



# ARBITRATION AWARD

Case No: **PSHS466-19/20**

Commissioner: **Maureen de Beer**

Date of award: **17 February 2021**

In the matter between:

**NPSWU obo Lubabalo Amos & 164 Others**

(Union/ Applicant)

and

**Department of Health- Western Cape**

(Respondent)

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## **Details of hearing and representation**

1. This matter was arbitrated on 9 February 2021 at Metro East Campus, Stikland Hospital. The dispute concerned the interpretation and/ or application of a collective agreement, in terms of section 24 of the Labour Relations Act 66 of 1995, as amended.
2. There applicants, being Lubabalo Amos and 164 others, were represented by Mr. ES Dlamini from the National Public Service Workers Union (NPSWU). Approximately 17 applicants attended the arbitration. Their names are reflected on the attendance register. The respondent, Department of Health- Western Cape, was represented by Mr. Ayanda Mniki from its Labour Relations Department.
3. The proceedings were manually and digitally recorded.

## **Background**

4. A dispute allegedly arose on 23 June 2019, which was referred to the Council on 12 June 2019. On 31 July 2019 a certificate of non-resolution was issued at Conciliation. The matter was then referred to arbitration on 11 September 2019.
5. The parties are in dispute in respect of the interpretation and application of PHSDSBC Resolution 3 of 2009, in particular clause 4.1.12.1 and Annexure A3. The applicants' case is that the respondent interprets and applies the agreement incorrectly. The applicants claim that the respondent is not granting a one notch gain to an applicant upon promotion to a higher post. In addition to this the applicants have indicated that the respondent had used notch R85 686.00 when the applicants were translated (or promoted) to occupation specific dispensation (OSD) in 2009, without any authority. The second issue in dispute is thus whether R85 686.00 applies to the collective agreement in respect of Annexure A3 (of the agreement).
6. It is the respondent's case that when there is a promotion, there is a one notch gain given to a successful candidate. The notch gain has a financial value. When an applicant is promoted and placed on an entry level notch of the particular post, such is deemed by the respondent as a notch increase.

## **Issue to be decided**

7. I am required to decide whether the respondent correctly interprets and applies PHSDSBC Resolution 3 of 2009. Should I determine that the resolution has been incorrectly applied and interpreted, I must provide the correct interpretation and guidance in respect of the application of the resolution.

## **Survey of evidence**

### **The applicants' evidence**

8. Mr. Lubabalo Amos testified in support of the case for the applicants. As per narrowing of issues, it was indicated that a list of all the promoted applicants were attached to the referral. Amos is appointed as an emergency care officer (ECO), i.e. an ambulance emergency assistant (AEA). He was previously a basic ambulance assistant (BAA), prior to being promoted on 1 December 2017. The basic grades for ECOs are grade

1 and 2; whereas an AEA will fall under grade 3. Amos was promoted from grade 1 to grade 3. Prior to being promoted his salary was R136 161.00 per annum; and subsequent to promotion his salary was R148 878.00. Amos read clause 4.1.12.1 into the record, which states the following:

“4.1.12.1 All professionals who are covered by this agreement and who are promoted to a higher post, shall gain at least one (1) notch on such appointment.”

9. Amos’s interpretation of the latter was that he has not gained a notch when he was promoted. He illustrated the latter by means of a document which reflected the various ECO grades, i.e. Emergency Care Practitioners (production levels). At the time prior to his promotion the amount of R136 161.00 was contained under level or notch 6 of an ECO grade 1. The amount of R148 878.00 was on level/ or notch 1 of an ECO grade 3. Amos testified that in terms of clause 4.1.12.1, when he was promoted, he was placed on salary level R148 878.00 and should then have gained one notch, in order for him to be on a salary level R153 384.00 (being level or notch 2 of the post grade he was promoted to). He further testified that the fact that he received a higher salary did not mean that he gained a notch according to his interpretation of clause 4.1.12.1. He motivated his rationale by referring to paragraph 36 of the Department of Public Service and Administration’s (DPSA) Circular 4 of 2009, which states the following:

“36. The MPSA has directed that an appointment (so-called promotion) rule. This entails that an employee gain (one) notch on –

36.1 internal appointment (“promotion”) to a higher grade (grade progression); and

36.2 internal appointment (“promotion”) to a higher post (post promotion).”

