



ARBITRATION AWARD

Panellist/s: Bhekinhlanhla Stanley Mthethwa
Case No.: PSHS594-11/12
Date of Award: 3-Sep-2012

In the ARBITRATION between:

PSA obo Mngomezulu, SD

(Union / Applicant)

and

Department of Health: KZN

(Respondent)

Union/Applicant's representative: MP. Zulu.
Union/Applicant's address: P.O. Box 4011
Durban
4000
Telephone: (031) 310-3600
Telefax: (031) 310-3615

Respondent's representative: TD Ntshangase
Respondent's address: Private Bag X 9051
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Details of hearing and representation:

1. The matter was scheduled for arbitration on 7 May 2012 at Newcastle Hospital in Newcastle and remained part heard and it was heard again on 4 July 2012. Mr. MP. Zulu, a trade union official of PSA represented Mr. SD. Mngomezulu (hereinafter referred to as the Applicant) and Mr. TD. Ntshangase represented the Department of Health (hereinafter referred to as the Respondent). The proceedings were digitally recorded.
2. Having presented their respective cases, parties agreed to submit written arguments by 12 July 2012 and they failed to do so.

Issues to be decided:

3. I have to decide whether or not the respondent committed “unfair act or omission... involving unfair conduct...relating to the promotion “of the applicant, as contemplated by section 186(2) (a) of the Labour Relations Act (“the Act”), as amended. In the event that it does, I have to determine the appropriate relief.

Background to the issue:

4. The applicant contended that he was informed by Mr. Ndaba and Mrs. Nel that he would be translated as a Community Health Facilitator at salary level 7. He was also advised that he would receive first payment in this regard. However, the respondent reversed appointment including the payment.
5. The applicant contended that in Lembe, Umzinyathi, Ilembe, eThekweni and uMgungundlovu districts Auxiliary Service Officer’s were translated to Community Health Facilitator. As such, he was entitled to be translated to Community Health Facilitator’s post at salary level 7 since he was already performing those duties.
6. In the belief that the failure to translate him amounts to misappropriation, the applicant referred a dispute in terms of section 186(2) (a) of the Act. The applicant sought, as a remedy that the respondent be ordered to translate him to Community Health Facilitator’s post.
7. The respondent, on the other hand, contended that the applicant was not misappropriated as such he was not entitled to be translated to Community Health Facilitator’s post. The applicant was duly appointed as the Auxiliary Service Officer and he was remunerated accordingly.
8. The respondent, sought, as a remedy, that the matter be dismissed.

Survey of evidence and arguments:

9. All witnesses gave evidence under oath. This is a summary and it reflects all the relevant evidence and arguments heard and considered in deciding this matter. The applicant testified and the respondent led evidence of Mr. Asa Herbert Mnguni. Their evidence may be summarized as follows;

Applicant's case:

The applicant testified on his own he did not call any witness.

10. He testified as follows:
11. He was informed by Mr. Ndaba and Mrs. Nel that he would be translated from salary level 3 to salary level 7 as the Community Health Facilitator. They also informed him that the head office shall fax the relevant documentation in this regard. As such, he was assessed as Community Health Facilitator. This was the same method used in translating Facilitators in uMzinyathi, eThekweni, Ilembe and uMgungundlovu districts. He was also advised that he would receive initial payment after being translated. He was later called by Ms. Tholakele Nyandeni and advised him that his appointment and payment have been reversed.
12. He did not receive a letter of appointment to the Community Health Facilitator's post. As much as he was appointed as the Auxiliary Service Officer in 2006 but he commenced performing Facilitator's duties in 2009. In terms of Circular 82 of 2011 when an employee was already occupying and performing duties attached to an upgraded post as a result of job evaluation for a period of one year that employee may be absorbed into the post provided he has received a satisfactory rating in a recent performance assessment. He met requirements of the post and he was allocated the post by the respondent.

Respondent's case:

The respondent called one witness in support of its case.

First witness – Asa Herbert Mnguni

13. Mr. Mnguni testified as follows;
14. He was the author of Circular 82 of 2011. The intention of the circular was to clarify the grading of those people appointed to Community Health Facilitators' posts. People that were appointed in these positions

were mainly drawn from Auxiliary Service Officer's ranks. However, any employee may request that his post be evaluated; when the post is found to be at the higher level; the respondent may either promote the employee concerned or advertise the post. The circular was not dealing specifically with Auxiliary Service Officers.

