



ARBITRATION AWARD

Panellist/s: Mangisi Mrwebi
Case No.: PSHS562-11/12
Date of Award: 7-Jun-2012

In the ARBITRATION between:

NEHAWU obo Quntana, L
(Union / Applicant)

and

Department of Health - Eastern Cape
(Respondent)

Union/Applicant's representative: _____
Union/Applicant's address: _____

Telephone: _____
Telefax: _____

Respondent's representative: _____
Respondent's address: _____

Telephone: _____
Telefax: _____

ARBITRATION AWARD

DETAILS OF HEARING AND REPRESENTATION

1. This matter was set down for arbitration on 3 May 2012 at the Amathole LSA Offices in King Williams Town at 10h00.
2. The applicant was represented by Ms. I Njingana from NEHAWU.
3. The respondent was represented by Mr. TA Nkangeni from the respondent's Labour Relations unit.
4. The parties agreed to submit their supplementary closing arguments on 11 May 2012.

PRELIMINARY ISSUES

5. There were no preliminary issues raised by the parties.

ISSUE TO BE DECIDED

6. I am required to determine whether the failure by the respondent to pay the applicant a translation of salary in terms of the OSD Resolution 3 of 2007 constitutes an unfair labour practice.
7. If it is found that such failure constitutes an unfair labour practice I must determine an appropriate remedy in terms of the Labour Relations Act No 66 of 1995, as amended.

BACKGROUND TO THE ISSUE

8. On or about 2000 the applicant was appointed as the Assistant Director at the Disease Surveillance Directorate in King Williams Town.
9. She applied for the OSD for Nurses in terms of Resolution 3 of 2007 but the respondent declined the application stating that she was the Assistant Manager and not doing clinical duties and thus was not entitled to receive the OSD.
10. The applicant followed all the respondent's grievance management procedures but in vain hence this referral to the Council.
11. The applicant challenges that she qualifies for the translation and the respondent's refusal to translate her salary accordingly constitutes an unfair labour practice (benefits).

EVIDENCE AND ARGUMENT

Submissions by the Applicant

The applicant submitted a bundle of documents marked as Employee bundle “A”

12. The applicant joined the respondent in 1994. She worked at Settlers Hospital in Grahamstown.
13. In 1994 she was transferred to Empilweni Gompo Health Centre in East London where she worked as a professional nurse.
14. In 2004 she trained as a clinical nurse: specialist. She qualified in 2005.
15. At end of August 2007 she left Empilweni Gompo Health Centre and was appointed on 1 September 2007 as the Assistant Director: Disease Surveillance Directorate at the respondent's Head Office at post level 9.
16. During 2009 she was asked (together with fellow employees) to submit proof of registration with South African Nursing Council (SANC) together with her other certificates and her job description in preparation for the OSD translation.
17. She testified that she responded to the advertised post of AD: Disease Surveillance because the post required a person with a nursing degree or diploma with seven years clinical experience. She has all these requirements.
18. Furthermore she stated that her duties involved:
 - 18.1 conducting vaccine preventable disease surveillance;
 - 18.2 conducting hospital visits for record reviews to ensure that vaccine preventable diseases were reported and properly investigated;
 - 18.3 conducting suspected disease outbreak investigation; and
 - 18.4 contacting tracing in communities.
19. This all shows that her duties involve clinical work.
20. She submitted that her service was continuous and she never broke her service record since leaving Empilweni Gompo Health Centre. Her subscription with the SANC has been continuous since August 1994.
21. She believed that her new post which she assumed on 1 September 2007 should have been translated because it was advertised early in 2007.
22. She further testified that OSD for nurses was payable to nurses who were office bound in terms of the Arbitration Award of 2009. The key issue was whether a nurse met the criteria laid down in the OSD Resolution.
23. She referred to the case of her predecessor: Ms. Wongoma Funeka whom the respondent was keen to process her translation but could not do so because she could not produce proof of registration with the SANC.