10. Amos argued that he did not gain any notch, since the notch he was placed on upon his promotion was an entry notch of the promoted post. In cross-examination Amos agreed that R148 878 was a different notch and more than what he had prior to his promotion. He however insisted that being placed on R148 878.00 was not a notch gained. He said that he should have gained one notch from the entry notch, being R153 384.00. Amos further agreed that clause 4.1.12.1 does not mention that a notch

should not be an entry level notch. Amos however still insisted that on top of the R148 878.00 notch, he should have received one notch higher being R153 384.00.

11. Amos then gave evidence in respect of an employee, referred to as “Jita”. He was also appointed as an ECO as of 1 July 2009 and was on a salary notch of R85 686.00. Amos questioned this amount. When it was put to him in cross-examination that the amount is contained in annexure A3 of Resolution 1/ 2010 (which replaced annexure A3 of Resolution 3 of 2009), he had no comment.

### **The respondent’s evidence**

12. Ms. Abigail Ruiters, who is an assistant director for Emergency Medical Service (EMS), People Management, testified in support of the respondent’s case. It was her evidence that her understanding of clause 4.1.12.1 was that when a person is promoted, he/ or she will gain one notch. Should such a person already be on the entry level notch of the promoted post, that person will gain one notch (or one level). In the latter regard she also referred to the DPSA Circular 4 of 2009; and read point 19 and 20 of the circular (which dealt with appointment/ progression to higher grades and posts) into the record. The following was read:

“19. If an employee is appointed [internal appointment (promotion)] to a higher post, the employee must commence on the minimum salary notch of the higher post. However if the OSD provides for overlapping of salary between work (post) levels, it may have the result that an employee may already be on a salary notch equal or higher than the salary notch of the higher post.

13. To address the situation the MPSA has directed that an employee must, upon promotion to the higher post, gain one salary notch ...”

14. When she was referred to Amos’s promotion during 2017, she explained that prior to his promotion he was on R136 161.00. He then obtained an AEA qualification and went to R148 878.00. According to her, he thus gained a notch due to his promotion to the entry level of the promoted post. When she looked at the specific sheet

containing the various notches, she indicated that Amos in fact gained about 4 notches (from where he was at grade 2, to what he then received in grade 3). He thus gained more than one notch. He did not gain an extra notch after promotion. He should have received the entry level notch.

15. In further evidence concerning Jita and the amount of R85 686.00, Ruiters testified that the inflation increase came into effect in July 2009, which adjusted the salaries of Resolution 3 of 2009. The amendment came through and was signed in 2010. She was not sure when the OSD was implemented but from what she remembers it was backdated in 2010 and people received back pay from July 2009. In cross-examination Ruiters was referred to the 2009 EMS operational levels. It reflected R85 686.00 as the first notch for ECO grade 3. She agreed that it was the 2009 notches which was reflected on the document but further stated that the physical implementation was only in 2010, although she was not able to remember the exact date of implementation. Ruiters testified that Jita was on R85 338.00 and was adjusted to the closest notch of R85 686 (which was the entry notch on grade 2 BAA qualification). In February 2010 he gained an AEA qualification and moved to ECO grade 3. Since he was already on the entry notch (salary) of that grade, he gained a notch and went to R88 278.00.

### **Closing Arguments**

16. The applicant's representative, Mr. Dlamini, requested to submit closing arguments in writing; whereas the respondent's representative, Mr. Mniki opted to give oral arguments. Subsequent to Mr. Mniki making his oral closing submissions, Mr. Dlamini also decided to give his closing arguments orally. The respondent argued that its interpretation of clause 4.1.12.1 is correct. An employee should at least gain one notch. It was further argued that the applicants' stance that a notch should be gained after promotion, is something which they read into the resolution. The DPSA released Circular 4 to clarify the resolution. Resolution 1/ 2010 was an agreement on the addendum to Resolution 3 of 2009. The respondent indicated that it did not understand the applicants' problem with implementation of that resolution, since there was no prejudice. It was argued on behalf of the applicants that prejudice was not an issue. They requested the correct interpretation and application of Resolution 3 of 2009. It was further argued that the wording of clause 4.1.12.1 must be taken as is, in particular

that each professional shall gain at least one notch on appointment. Subsequent to promotion, a gain of one notch should be applicable. In respect of Amos, it was argued that there was no gain when he was promoted. The amount of R148 878.00 was a entry notch. He should then have gained at least one notch. It was further argued that the respondent acted incorrectly when it used Resolution 1 of 2010. It was also argued that all applicants who were promoted should at least be given one notch upon promotion.

