



# ARBITRATION AWARD

Case No: **PSHS641-17/18**

Commissioner: **Catherine Willows**

Date of award: **10 April 2018**

In the matter between:

**HOSPERSA obo DR MITRA**

(Union/ Applicant)

and

**DEPARTMENT OF HEALTH- EASTERN CAPE**

(Respondent)

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## **DETAILS OF HEARING AND REPRESENTATION**

1. This is an arbitration award issued in terms of Section 138 of the Labour Relations Act 66 of 1995 (as amended) and herein after referred to as the LRA. The matter was set-down for arbitration in terms of Section 24 (2), 24 (5) of the LRA. That is, interpretation and application of a collective agreement. The collective agreement being Resolution 1 of 2002 payment of acting allowance for an employee acting in a higher post.
2. The arbitration hearing was held on the dates of 17 November 2017; 11 December 2017 (whereupon a Jurisdictional Ruling was issued); 23 January 2018 (whereupon a Postponement Ruling was issued); 2 March 2018 (whereupon a further Postponement Ruling was issued) and concluded on 27 March 2018 at the premises of Cecelia Makiwane Hospital, Mdantsane, Eastern Cape.

3. The Applicant appeared in person at the arbitration hearings and was represented by his Union Official, Mr M Sityana of HOSPERSA. The Respondent was represented at all sittings by Mr ST Nxumalo, Deputy Director: Labour Relations of the Respondent.
4. The proceedings were conducted in English and were digitally recorded. I also kept handwritten notes.
5. The Applicant utilised a bundle of documents, marked “Applicant Bundle A” and the Respondent utilised a bundle of documents, marked “Respondent Bundle A”. The documentation handed in by the parties in the utilisation of their respective cases was not placed in dispute.
6. The parties furthermore agreed to submit written closing arguments by 9 April 2018, such duly received by the Applicant and the Respondent by such date and utilised in consideration of this Award.

#### **ISSUE TO BE DECIDED**

7. The Applicant has referred a dispute to the Bargaining Council relating to interpretation and / or application of Collective Agreement, in terms of Section 24 (2) and (5) of the LRA.
8. I am called upon to determine whether or not the Respondent has correctly interpreted and applied PHSDSBC Resolution 1 of 2002 and whether the Applicant was eligible for an Acting Allowance in terms of this Resolution.
9. The Applicant’s dispute relates to Resolution 1 of 2002 (“Agreement on Acting Allowances”). The Applicant held the position of Head of Casualty/ Clinical at Cecelia Makiwane Hospital from 1 July 2010 to 28 February 2017.
10. The Applicant relies upon a letter of appointment to such acting position issued by Dr Z Jafta (Acting Director of Clinical Governance: ELHC) on 1 July 2010. It is not in dispute that the Applicant acted in such position continuously from 1 July 2010 until 28 February 2017, whereupon such “acting position” was terminated.

11. The Applicant claims for the allowance payable for a period of 12 months from February 2016 to February 2017.

## **SURVEY OF ARGUMENTS**

### **ARGUMENT FOR THE APPLICANT**

12. The Applicant submitted that he commenced working for the Respondent in 2003 at Mthatha General Hospital. In 2004 he joined Cecelia Makiwane Hospital as a Chief Medical Officer, Grade 3 in 2004.

13. On 29 June 2010 he was handed an Internal Memorandum from Dr Z Jafta (Acting Director: Clinical Governance, ELHC) in terms of Section 32 of the Public Act, 1994 whereby he was requested to act in the capacity of Head of Casualty Department, Cecelia Makiwane Hospital from 1 April 2010.

14. The Applicant submitted that he accepted such appointment and signed receipt of such on 1 July 2010. He furthermore submitted under oath that Dr Jafta was senior to him as she was Level 14 and his level at the time was Level 12. His interpretation of the letter was that he was appointed to the position of head of Clinical Unit of Emergency Unit.

15. He occupied and acted in such capacity from 2010 to 2017. He however never received any additional remuneration and / or acting allowance for such acting for the period of 7 years.

16. The Applicant admitted that he understood the letter from Dr Jafta in its entirety, that there was no additional remuneration applicable as contained in the letter in the last paragraph.

17. However, he only came to know of acting allowances and the applicability of such later on. When he became aware of the inconsistencies of such, he approached Dr

Xamlashe for relief but to no avail. He believed the acting position to be Level 14, a more senior position to what he held which was Level 12.

18. He also stated under cross-examination that if Dr Jafta had not made him Acting Clinical Head of the Department it would have collapsed. At the time of his appointment, Cecelia Makiwane Hospital was part of the structure of the East London Hospital Complex.
19. As a clinician, he is not familiar with the rules and / or regulations in place and the fact that he acted in a position for 7 years without any allowance was not of his own doing. This is the rationale for why he is only requesting relief of acting allowance for the past 12 months.
20. He furthermore submitted that he had no reason to question or doubt Dr Jafta's ability or authority to issue instructions to him.
21. In closing submissions, the Applicant motivated that the letter was written by a senior official of the Department of Health and was specific in terms of the role and function to be played by the Applicant.
22. The letter of appointment was signed by the appointing authority and the Applicant accepted. The Applicant furthermore testified that he did not know anything about collective agreements at the time of his appointment and was unaware that he cannot act more than 12 months, but the Respondent ought to have known.
23. It was submitted that the Applicant's acting meets the criteria as set out in the collective agreement and Clause 3.3 in the collective agreement makes provision why the Applicant was appointed to act 2 Levels higher than his level.
24. As Clause 3.4 in the collective agreement is explicitly clear on the right of the employee in an acting position, Clause 3.5 in collective agreement should be adhered to.

