



ARBITRATION AWARD

Case No: **PSHS585-19/20**

Commissioner: **Zuko Macingwane**

Date of award: **16 September 2020**

In the matter between:

PSA OBO NDABA DAVID KANONO

APPLICANT

and

DEPARTMENT OF HEALTH – FREE STATE

RESPONDENT

Details of the parties and representation

1. The matter was set down for arbitration before me on 1 September 2020 and scheduled to commence at 10:00AM at the Respondent's premises at Seronita Ntlabathi District Hospital in Lady Brand. The arbitration was held under the auspices of the Public Health and Social Development Sectoral Bargaining Council (PHSDSBC).
2. This matter was initially scheduled for arbitration before me on 28 July 2020, where the parties dealt with the matter by way of submissions in absence of a stated case and without leading oral evidence. I subsequently issued a directive on 13 August 2020 for the parties to present oral evidence on material issues on a date to be determined by the Council. The Council subsequently scheduled the matter as stated in paragraph 1 above.
3. The applicant, Mr. Ndaba David Nkanono was present and represented by Mr. Janjie Jack, the union official with the Public Servants Association (PSA).

4. The respondent Department of Health- Free State, was represented by Mr. Sechaba Khoali, its Labour Relations Practitioner.
5. The proceedings were digitally recorded. The applicant submitted a bundle of documents which was marked as bundle "A". The respondent's bundle was marked "B". The parties agreed on record to submit closing arguments in writing on or before 8 September 2020. Both parties submitted their closing arguments.

Issues to be decided

6. I am required to determine whether or not the respondent correctly interpreted or applied the provisions of Resolution 1 of 2002 of the Public Health and Social Development Sectorial Bargaining Council (herein referred to as the Agreement and/or Resolution), a Collective Agreement concluded under the auspices of the Council, which reflects as "agreement on acting allowances."

Background

7. At the time of the dispute, the applicant was employed by the respondent as a Supply Chain Practitioner at Level 7 at Seronita Ntlabathi Hospital. He was employed on 1 March 2013. The applicant is still in this position. The dispute arose on 1 July 2019 and the referral was filed on 8 August 2019. The applicant acted in the position of Senior Supply Chain Practitioner, which is a level 8 post several times. The applicant referred an interpretation or application of a collective agreement dispute in relation to payment of an acting allowance.

Survey of evidence and arguments

Applicant's case

8. The applicant testified under oath that he was working for the respondent as a Supply Chain Practitioner, which is a level 7 position. He acted in a Senior Supply Chain Practitioner position, which is at level 8, and it was not occupied at the time he was acting in this position. He was appointed by Dr N.J Setshego, the CEO to act in that position in

both acting terms. The CEO had previously appointed him in this position from 1 August 2015 and before 2017 and was paid the acting allowance during that period.

9. At the time of his appointment to act in that position on 1 November 2017 he was neither told that there were delegations in place nor provided with the attachment on delegations. He was not aware that the CEO did not have the necessary delegations to appoint him in the vacant acting position in the appointment letter of 1 November 2017 and 1 November 2018. The applicant submitted that he does not fall under the guidelines. He accepted the acting appointment in 2017 and 2018 in order to provide service delivery.
10. The applicant also testified that prior to November 2017 he was appointed by the CEO to act in that position and was paid for all the months from 2015 and according to him such an appointment was in line with the resolution.
11. The applicant stated that he has acted in a higher post in 2017 and 2018 and he wanted to be compensated, there was a need for acting in that position and he has to be paid for acting in that position.
12. During cross-examination, the applicant confirmed that the CEO does not appear in clause 3.1 of the Resolution, but confirmed that it is only the HoD that appears in that clause and also indicated that he does not understand the part of the delegation. He confirmed that the HoD does not reflect in page 11 & 12 of bundle A, which are the acting appointment letters of the applicant for the period 1 November 2017 until 31 October 2018 and 1 November 2018 until 29 March 2019 respectively. He did not know whether the CEO was duly authorized to appoint him or not. The applicant could not be sure if the information in delegation was consistent the Resolution or not.
13. The applicant confirmed that the two periods in dispute regarding his acting allowance are for November 2017 until October 2018 and for 1st November 2018 until 29 March 2019 at which he acted without being remunerated for acting and also confirmed that he lodged the grievance on 1 July 2019. He complained telephonically before he lodged the grievance. He never complained to the CEO regarding his payment, because the CEO

always referred them to Ms. Pule their head of Human Resources. Ms. Pule promised to assist and told him that the submission was done for him to be paid.

14. At re-examination, the applicant stated that the CEO might be included in the delegations. He further submitted that clause 3.1 in the Resolution is not clear. He also confirmed that the delegations were there but he was not aware of them.

Respondent's case

15. The respondent opted not lead evidence and not to call any witnesses, despite being sensitized by me on record on the importance of leading *viva voce* evidence. The respondent only relied on its submissions and closing arguments, which reflect below.

