



PHSDSBC

PUBLIC HEALTH AND SOCIAL DEVELOPMENT
SECTORAL BARGAINING COUNCIL

ARBITRATION AWARD

Commissioner: **Minette van der Merwe**

Case No: **PSHS644-18/19**

Date of award: **28 April 2019**

In the matter between:

PSA obo JA Bierman & 6 others

(Union/ Applicant)

and

Department of Health – Free State

(Respondent)

DETAILS OF HEARING AND REPRESENTATION:

- [1] The arbitration was held on 29 March 2019 at the Bophelo House in Bloemfontein.
- [2] The Applicants were present and represented by Mr N Cloete, Office Bearer from PSA, whereas the Respondent was present and represented by Mr M Supi, Labour Relations Officer.
- [3] Proceedings were mechanically recorded, and copious notes were taken. Interpretation was not required.

BACKGROUND TO THE DISPUTE:

[4] The matter was scheduled for Arbitration in terms of section 186(2)(a) of the Labour Relations Act (Act 66/1995) (hereinafter referred to as the “LRA”), related to an alleged unfair labour practice in respect of promotion.

[5] Parties agreed to argue the merits of the dispute by way of written arguments as there were no factual disputes, but only disputes of law that needed determination. Therefore, parties were required to conduct a pre-arbitration and conclude a statement of case. The statement of case had to contain a written statement of facts which were common cause so as to put me in a position to answer the legal question put before me. Such a statement of case is important in matters where parties elect to argue the dispute by way of written arguments, as was held in *Arends and Others v South African Local Government Bargaining Council and Others* (2015) 36 ILJ 1200 (LAC). The principle was again confirmed in *Public Servants Association and others v Minister of Correctional Service and others* [2017] 4 BLLR 371 (LAC).

[5] Parties agreed to submit heads of arguments as follows:

(a) Statement of case, duly signed by both parties, due on or before 03 April 2019.

(b) Applicant to submit heads of arguments on or before 09 April 2019.

(c) The Respondent to submit heads of arguments on or before 16 April 2019.

(d) Applicant to submit heads of arguments if it needed to clarify any issues raised in the replying heads of arguments of the Respondent, on or before 19 April 2019.

[6] The Applicants in this dispute is identified as:

- 1) JA Bierman
- 2) NLC Lesoli
- 3) PE Taljaard
- 4) BE Valla
- 5) MC Conradie
- 6) MC Robertson
- 7) A Pretorius

ISSUE TO BE DECIDED:

- [7] I was called upon to determine whether the Respondent committed an unfair labour practice by failing to implement the approved translation for the listed Applicants in respect of the applicable Resolution and, if I find that the Applicants are entitled to said grade translation, that such should take retrospective effect from 19 December 2012.
- [8] The following were agreed to as common cause:
- a) All the Applicants are currently still employed by the Respondent
 - b) All the Applicants are employed as Physiotherapists
 - c) All the Applicants sought to be translated to Chief Physiotherapists
 - d) All the Applicants were approved for translation with effect from 01 April 2016 (page 16 of “A”) as a result of approval granted by the MEC: Health and Treasury
 - e) The Applicants were overlooked for the translation, whereas the other Physiotherapists that formed part of the initial submission for upgrading, were approved (pages 10 – 14 of “A”)

SURVEY OF EVIDENCE AND ARGUMENTS:

Evidence from the Applicants:

Documentary:

- [9] Bundle “A”
- [10] The heads or arguments will not be summarized in this award, but the essence thereof can be summarized as follows:
- [10.1] During the implementation of OSD during 2012, said was implemented for 9 of the 18 Physiotherapists, and the Applicants were overlooked. The ‘overlooking’ was documented (page 10 of “A”). Job Evaluations were done for the Applicants, which confirmed their entitlement to be translated. Approval was granted by the MEC: Health on 28 August 2013 and by Treasury on 06 December 2016. An award under case number PSHS 679-14/15 was granted in the Applicants’ favour, in a case with the

same issues in dispute. The Respondent made an unsuccessful attempt at reviewing said award.

Evidence from the Respondent:

[11] The heads or arguments will not be summarized in this award, but the essence thereof can be summarized as follows:

[11.1] Reference made to the Public Service Regulations, 2016, Chapter 4: section 3(a), section 5, section 40 and section 41 thereof.

[11.2] The procedure followed by the Respondent in the case of the Applicants were not in compliance with the Public Service Regulations, 2016. The following Employees were affected by the subsequent withdrawal of said approval:

- a) MJ Mofokeng
- b) QJ Mofana
- c) WM Afrika
- d) SJ Thaane
- e) MS Mofokeng
- f) LJ Mokheseng
- g) MMR Mapule
- h) MH Motaung
- i) KS Jafa
- j) S Kok
- k) MD Miya
- l) KS Motsieloa
- m) NJ Mabula

ANALYSIS OF EVIDENCE AND ARGUMENT:

[12] In terms of section 138(7) I must issue an arbitration award with brief reasons.

[13] The Applicant bore the onus to prove that the Respondent had committed an unfair labour practice, as alleged, and further related to a claim for promotion, as categorized by the Applicants.

[14] It is clear that the CCMA and Bargaining Councils may scrutinize the employer's conduct under section 186(2)(a) in two instances:

- Where the employer fails to comply with a contractual obligation, or
- Where an employer exercises a discretion that it enjoys under the contractual terms of the scheme conferring the benefit.

[15] In terms of the Resolution that deals with "OSD for Therapeutic, Diagnostic and related Allied Health Professions", which includes Physiotherapists, all parties to this dispute are bound by the Resolution. Further, there is no discretion on the Respondent to comply with said Resolution.

[16] It was common cause that the Applicants were approved for the translations as follows:

- 1) Motivation for translations submitted during August 2011
- 2) The outcome of the job evaluation was presented for approval, and approved by the MEC: Health on 28 August 2013 on benchmark salaries
- 3) Approval for implementation was granted by Treasury on 06 December 2016
- 4) Implementation had to be with effect from 01 April 2016.

[17] The Respondent's submission that the procedure followed was not in compliance with the Public Service Resolution, 2016 was not supported by the list of affected Employees it submitted. As such, the argument that the Applicants' grading and OSD entitlement was withdrawn, is rejected.

[18] Essentially, the Applicant's claim was largely undisputed by the Respondent. A reasonable and justifiable explanation was not proffered as to why the Respondent had failed to implement the approved translations.

[19] However, in the matter of *PSA obo Strauss and Others v Department of Public Works NO and Others* (2013) 34 ILJ 2929 (LC) the Court held that a Commissioner did not have the jurisdiction to deal with the fairness of a Collective Agreement as a species of unfair labour practice.

[20] When the true nature of the dispute is that of the interpretation and application of a valid Collective Agreement, the dispute must be pursued under section 24 of the LRA.

AWARD:

[21] The PHSDSBC lacks the jurisdiction to determine a dispute about the interpretation and application of a Collective Agreement / Resolution under the auspices of section 186(2)(a), and as such the claim is dismissed.

[22] The Bargaining Council must close the file.

Signature:

A handwritten signature in black ink, appearing to read 'M. van der Merwe', is placed on a light green rectangular background.

Commissioner: **Minette van der Merwe**