



ARBITRATION AWARD

Case No: **PSHS417-20/21**

Commissioner: **Allan Kayne**

Date of award: **11 February 2021**

In the matter between:

KEITHENG CATHERINA KITSA

(APPLICANT/UNION)

and

DEPARTMENT OF HEALTH – NORTH WEST

(RESPONDENT)

DETAILS OF THE HEARING AND REPRESENTATION

1. The applicant referred a dispute to the Public Health and Social Development Sectoral Bargaining Council (“the Council”), in terms of section 24(2) of the Labour Relations Act 66 of 1995 (“the LRA”), pertaining to the interpretation or application of a collective agreement. The arbitration took place on 28 January 2021 at the Potchefstroom Hospital. Subsequent to leading oral and documentary evidence, the parties were afforded an opportunity to submit closing arguments in writing.
2. The applicant was in attendance and represented by her attorney, Willard Chisora. Mzamo Adoons represented the respondent.
3. Both parties submitted bundles of documents to be utilised during the arbitration proceedings.

4. The proceedings were conducted in English, were electronically recorded, and the record filed with the Council's administration.
5. This award is issued in terms of section 138(7) of the LRA, which requires a commissioner to provide brief reasons for his/her outcome.

ISSUE/S TO BE DECIDED

6. I must determine whether the Council's Resolution 3 of 2007 ("the Nursing OSD"), in particular paragraph 3.1.3.2, finds application in the case of the applicant and whether she is entitled to be remunerated as a Professional Nurse Grade 2 (Speciality Nursing), for her tenure with the respondent.

BACKGROUND

7. It was accepted as common cause that the applicant applied for and was appointed to the position of Professional Nurse (General Nursing) with effect from 01 October 2009 and, at the time of her retirement on 30 September 2020, was employed as a Professional Nurse Grade 3 (General Nursing), rendering service in the Paediatric Clinic, which is recognised as being part of a specialised unit.
8. The parties further agreed that the applicant's qualifications and registrations with the South African Nursing Council ("SANC") were not in dispute.

SURVEY OF EVIDENCE AND ARGUMENT

9. The following constitutes a summarised version of the evidence of the parties and has not been captured verbatim. The fact that I have not captured all of it should not be misconstrued that I have not taken it into account. My findings are accordingly within the context of all of the evidence tendered.

APPLICANT'S EVIDENCE

Keitheng Kitsa ("Kitsa")

10. The applicant testified under oath that she obtained a Diploma in Paediatric Nursing Science in 1993 and, subsequently, rendered service at the

Potchefstroom Hospital as a Paediatric Nurse Specialist until she left its employ. Later, she was employed by the respondent with effect from 01 October 2009, having applied for a Professional Nurse (General Nursing) position and was allocated to the Paediatric Unit at the Potchefstroom Hospital. At that time, she enquired from the Matron if she would be paid for working in a specialised unit and was instructed to just work there. Within that unit, she was the only Professional Nurse with a post-basic qualification in paediatrics. She performed duties at this level, including the resuscitation of babies and other advanced tasks that Professional Nurses with only a basic qualification did not possess. Even her superior, Mrs van Wyk, was not suitably qualified.

11. She presented into evidence the Nursing OSD explaining that paragraphs 3.1.3.1 and 3.1.3.2 indicated that there would be differentiation in salary scales between Professional Nurses (General Nursing) and Professional Nurses (Speciality Nursing) and that, given that paediatrics was such a specialised unit and that she possessed such a specialised qualification, recognised in terms of the Nursing OSD, she ought to have been remunerated at the higher level since commencement of services in 2009. However, the respondent refused to do so. She claimed that the respondent utilised her skills but failed to pay for its use thereof. Paragraph 3.4, read in conjunction with paragraph 2.2 of Annexure A to the Nursing OSD sets out the qualifications for a Professional Nurse Grade 2 (Speciality Nursing) to include a basic qualification plus a post-basic qualification, both accredited by SANC. Having met the qualification and experience requirements for the position and having, 15 years' service in the speciality, at the time of her retirement, she ought to have at least been remunerated at notch 3 of PN-B2, despite having amassed more than 26 years of service within the speciality.
12. Kitsa submitted copies of grievances that she lodged requesting to be paid as a specialist, but the respondent refused to accede to her request. During her tenure with the respondent, she had never seen an advertisement for such specialist positions in the Paediatric Unit, despite there being a need for them. She reiterated that the respondent, instead, just utilised her specialist skills without remunerating her correctly.