24. Under cross examination it was put to the applicant that her post was advertised as non OSD post.
25. It was also put to the applicant that there were types of positions at the respondent: those that a graded – the OSD posts and the Salary leveled posts – non OSD posts. The applicant had no comment.
26. It was also put to her that her position was the latter and thus she was not eligible for translation in terms of the OSD Resolution.

Submissions by the Respondent

The respondent submitted a bundle of documents marked as Employer bundle “B”. In support of its case it called one witness.

Mr. M Mrara

27. He is employed by the respondent as the Deputy Director: Human Resources.
28. He testified that the OSD is paid to nurses who were performing duties as nurses on 1 July 2007.
29. He further testified that during September 2007 the respondent’s structure had already been aligned, but all the posts that were advertised prior the OSD implementation were not aligned.
30. This applies to the post occupied by the applicant as this was advertised before 1 July 2007. Thus the post occupied by the applicant is classified as a non OSD post. The incumbent is not eligible for the OSD translation.
31. Furthermore, the applicant was appointed on 1 September 2007 and the effective date of the OSD translation was if the person was performing clinical duties as at 1 July 2007.
32. The applicant was appointed to this post only on 1 September 2007.
33. In terms of the respondent’s structure the applicant’s post is classified as non-OSD post.
34. Under cross examination Mr. Mrara testified that prior to the introduction of OSD public servants were remunerated in terms of salary levels.
35. At the introduction of the OSD, all those who qualify for OSD were migrated to the salary grade system. He referred to the respondent’s bundle of documents in this regard.
36. The applicant belongs to the old salary levels: at salary level 9. This proves that her post is an non OSD post. She is not eligible to be translated in terms of the OSD Resolution.

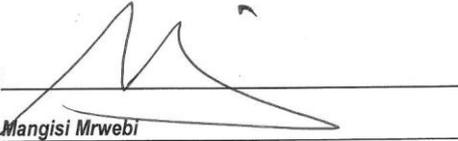
ANALYSIS OF EVIDENCE AND ARGUMENT

37. In these proceedings the applicant challenges that the respondent committed an unfair conduct when it refused to translate her in terms of the OSD Resolution 3 of 2007.
38. The applicant's evidence is that she qualifies for this translation because her duties, as envisaged in the OSD Resolution 3 of 2007, are clinical.
39. She also testified that she met the criteria as laid down in the said Resolution.
40. However, the evidence of the respondent's only witness was that the applicant was not entitled to be translated as she was appointed after the effective date (the translation date 1 July 2007).
41. She was appointed on 1 September to a non-OSD post of Assistant Director: Disease Surveillance.
42. The applicant also testified on her predecessor who had her OSD translation processed but was declined because she could not produce proof of registration with nurses' professional body (SANC). She testified that her predecessor's translation was declined only because of registration problem.
43. The applicant failed to call this person to testify on her behalf.
44. Mr Mrara, for the respondent, testified that all the OSD posts are salary graded whereas the non-OSD posts remained under the salary levelled positions (which was the position of all government posts prior the implementation of the OSD).
45. The applicant's post in terms of the respondent's structure is a non-OSD post and thus not eligible for the OSD translation.
46. The respondent's evidence was not refuted by the applicant except to submit that it was unfair that there was such a differentiation in the posts' structure within the Department.
47. I am satisfied that the applicant has failed to prove that respondent committed an unfair labour practice (benefits) when it refused to pay the applicant the OSD translation.
48. In the circumstances , I make the following award:

AWARD

49. The respondent has not committed an unfair labour practice in refusing to translate the salary of the applicant in accordance with the OSD Resolution 3 of 2007.
50. The applicant is not entitled to any relief.
51. There is no order as to costs.

Signature:



A handwritten signature in black ink, consisting of several sharp, angular strokes, written over a horizontal line.

Commissioner: *Mangisi Mrwebi*

Signature
Mangos Mrwebi – Panellist
28 May 2012