16. The respondent disputed that the applicant is covered through clause 3.1 of the Resolution because the applicant was not appointed by the Head of Department (HoD) or his/her delegate at provincial or national level, but appointed by the CEO. The CEO is not the Head of Department while the Delegation was with the Head of Department and not the CEO. The CEO exceeded his powers therefore the applicant is not eligible to an acting allowance. The applicant cannot talk of sub clauses of clause 3.1 if clause 3.1 is not complied with. The period in dispute is from 1 November 2017 until 29 March 2019. Resolution 1 of 2002 is not applicable to the applicant and he is not eligible for acting allowance compensation.

17. The respondent conceded that the applicant acted in the position of a Senior Supply Chain Practitioner in the said periods as stated by the applicant, but submitted that the issue in dispute is only that the CEO did not have the authority to appoint the applicant. He was not appointed by a duly authorised official.

18. In support of its argument, the respondent submitted a document titled "annexure D3: Delegations register- HOD to other performer levels in terms of the Public Service Act, 1994 (as amended)' signed by the Head of Department on 22 August 2017. The respondent submitted that as per paragraph 32 (2) of the said document the region and district are not delegated, therefore the CEO does not have power to appoint in that level.

Such appointment shall be made by the HOD. The said Resolution would be applicable if there was compliance with delegations. The respondent also submitted a document titled Free State Department of Health: Human Resources Management Delegations in support of its argument.

19. The respondent submitted that it has interpreted and applied the Resolution correctly.
20. In reply and in closing arguments, the applicant submitted that the CEO acted in the position of the post holder when he wrote the appointment letter of the applicant. The document of delegations cannot take precedence of the Resolution. Mr Janjie Jack, the applicant's representative submitted that he based his argument in the application of Resolution 1 of 2002, in particular clause 3.1 which stipulates that 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 (here-after the "appointing authority") shall be paid an acting allowance to act in vacant posts provided that the post is a vacant and funded post, the acting period is longer than 6 weeks, the appointing authority is a level higher than the acting appointee and the employee must accept the acting appointment.
21. There was a vacant and funded post of a Senior Supply Chain Practitioner which is at salary Level 8 at which the applicant was appointed to act. The post was vacant since 2015 when the incumbent was transferred. The acting period was from 1 November 2017 to 31 October 2018 (which was more than six weeks) and also from 1 November 2018 to 29 March 2019, which is also more than six weeks.
22. The applicant was appointed by the Chief Executive Officer (CEO) of Seronita Ntlabathi District Hospital and he accepted the acting appointment. The CEO is holding a position higher than the applicant when the applicant was appointed on both periods. The applicant acted in a level higher than the post he is currently holding. The periods he acted in that position were less than 12 months.
23. During the two periods the respondent failed to pay the applicant as per the Resolution. The applicant had previously acted in this position in 2015, 2016 and 2017 and was paid the acting allowance during those periods.

24. The post was only filled in on April 2019. The salary scale of the applicant during the two periods was R226 611-00 per annum from July 2017 to July 2018 and R242 475-00 per annum from 1 November 2018 to 29 March 2019, so he must be paid the difference between the two salary scales. The prayer of the applicant was for the Resolution to be interpreted and applied correctly and the respondent to be ordered to pay the applicant.

Analysis of evidence and arguments

25. I am required to interpret Resolution 1 of 2002 regarding non-payment of an acting allowance.

26. Resolution 1 of 2002 of the Public Health and Welfare Sectoral Bargaining Council (The resolution), which is titled "Agreement on acting allowances" is the basis of the dispute referred by the applicant.

27. The purpose of the said Resolution is to determine a policy on acting allowance and compensation to be paid to an employee appointed to act in a higher post.

28. Clause 3 of the Resolution is worded as follows: *"THEREFORE the parties agree as follows: 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 (here-after 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.*

29. I have considered the evidence led, the submissions of the parties and the closing arguments even if not pertinently mentioned in this award.

30. Most of the issues are common cause such as the position of the applicant which is Supply Chain Officer (Level 7), the period he was appointed to act by the CEO in a vacant funded higher position of Senior Supply Chain Practitioner at Level 8, as mentioned in the submissions of the parties. The applicant did not dispute that he was not appointed in writing by the HoD.

31. The issue in dispute is whether or not the respondent interpreted or applied correctly the provisions of the Resolution when it did not pay the applicant an acting allowance and whether the CEO had the requisite powers/ or had vested powers to sign the appointment letter and appoint the applicant to act in the position of a Senior Supply Chain Practitioner.
32. The central part of the contention by the applicant is that he had met the requirements of the Resolution while the respondent's contention was that the applicant was not appointed in writing by the HoD or his/her delegate at provincial or national level, there are delegations that give the sole power to appoint to the HoD and therefore the applicant should not be paid an acting allowance because he has not met the requirements.
33. In *Horspersa obo Tshambi v Department of Health, KwaZulu-Natal* [2016] 7 BLLR 649 (LAC) it was held that a dispute over the interpretation of a collective agreement exists if the parties disagree over the meaning of a particular provision. A dispute over the application of a collective agreement arises when the parties disagree over whether the agreement applies to or in a particular set of facts and circumstances.
34. There seems to be a dispute over the meaning of delegate at provincial or national level. With the applicant contending that the delegated responsibility mentioned in clause 3.1 vests powers to sign the appointment letter to the CEO. The Oxford dictionary meaning of delegate is "to entrust (a task or responsibility) to another person, typically one who is less senior than oneself". No documentary evidence was submitted nor convincing evidence by the applicant to support this claim and to prove that the HoD delegated the task or responsibility to appoint the applicant to act in that position to the CEO in the period in dispute. Accordingly, the onus and evidential burden was on the applicant to prove the foundation of his claim.
35. The reading of clause 3.1 of the Resolution reflects that it is only the Head of Department or his/her delegate at provincial or national level who has the appointing authority, not the CEO. The CEO is neither at the provincial nor at the national level and has been not been mentioned in delegations.