13. During cross-examination, she testified that, before leaving the public service the first time, she was appointed as a Paediatric Specialist Nurse. However, she later conceded that she was unaware that, at the time, there were no such positions as the Nursing OSD was only implemented in 2007. Upon reappointment, she applied for and was appointed to the position of Professional Nurse (General Nursing), despite possessing the post-basic qualification in Paediatric Nursing Science. As she was allocated to the Paediatric Unit, she queried if she would be remunerated as a specialist, to no avail. As she was desperate for employment, she continued to render service as a specialist in spite of not being paid as such. The responses to her grievances were arrogant, and the reasons preferred were that the respondent had no money for specialist positions. Having been failed by the unions who were assisting her, she sought legal representation in 2015 and, when her grievance of 2019 was still not resolved, she decided to refer a dispute to the Council.
14. Based on her understanding, it was a requirement to have a post-basic qualification in the relevant speciality in order to work in such a unit. While the respondent utilised Professional Nurses without post-basic qualifications to perform the nursing services in these specialised units, it was incorrect as those with post-basic qualifications possessed an advanced knowledge of the speciality and performed different duties. According to the same Annexure A of the Nursing OSD, she conceded that a post-basic qualification was not a requirement to be appointed to the positions enumerated as PN-A2, PN-A3 or PN-A4.
15. During re-examination, Kitsa testified that even if she had been appointed in a non-speciality unit, she would have been aggrieved that the respondent was not recognising her post-basic qualification.

RESPONDENT'S EVIDENCE

Khumidho Mmolawa (“Mmolawa”)

16. Mmolawa testified under oath that she was employed as the Nursing Services Manager at the Potchefstroom Hospital. She recalled that the applicant applied for a position of Professional Nurse (General Nursing) and was appointed in

2009. She was remunerated based on her appointment and not based on her qualifications. At the time of recruitment, the respondent had no requirement to fill a specialised position. She denied that the applicant worked alone in the Paediatric Unit and that the only requirement was that an individual possessing a specialist qualification oversaw the unit.

17. Under cross-examination, she confirmed that the applicant possessed a post-basic qualification in a recognised speciality and met the requirements to be a Professional Nurse (Speciality Nursing) but that the remuneration paid was not linked to a qualification but to the position to which an employee was appointed, which in turn was based on the needs of the institution. In her case, the institution only required a Professional Nurse (General Nursing). According to Mmolawa, specialised units did not specifically require only those with specialist training. In the Paediatric Unit, the applicant worked under the direct/indirect supervision of a suitably qualified individual. She acknowledged that, within the Paediatric Clinic which fell under the Paediatric Unit, the applicant was the only Professional Nurse possessing a specialist qualification, adding that it was not a requirement that such a clinic be facilitated by Professional Nurse with such a post-basic qualification. Even the applicant's predecessor in the clinic and the current incumbent, who similarly worked alone, did not possess the same qualification, and it was not a requirement of the position.
18. Mmolawa refuted the applicant's claim that paragraph 3.1.3.2 of the Nursing OSD indicated that a post-basic qualification was an inherent requirement for her particular position, reiterating that the applicant was appointed and measured against the job description of a Professional Nurse (General Nursing). She added that the applicant's claim that only she could perform specific advanced tasks like resuscitating babies was incorrect as any Professional Nurse could be called upon to do so.
19. She later conceded that Mrs van Wyk did not necessarily possess a post-basic qualification, adding that it was not a requirement for the position as long as there were other Professional Nurses with relevant post-basic qualifications within the unit. As the Paediatric Unit reported into an Assistant Nursing Services Manager who possessed a post-basic qualification in Advanced Midwifery, the applicant

was indirectly supervised by a suitably qualified person. However, she also rotated between different departments in the hospital, based on need.

