



ARBITRATION AWARD

Panellist/s: Ananthan Sanjivi Dorasamy
Case No.: PSHS447-11/12
Date of Award: 11-Dec-2011

In the ARBITRATION between:

DENOSA O B O ISMAIL I

(Union / Applicant)

and

DEPARTMENT OF HEALTH: KZN

(Respondent)

Union/Applicant's representative : MR S NGCOBO

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Respondent's representative : MR M KHUMALO

Respondent's address : PRIVATE BAG X 004
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Details of hearing and representation:

1. The arbitration proceedings commenced at 11H00 on the 24 November 2011 at the King Edward Hospital, V I P Lounge Doctor's Quarters, Durban. Mr S Ngcobo of PSA represented the applicant and Mr M Khumalo represented the respondent. After reverting to section 138 (3) of the Labour Relations Act the parties agreed on the following:

The parties confirmed that oral evidence would not be tendered and that submissions would be made in the form of Heads of Arguments to be forwarded to the arbitrator on or before the 28 November 2011. The applicant submitted its arguments on the 3 November 2011.

Issues to be decided:

2. I am to decide whether the PHSDSBC has the requisite jurisdiction to entertain the applicant's dispute. Should I find in the affirmative then I am required to direct on the future conduct of the proceedings.

Background to the issue:

3. The applicant lodged an unfair labour practice dispute citing that he was unfairly demoted. The respondent (employer) raised a point in Limine in respect of the Council's jurisdiction to arbitrate the matter.

Summary of evidence and arguments:

4. **RESPONDENT'S HEADS OF ARGUMENTS (EMPLOYERS)**

1.

This is application to have the applicant's application dismissed; the reasons for this application are going to be set out hereunder.

2.

It is also clear that this dispute is a dispute about salary. There is nothing suggesting that this dispute is about anything else other than salary. In the absence of the post to which the applicant says he is entitled to be appointed into, this dispute remains a salary dispute. The applicant referred the dispute in terms of Section 186(2) of the Labour Relations Act. It is submitted that this dispute is not covered in this subsection and therefore it is neither any of the disputes that are listed in the same subsection. The PHSDSBC does not have requisite jurisdiction to arbitrate matters relating to salary. It is on this basis that this application is made.

3.

The dispute was lodged in terms of Labour Relations Act and it is aimed at resolving the dispute arising out of the collective agreement. The dispute lodged is not about interpretation or application of the collective agreement (PSCBC Resolution 1 of 2007) which also is an agreement aimed at improving salaries of Health Professionals in the Public Service. In the instant case the applicant seeks the PHSDSBC to arbitrate a dispute which it has no jurisdiction to arbitrate. It is submitted that in light of the above the PHSDSBC lacks necessary jurisdiction to deal with this matter even on this score.

Wherefore it is respondent's prayer that the applicant's case be dismissed.

5. APPLICANT'S HEADS OF ARGUMENTS (EMPLOYEE):

JURISDICTION

The employer raised the issue on whether the commissioner has jurisdiction to listen to this matter as it is an OSD matter, and should be cited under unfair labour practice (4) benefits and salary issues.

On that issue we are quite clear that the commissioner can arbitrate on this dispute as the council has arbitrated the matter of OSD before eg. In the case of (Gumede vs Stanger Hospital Ref No. PSHS 147-10/11) We correctly cited unfair labour practice (Demotion) as the above complainant has been placed on the notch of R 223 000.00 in July 2010 and was demoted to notch of R 210 630.00 in the same month. We view that as plain demotion hence our referral is cited as such.

ASPECT 2

MERITS OF THE CASE

Resolution 3/2007 on point 3.11 under area of dispute records of service that cannot be produced, it states that (in the absence of the records of service for whatever reason documents such as South African Nursing Council registration records may assist.

The employer is rejecting to implement phase 2 of OSD as it claims that there are no records or certificates from the previous employer, which states that employer is disregarding the Resolution 3/2007.

The dispute is whether the employer should implement phase 2 in the absence of any documents produced than the South African Nursing Council registration.

It is our submission to the commissioner that this case should be arbitrated to get closure of the matter.

Analysis of evidence and arguments:

6. The applicant declared a dispute and according to the referral form the Nature of the Dispute is recorded as an Unfair Labour Practice dispute in respect demotion specifically that his salary was reduced hence then allegation that he was demoted.
7. The employer contends that the Council lacks jurisdiction to entertain this matter because it relates to salary.
8. This dispute is referred in terms of section 186 (2)(a) of the Labour Relations Act and specifically in terms of demotion.
9. There is no evidence or argument that the applicant was demoted as a result of a disciplinary sanction. Further the applicant has not indicated from what higher position or status he was downward placed. His only contention is that the employer incorrectly applied resolution 3 of 2007 resulting in his salary being reduced. As such his dispute is not about being placed in a lower position coupled with a reduction of his salary but clearly he is unhappy about earning less. This is the crux of his dispute. Issues about how much an employee earns relates to salary and as such are issues that are covered in the referral form. It is clear that salary issues are excluded from matters that are arbitrated by the council.
10. As a consequence thereof the application succeeds in that the respondent has shown that the dispute does not fall within the definition of demotion but salary which is a matter of mutual interest and therefore the Council does not have the requisite jurisdiction to entertain the matter.

11. The following is recorded for completeness in the matter.

12. As a consequence of the above I determine that the applicant has failed to discharge the onus that the employer had failed or incorrectly interpreted and applied resolution 3 of 2007 and further determine that the Council does not have the requisite jurisdiction to arbitrate the matter.

Award:

13. The Council does not have the requisite jurisdiction to entertain the matter.

14. The application is dismissed and the applicant is not entitled to any relief.

15. No order for costs is made.

16. This file should be closed.

DONE AND SIGNED IN DURBAN ON THIS 11 DAY OF DECEMBER 2011.

Signature

A handwritten signature in black ink, appearing to read 'Anand Dorasamy', written in a cursive style.

Arbitrator: Anand Dorasamy