36. It is my considered view that the CEO did not possess the power to appoint the applicant to act in the post of Senior Chain Practitioner and for the applicant to be paid an acting allowance in the period in question. The HOD did not appoint the applicant.
37. It is also my considered view that the applicant relied in clause 3.1 of the Resolution without properly considering that there are delegations in place which are expressly conferring the power to appoint to the HoD.
38. Resolution 1 of 2002 expressly states and makes provision for payment of an acting allowance if the appointment in writing has been made by the HoD or his/her delegate at provincial or national level. The words used by the parties in this Resolution in clause 3.1 are very clear and unambiguous. The applicant is not covered by the Resolution since the CEO is not mentioned in this Resolution and there were delegations in place. The said delegations are signed and dated 22 August 2017, the dispute at hand is for the period from 1st November 2017 to 29 March 2019.
39. The respondent raised its argument sharply that this resolution identified the appointing authority and the respondent also submitted the Delegations, which were not opposed by the applicant, save to say they cannot take precedence over the Resolution and they are incomplete. The veracity of the delegations was never challenged.
40. The applicant in its closing arguments relied mainly on the fact that line authority originates from the EA and HoD, where powers required by managers are originally vested, and these powers must be delegated to the appropriate performer. The CEO when appointing the applicant to act in a senior position since 2015, the CEO had full delegations to appoint an employee to act. The applicant also argued that the fact that the respondent did not present oral evidence means that its documents can only have evidentiary value relevant if they are contextualised by witnesses talking to the documents.
41. The respondent's argument was that the applicant is not entitled to the allowance because the CEO did not have the power to appoint him at the period in contention. Such an argument by the applicant does not hold water in presence of the delegations. I am also mindful of the argument raised by the applicant that the delegations provided by the

respondent are incomplete. However, the respondent submitted complete delegations in its argument. I can only pronounce on the dispute at hand and its period thereof, I will be acting ultra vires if I pronounce on the period preceding the dispute at hand.

42. The argument raised by the respondent was succinct when it pointed out that the specified Resolution does not vest the powers to the CEO, in presence of delegations. The applicant failed to present a compelling argument or any substantiating documents or convincing evidence to prove that the HoD delegated the CEO to appoint the applicant in the position of a Senior Supply Chain Practitioner.

43. Neither one of the parties called the CEO to testify. In fact, the applicant indicated that it had subpoenaed the CEO, but on delivery of the subpoena, they were informed that the CEO was not available. The applicant decided to close its case without calling the CEO, nor seeking an indulgence to pursue the approved subpoena or a postponement to secure the attendance of the CEO as a witness.

44. I am mindful of the applicant's argument that the respondent failed to lead evidence or call any witnesses to support its case, but submitted documents and those documents should not have evidentiary value and the authority referred to. However, the applicant in the witness stand could not produce convincing evidence to support its version and could not be sure at cross-examination and did not know some of the issues put to him regarding the delegations, including clause 3.1 of the Resolution and the authority of the CEO to appoint. There was an evidentiary burden on the applicant.

45. The applicant when pressed at cross examination confirmed that he is not sure and does not understand the content in clause 3.1 of the Resolution. The CEO is not mentioned in clause 3.1. He conceded that the HoD does not reflect in his letters of appointment in the period in question, but the CEO. He did not know and could not be sure whether the CEO had delegated powers to appoint him in the acting position during the period in question.

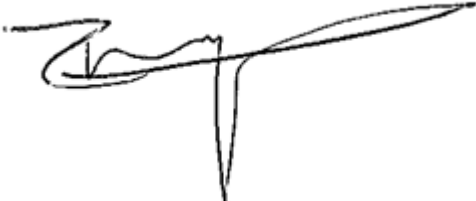
46. On the testimony of the applicant, submissions and arguments by parties that have been placed before me, I am satisfied that the respondent correctly interpreted and applied clause 3.1 of the Resolution.

47. I accordingly find that the respondent is correct in its interpretation of the Resolution by not effecting the acting allowance to the applicant.

Award

48. The respondent correctly interpreted and applied clause 3.1 of the Resolution.

49. The applicant's claim is hereby dismissed and he is not entitled to any relief.

A handwritten signature in black ink, appearing to be 'Zuko Macingwane', written over a horizontal line. The signature is stylized with a large 'Z' and a long horizontal stroke.

Zuko Macingwane