15. In terms of Human Resource Management Circular 130 of 2004 in which the principles for the filling of upgraded posts and posts in the new structure were defined. It was clarified that the upgrading of in-service employees may be considered on the following conditions. (a) When an employee was already occupying and performing duties attached to an upgraded post as a result of job evaluation for a period of one year, (b) he/she may be absorbed into the post provided she/he has received a satisfactory rating in his/her recent performance assessment. No in-service employees should have been upgraded as a result of the job evaluation for the Community Health Facilitator's post, unless they were appointed to the existing posts of Community Health Facilitator created in the establishment of the institution.
16. Some people were confusing their situations with that of uMgungundlovu district. In that district Community Health Facilitators' posts were advertised at salary level 6, instead of salary level 7. Therefore, their grievance was that posts were advertised at wrong level and that is why their issue was resolved. The respondent may hold a person against a post and that does not mean the person is performing duties of that post. There would be consultation between the employee concerned and the respondent. Even if the applicant was performing duties of the Community Health Facilitator; he could not be upgraded to that post, unless if he was appointed as the Community Health Facilitator. The applicant has not been paid acting allowance because the Community Health Facilitators' post has not been vacant before and it was not vacant at anytime. In order to claim acting allowance you must have occupied a post that was filled before and became vacant. A person cannot act on a new post. There was a moratorium on appointments.

Analysis of evidence and arguments:

17. The applicant's case was that he was performing Community Health Facilitator's duties and he was assessed as such. He further contended that the respondent's failure to promote him to Community Health Facilitator's post in terms of its promotion policy, constitutes unfair labour practice in terms of section 186(2) of the Act.
18. On the other hand the respondent contended that even though the applicant was held against Community Health Facilitator's post but he was not performing duties of that post. Mnguni testified that

employee was held against a post after consultation with the employee concerned. He further testified that even though the post could be evaluated and found to be at the higher level the respondent may decide to promote the employee concerned or advertise the post. There was nothing unbecoming to find an employee held against a post. It has never happened that an employee would be translated in the manner that the applicant wants to be translated. The post of Community Health Facilitator has not been advertised at Newcastle Provincial Hospital, therefore, nobody could lay claim to that post.

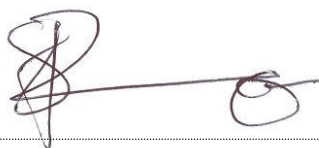
19. As much as the applicant feel that the respondent committed unfair labour practice for not translating him to Community Health Facilitator's post, this version is negated by the fact that the applicant has not received satisfactory assessment in the post and he was appointed as the Auxiliary Service Officer. Furthermore, he failed to produce completed assessment in this position to demonstrate that indeed he was performing duties of the said post satisfactory.
20. I do not find anything to justify that the respondent erred in its conduct by placing the applicant at salary level 3 based on the provisions of the promotions policy document presented in this arbitration hearing. It is clear that the respondent applied and interpreted the policy as it had done in the past as set out in Circular 82 of 2011. If there was any error in placing the applicant in a different post than that of Auxiliary Service Officer, it cannot be said that the error, was so unreasonable as to constitute unfair labour practice in view that the applicant was consulted prior to be held against the Community Health Facilitator's post.
21. Therefore, the respondent cannot be flawed for unfair labour practice as anticipated in the Act for not translating the applicant. Accordingly, it is my conclusion that the surrounding facts put together outweigh the evidence of the applicant on material facts regarding alleged unfair labour practice and misappropriation by the respondent. I cannot find justification to reach a conclusion that there was anything unfair on the part of the respondent.
22. The applicant bear the onus of proving that he was unfairly treated by the respondent for not translating him and/or appointing him as the Community Health Facilitator, and I find that he has not discharged that onus.
23. The dispute is accordingly determined as follows;
- Award:**
24. The respondent's failure to translate the applicant to Community Health Facilitator's post did not breach any respondent policy and the respondent's conduct did not constitute unfair labour practice.

25. The applicant's application is dismissed and he is not entitled to any relief.

26. No order for costs is made.

DONE AND SIGNED IN JOHANNESBURG ON THIS 31ST DAY OF AUGUST 2012.

Bhekinhlanhla Stanley Mthethwa

A handwritten signature in black ink, consisting of a large, stylized initial 'B' followed by a horizontal line and a smaller, circular flourish at the end.

Signature