## ARGUMENT FOR THE RESPONDENT

25. The Respondent submitted that they did not dispute that the Applicant acted in the position from 2010 to 2017 but that the letter “*appointing*” the Applicant to the post was invalid as Dr Jafta did not have the authority to do so.
26. The Respondent called Dr Galo, Manager of Medical Services for Cecelia Makiwane Hospital to give evidence in this regard. Dr Galo submitted under oath that he is senior to the Applicant, both in 2010 and to date. The post to which the letter of 2010 purports to appoint the Applicant was not a Level 14 position because the Casualty Department did not have a Specialist.
27. The Applicant was asked in 2010 to act in the position as the previous incumbent of the post, Dr Ting, who was a Chief Medical Officer Level 12) was absent. In terms of functionality Level 14 is supposed to be fulfilled by that of a Chief Specialist. It is absolutely incorrect that a Level 12 staff member can act in a position of a Level 14.
28. Dr Jafta did not have the authority to appoint as only a designated authority (Accounting Officer) that of a Chief Executive delegated to by the Superintendent-General. Under cross-examination, Dr Galo stated that he was supervising the Applicant in 2010 and was responsible for managing all staff members. Their relationship was professional with no significant conflict.
29. None of the Applicant’s “*appointment*” complied with any of the policies and / or regulations. The history behind the position provides an explanation as to why Dr Jafta acted outside of her authority as at the time, there was no specialist.
30. Therefore, the position was allocated to a Chief Medical Officer ie. Dr Ting, Dr Thomas and the Applicant. These staff members were not exploited as “it cannot be exploitation when they do not qualify”. The Applicant acted for a period of more than 12 months due to “in act processes”.

31. Dr Galo submitted that he requested the Applicant be removed from the post on numerous occasions but due to poor processes and lack of executive decisions the status quo was allowed to continue which led to the Applicant's unhappiness.

32. Because the executive authority was not taking any decisions to remedy or mitigate the decision, Dr Galo stated that he terminated the acting appointment last year.

## **ANALYSIS OF EVIDENCE AND ARGUMENT**

33. The Applicant referred an interpretation and application of a collective agreement dispute in terms of section 24 of the Act to the Council. His version was that he had complied with the requirements of the Resolution which regulates the payment of acting allowances. The requirements are set out in section 3.1 of the Resolution. It reads as follows:

*3.1 "An employee appointed in writing to act in a post of a higher grade than the grade of an employee by the Head of Department or his / her delegate at provincial or national level (hereafter 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 appointment.*

*3.2 An employee may only be appointed to act in a higher post that is one post level higher than her / current position.*

*3.3 The provisions of paragraph 3.2 above may be deviated from on good cause shown by the appointing authority".*

34. In the Labour Appeal Court matter of *Western Cape Department of Health v MEC Van Wyk and Others 11 BLLR 1122 (LAC)*, which principles I will endeavour to apply, the

following was stated in relation to the type of dispute that I am called upon to resolve (at paragraph 22):

*“In interpreting the collective agreement the arbitrator is required to consider the aim, purpose and all the terms of the collective agreement. Furthermore, the arbitrator is enjoined to bear in mind that a collective agreement is not like an ordinary contract. Since the arbitrator derives his/her powers from the Act, he /she must at all times take into account the primary objectives of the Act. The primary objectives of the Act are better served by an approach that is practical to the interpretation and application of such agreements, namely to promote the effective, fair and speedy resolution of labour disputes. In addition, it is expected of the arbitrator to adopt an interpretation that is fair to the parties”.*

35. The evidence given by Dr Galo was concise and explanatory as to the reasons why the Applicant continued to act in the position for such a long period of time. It was undisputed that Dr Jafta did not have the authority to appoint the Applicant in terms of the Resolution.
36. Only a designated authority (Accounting Officer) that of a Chief Executive delegated to by the Superintendent-General may make such an appointment.
37. As a result, this leads us to an untenable position, whereby the Applicant, in all respects a well-respected and revered medical practitioner, faithfully carried out duties instructed to him under the guise that such instructions were compliant and legal.
38. However, my sympathies for the Applicant cannot be a factor in the decision I am called to make.
39. The Applicant requires me, in terms of Section 24 (1) of the Labour Relations Act 66 of 1995, as amended, to interpret Resolution 1 of 2002 with a view to find that the Respondent is not in compliance thereof and to order such compliance by finding that he is entitled to be paid an acting allowance for the period in question.

40. From the evidence led by the Applicant it can be seen that he did not meet all the criteria as provided for in Resolution 1 of 2002 and HRM Circular 132 of 2005 .

41. In the final analysis, I find that no authorisation was given to Dr Jaffa to appoint the Applicant.

42. Therefore, the Applicant is not entitled to payment of an acting allowance.

43. In the circumstances, I make the following award:

### **AWARD**

44. I find that the Applicant, DR Mitra, is not entitled to payment of an acting allowance.

45. This application is dismissed.

46. I make no order as to costs.

Signed:



Catherine Willows