3 deals with the level of the post. It is common cause that the post in question is a higher level than the level occupied by the Applicant.

5.10 Section 3.1.4 deals with the requirement that the Applicant must accept the acting appointment. It has been established that the Applicant could and did not accept the acting appointment as the offer was never put to him. The Applicant therefore fails on this point too.

5.11 Mr. Mene raised a further point that the Bargaining Council does not have the jurisdiction to award the relief sough by the Applicant. The relief being that the Applicant was supposed to act, and the second being that he should be paid for the period that he was supposed to act.

5.12 Mr. Mene based his argument on two legs. The first leg is that the first portion of the order was of academic value only as the acting period is long gone and a permanent appointment has been made. He referred to the following case law on this point being;

- *President of the Ordinary Court Martial Lieutenant – Colonel Mardon NO and Others v The Freedom of Expression Institute and Others 1999 (11) BCLR 1219 (CC)*
- *National Coalition for Gay and Lesbian Equality and Others vs Minister of Home Affairs and Others 2000 (1) BCLR 39 (CC)*
- *SATAWU v ADT Security (PTY) Ltd [2001] 9 BLLR 869 (LAC)*

5.13 I agree with Mr. Mene that should I have found that a proper appointment had been made in writing and should the Applicant not have acted, an order directing the Respondent to permit the Applicant to act would have been of academic value only as the period during which the acting was required has expired. Such an order would have been of no value.

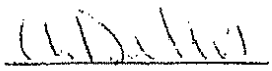
5.14 The second aspect raised by Mr. Mene was that the Commissioner is not at liberty to order damages to an Applicant under circumstances such as the present. The Applicant did not act and therefore he was not entitled to an acting allowance. Payment in lieu of the question of whether he should have been permitted to act would, I agree, amount to damages. I am in agreement with Mr. Mene that damages can not be awarded in a dispute which relates to the interpretation and / or application of a Collective Agreement.

6. AWARD:

6.1 The Respondent, Department of Social Development: Free State, interpreted Clause 3.1 of Resolution 1 of 2002 correctly.

6.2 No order as to costs is made.

SIGNED AT BLOEMFONTEIN ON THIS 13th DAY OF JANUARY 2012



SENIOR COMMISSIONER
C L DICKENS
PHSDSBC