### **Analysis of evidence and arguments**

17. A collective agreement is defined in section 213 of the LRA as:

*“a written agreement concerning terms and conditions of employment or any other matter of mutual interest concluded by one or more registered trade unions, on the one hand and, on the other hand-  
one or more employers;  
one or more registered employers' organisations; or  
one or more employers and one or more registered employers' organisations”*

18. PHSDSBC Resolution 3 of 2009 complies with this definition. The specific agreement relates to the Occupational Specific Dispensation for Medical Officers, Medical Specialists, Pharmacologists, Pharmacists and Emergency Care Practitioners. The OSD was introduced through the adoption of the Public Service Coordinating Bargaining Council's (PSCBC) Resolution 1 of 2007. PHSDSBC resolution 1 of 2009 was a product of the PSCBC's collective agreement. . In terms of its objectives, the PHSDSBC Resolution 1. 2009 introduced an occupational specific remuneration and career progression dispensation (OSD); provides within the OSD career pathing opportunities, pay progression, grade progression opportunities, recognition of experience for grade progression, recognition of performance; introduction of differentiated salary scales for identified categories of professional; etc.

19. When dealing with interpretation of collective agreement disputes, the principles usually applied to interpreting contracts can be applied to the interpretation of collective agreements, but their interpretation must be informed by some additional

considerations. Du Toit et al Labour Relations Law 5th Edition, recognise the following principles:

*“Where the wording of the agreement is clear and unambiguous, the parties may not rely on evidence beyond what is embodied in the document to demonstrate their intentions at the time it was concluded (the so called parol evidence rule);*

*The words in the agreement must be given its ordinary grammatical meaning and must be interpreted in the context of the agreement as a whole; and*

*Where words are unclear or ambiguous, regard may be had to the circumstances surrounding the agreement such as previous negotiations between the parties, correspondence between them and the manner in which they acted.”*

20. The first part of clause 4.1.12.1 refers to professionals covered by the agreement and who were promoted to a higher post. The second part of the clause states that such professionals, who have been promoted, shall gain at least one (1) notch on such appointment. When an employee is promoted, he or she is normally advanced to a higher level post or job title, with more or higher job responsibilities. A higher salary is also a norm or expectation. It was indicated that Amos and some of the other applicants were promoted. They were unhappy with the fact that when they were promoted, they failed to receive one notch in addition to the entry amount of the particular promoted posts. Evidence by the respondent was that when a person is already on the entry level notch of the particular post, a one notch increase must be provided to that person. In the case of Amos it was the respondent's case that he received about 4 notches when he was promoted and his salary was increased from R136 161.00 to R148 878.00. A notch is normally referred to as a salary or pay progression. In respect of the emergency care officers (ECOs) four different grades are reflected in respect of the production levels. Under each grade there are ten levels, each with different notches or salary amounts. In some cases the notches overlap with a different grade, depending on the level of the specific post grade. As indicated by Ruiters, there were about four different notches between the amount Amos was on

and the amount he was given upon promotion. From the document she referred the following notches were between amounts R136 161 and R148 878.00, i.e.:

R138 201.00;

R140 271.00;

R142 380.00;

R144 51300.

21. It thus appears that Amos gained 5 notches. Clause 4.1.12.1 does not stipulate that when a person is promoted, he or she should receive the entry level salary or notch of that particular post. It is thus incorrect for the applicants to interpret the latter clause to mean that upon promotion the particular employee must be placed on the entry level of that post and then receive a one notch increase. The section refers to “at least one (1) notch”. Thus, upon promotion a person can in fact gain more than one notch. Based on the evidence Amos gained more than one notch, which was in line with clause 4.1.12.1. It will be correct that when an employee is already on the entry level of the promoted post, that he or she should receive at least one notch. The various levels on the different post grades have overlapping notches, which could mean that a particular person who is promoted may already be on a high notch, equal to the promoted post and in such instances, at least one notch should be given to promoted employee. Based on the evidence, the respondent has correctly interpreted and applied the agreement.

22. In respect of the applicant’s concerns regarding annexure A3 of the agreement, it was testified by the respondent that Agreement 1/ 2010 replaced annexure A3 of agreement 3 of 2009. The document was handed up and signed by all the relevant parties. The applicant failed to give evidence in this regard. I can thus not find that any incorrect interpretation or application has occurred on the part of respondent.

**Award**

23. The applicants failed to establish that the respondent incorrectly applied and interpreted PHSDSBC Resolution 3 of 2009.

24. The applicants' claim is hereby dismissed.

25. There is no order of costs.



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**Commissioner Maureen de Beer**