



# ARBITRATION AWARD

Case No: **PSHS720-19/20**

Commissioner: **Samuel Baron**

Date of award: **11 September 2020**

In the matter between:

**DENOSA OBO MOIRA ADAMS**

APPLICANT

and

**DEPARTMENT OF HEALTH- EASTERN CAPE**

RESPONDENT

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## DETAILS OF HEARING AND REPRESENTATION

1. This matter, an arbitration in terms of section 24 of the Labour Relations Act 66 of 1995, as amended, ("the Act"), was finalized on 27 August 2020 at the Dorah Nginza hospital In Port Elizabeth. The parties requested to submit their closing arguments in writing within seven days and they duly obliged.
2. The Applicant, Ms. Moira Adams, was present and was represented by Mr. Sivuyile Sikwe, an official from the trade union DENOSA, of which the Applicant is a member.
3. Mr. Zola Peyi, the Labour Relations Officer, represented the Respondent, the Eastern Cape Department of Health.
4. The proceedings were digitally recorded.

## **ISSUE TO BE DECIDED**

5. I am required to interpret and apply the provisions of PHSDSBC Resolution 3 of 2007, especially insofar as it relates to the promotion / translation of the Applicant to the post of Professional Nurse (Speciality).

## **BACKGROUND TO THE DISPUTE**

6. The Applicant was permanently appointed since 2008 and was placed in intensive care unit under general stream PN-A. She obtained a post basic qualification in critical care during February 2014. She was then promoted on the 1<sup>st</sup> of March 2018 to a Professional Nurse Speciality (PN-B1).
7. The Applicant was, upon her promotion, placed on the first notch of the entry level of that particular post. She felt aggrieved that the Respondent did not take into account her almost ten years of experience as a Professional Nurse when she was promoted. She therefore referred this dispute to the Council in order for that situation to be rectified.

## **SURVEY OF EVIDENCE**

### **Applicant's case**

8. The Applicant testified that she was working for the Respondent since 1990 at Livingstone Hospital in Port Elizabeth until 2006 as an Enrolled Nurse. She terminated her services and was reappointed in 2008 as a Professional Nurse PN-A2 under general stream.
9. She was then allocated to work in a Paediatric Intensive Care Unit, in 2014 was given special leave to go and improve her qualifications where she obtained a Diploma in Critical Care. She came back and reported for duty after her completion in school, where she submitted her qualifications to Human Resources for recognition of improved qualification and placement.

10. She continued working as a Professional Nurse under general stream even though Intensive Care Unit was categorized under specialty stream under OSD for Nurses. She raised this with her immediate supervisor and was promised to be attended to, but ever since then there was nothing coming forth instead, she saw other nurses who qualified after her being placed to specialty position and change in their salaries.
11. She was subsequently placed to a position of Professional Nurse Specialty (i.e. PN-B1) on the 26th February 2018 which was almost 4 years post her attaining the relevant specialty for nursing in such a specialized area. She also claimed that she was at times during the period of 2014 and 2018 asked to lead a shift as the person with relevant expertise without being remunerated for such.
12. The Applicant thus argued that she should be appointed as a Professional Nurse Specialty (PN-B1) from January 2015 as per the time she returned back from school and was expected to carry out duties of a Professional Nurse with Specialty and retrospectively back pay any outstanding monies.
13. The Applicant testified pointed to Clause 3.1.4 of the Resolution which relates to the requirements for appointment and promotion. It states that "Appointment and promotion requirements for each category as determined by the employer, subject to any statutory requirements determined by the SANC, as indicated in Annexure A.
14. She also submitted that Clause 3.1.13 talks to the "salary recognition upon promotion" and clause 3.1.13.2 shall gain at least one notch on such promotion. She stated that she was on production grades since January 2008 and got promoted to a higher post, but she was placed at an entry notch of the higher post she was promoted to and did not receive one notch higher.
15. The Applicant further referred to Annexure A of the Collective Agreement Clause 2.1 which tabulates the different notches the Respondent should consider when effecting such appointment or promotion, but the Respondent did not consider it. She should thus not have been placed on the entry notch of R3340 431, which has since been adjusted to R362 559. She is of the view that she should have been placed on R373 440, which is one notch above the entry level when she was promoted. The Applicant therefore

claims that she be correctly promoted as directed by the Resolution and be paid retrospectively any outstanding amount owed to her.

## **Respondent's submissions**

16. Mr. Peyi, for the Respondent, closed his case without leading any oral evidence, but submitted closing arguments based on the evidence submitted stated by the Applicant.

## **ANALYSIS OF EVIDENCE AND ARGUMENT**

17. This dispute relates to the application of PHSDSBC Resolution 3 of 2007 read with the arbitration award dated 7 August 2009. A dispute over the interpretation of a collective agreement exists if the parties disagree over the meaning of a particular provision. In other words, 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. I am thus required to determine whether there was compliance with a provision of the Resolution that applies to the Applicant.

18. It is trite that in interpreting a 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. In this regard the arbitrator must take into account the primary objectives of the LRA. The primary objectives of the LRA 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.

19. The objectives of Resolution 3 of 2007 are stipulated as follows:

1.1 To introduce an occupational specific remuneration and career progression system for Professional Nurses (Registered Nurses), Staff Nurses (Enrolled Nurses) and Nursing Assistants (Enrolled Nursing Assistants) who fall within the registered scope of PHSDSBC that provides for –

1.1.1 career pathing;

1.1.2 pay progression;

- 1.1.3 grade progression;
- 1.1.4 recognition of appropriate experience;
- 1.1.5 increased competencies;
- 1.1.6 and performance,

with a view to attracting and retaining nursing professionals in all the identified occupations to the public health sector.