ANALYSIS OF EVIDENCE AND ARGUMENT

20. In the matter to hand, the applicant contends that, by possessing a post-basic qualification in Paediatric Nursing Science and rendering nursing duties of a specialist nature within that specialised unit (or in fact any unit within the institution), she ought to have been remunerated as a specialist. In this regard, her qualifications were not disputed or that she rendered nursing services within a specialised unit.
21. As one of the primary objectives, the Nursing OSD, in paragraph 3.1.3.1, provides for differentiated salary scales between different categories of Professional Nurses, including General Nursing and Speciality Nursing. Paragraph 3.1.3.2 indicates that *“Posts in Speciality Nursing refer to those positions where a post-basic qualification listed in Government Notice R212, as amended, is an inherent requirement to perform the duties attached to the post.”*
22. Although the applicant concedes that she applied for and was appointed to a position of Professional Nurse (General Nursing), she claims that the respondent utilised her as a specialist within a specialised unit and ought, therefore, to have remunerated her as a Professional Nurse (Speciality Nursing), retrospective to her commencement date.
23. It bears noting that the veracity of the evidence of both witnesses was, in some respects, questionable and casts a shadow over their evidence as a whole. Specifically, the applicant’s claims to have been appointed as a Paediatric Nursing Specialist during her earlier tenure at the Potchefstroom Hospital, when these positions were only established in terms of the Nursing OSD must be weighed against Mmolawa’s changing version regarding the supervision of the applicant by a suitably qualified person.
24. While the applicant claims that specialists performed more advanced duties than those without post-basic qualifications, she presented no proof to this effect but

did acknowledge that they were more knowledgeable than those with only a basic qualification.

25. I do not doubt that the respondent and many patients benefitted from the applicant's advanced knowledge in executing her duties. Although she possessed a recognisable and relevant post-basic qualification in Paediatric Nursing Science and, on the balance of probability, rendered nursing services almost solely within that specialised unit of the hospital (in both the ward and clinic), one cannot ignore that her initial appointment was as a Professional Nurse (General Nursing). Not only did she concede that this was the position that she applied for but was also the position to which she was appointed. Simply meeting the requirements of a more advanced position based on qualification or skills acquired is not reason enough to be appointed to the advanced position, where such a position is not vacant, funded and advertised. Paragraph 3.1.3.2 does not create an obligation on employers bound by it to accommodate employees in such roles based on their qualification. Rather, it provides for the establishment of posts in Speciality Nursing where a relevant post-basic qualification is an inherent requirement to perform the duties. The applicant's mere say-so that her post-basic qualification in Paediatric Nursing Science was a requirement for her position is fundamentally misplaced, especially taking into account that, in her evidence in chief, she stated three times that her post-basic qualification ought to have been recognised by the respondent, regardless of the unit in which she worked.
26. In disputes of this nature, the onus of proof lies squarely with the applicant party to show that the collective agreement in question finds application in the circumstances or that it should be interpreted in a particular manner to give effect to its objectives. However, in the present case, the applicant has done nothing more than claim an entitlement to remuneration based on a position to which she was never appointed. Accordingly, she has failed, on the balance of probabilities, to discharge the onus required of her.

AWARD

27. Accordingly, the applicant has failed to discharge the onus of proof required of her.

28. The matter is, therefore, dismissed.

A handwritten signature in black ink, appearing to read "Allan Kayne", with a period at the end.

Allan Kayne