1.2 To introduce differentiated salary scales for identified categories of nursing professionals based on a new remuneration structure.

1.3 To incorporate the existing scarce skills allowance payable to identified categories of specialty nurses into salary.

Clause 3.1.3.2 of Resolution 3 of 2007 provides as follows:

“Posts in Specialty Nursing refer to those positions where a post-basic qualification listed in Government Notice R212, as amended, is an inherent requirement to perform the duties attached to the post. This also includes similar post-basic qualifications with duration of at least one year in the relevant specialty recognized by SANC prior to the publishing of Government Notice R212.”

Clause 3.2.5.3 of Resolution 3 of 2007 sets out clearly the requirements for the translation of Professional Nurse (Registered Nurse) to specialty posts as follows:

- (i) A Professional Nurse (Registered Nurse) who occupies a post in a nursing specialty and who –
  - (a) is in possession of a post-basic clinical nursing qualification listed in Government Notice R212, as amended, shall translate to the appropriate specialty post; and
  - (b) is not in possession of a post-basic clinical nursing qualification listed in Government Gazette Notice R212, as amended, but who has been permanently appointed in a post in a specialty unit and has been performing these duties of the specialty post satisfactorily on 30 June 2007, shall be translated as a once-off provision to the first salary scale attached to the production level.

- (ii) A Professional Nurse (Registered Nurse) referred to in (i)(b) shall not progress by means of grade progression to the higher salary scale attached to a post in the clinical specialty without first having obtained the required educational qualification in the clinical specialty listed in Government Notice R212.
- (iii) A Professional Nurse (Registered Nurse) who is managing a nursing specialty unit, and who is not in possession of a post-basic clinical nursing qualification listed in Government Notice R212, as amended, but who has been performing these duties of managing the specialty unit satisfactorily on 30 June 2007, shall be translated as a once-off provision to the appropriate salary scale attached to the corresponding management level.

20. It is common cause that the Applicant was not in the Respondent's employ on 1 July 2007. Therefore, all the provisions as it relates to the translation of a Professional Nurse to speciality posts as per clause 3.2.5.3 is not applicable to the Applicant. Thus, the reference by the Applicant to Annexure A, page 14, which refers to the Salary Level and scale of a Professional Nurse is not applicable as it relates to the translation of Professional Nurses to speciality posts at the time of the commencement of the Resolution.

21. The Applicant's case is however not that she should have been translated at that time, but that her experience should have been taken into account when she was appointed as Professional Nurse Speciality with effect from the 1<sup>st</sup> of March 2018. The Applicant argues that had that been done, she would have been placed on higher notch than the entry level notch.

22. As I mentioned, the Applicant was not employed during the implementation phase of the Resolution, therefore any prior experience she has gained inside and outside the public service was not applicable to her.

23. The Resolution also introduced a system of pay and grade progression which followed the initial implementation of the Resolution. According to that, the Applicant would have progressed according to her salary level once she had correctly placed had she been in the service of the Respondent at the time of the implementation of the Resolution.

24. The Applicant wants me apply the provisions of the Resolution to her appointment on 1 March 2018. Specifically, she wants me to find that the Respondent had to take into account her previous years of experience and order that she be placed on notches higher than the entry level notch she was placed on at appointment.
25. Paragraph 38 of the Communication dated 28 September 2019 from the DPSA on implementation of OSD for Professional Nurses, Staff Nurses states as follows: “Due to the fact that the production levels in the OSD’s for Professional Nurses, Staff Nurses and Nursing Assistants consists of various production grades, it should be noted that departments have flexibility to advertise and fill posts at production levels in the following manner:
- 38.1 Advertising of the appointment requirements (i.e. statutory and experience requirements) and specific grade attached to the post with a view to appointing the designated candidate on the specific grade
- 38.2 Advertising of the requirements (i.e. statutory and experience requirements) and salaries of all the grades attached to the posts with the view of appointing the designated candidate on the appropriate production grade based on his / her experience.
26. The Applicant was however appointed/ translated in accordance with Circular 49 of 2018 which intended to fast track the filling of vacant funded posts at various hospitals. There was no advertising of the posts on specific salary levels and the Circular did not specify the experience that would be taken into account when appointments in terms thereof would be made. She was simply promoted / translated and placed on the entry salary level of the post due to a specific need the Respondent was experiencing.
27. Although the appointment letter refers to the “translation to the post of Professional Nurse”, it cannot mean a translation in terms of the provisions of the Resolution, because those measures applied to a Professional Nurse in the employ of the Respondent at the implementation date. The Applicant was neither permanently employed and performing the duties of the speciality in order to qualify for the once-off provision, nor did she possess the post-basic nursing qualification in order to be translated.
28. My assessment of the documentary evidence and the arguments submitted by the respective parties are that the provisions of Resolution 3 of 2007 is not applicable to the appointment of the Applicant as a Professional Nurse (Speciality) as of 1 March 2018.

29. In the premises therefore, I make the following award:

**AWARD**

30. The provisions of PHSDSBC Resolution 3 of 2007 is not applicable to the appointment of the Applicant, Ms. Moira Adams, to the position of Professional Nurse (Speciality) by the Respondent, the Eastern Cape Department of Health.



Samuel Barron