



ARBITRATION AWARD

Case No: PSHS758-16/17

Panellist: Paul Phundu

Date of Award: 5 April 2017

In the matter between:

Nehawu obo David Makhoba

Applicant

and

Department of Health-North West

Respondent

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 conducted on 22nd March 2017 at the Department of Health Boardroom, Mafikeng.
- [3] The Applicant appeared in person at the arbitration hearing and was represented by Mr T. Makwetu, an official from the union NEHAWU. The Respondent was represented by, Mr J. Dlamini, Manager Labour Relations.
- [4] The proceedings were conducted in English and were digitally recorded. I also kept handwritten notes.

- [5] The Applicant handed in a bundle of documents marked Annexure "A", documents were admitted by both parties.

ISSUE TO BE DECIDED

- [6] 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.

BACKGROUND TO THE ISSUE

- [7] The Applicant is in the employ of the Department of Health as an Assistant Director-Communication. In 2004 he was employed as Communications Officer at salary level number 6. On the 1st June 2004 he was appointed to act as a Public Relations Officer, salary level 9, up until 15 June 2008. He declared a dispute concerning an interpretation and/or application of a collective agreement (PHSDSBC Resolution 1/2002) on 10 October 2016.
- [8] On 31 October 2016 conciliation failed and the certificate of non-resolution of the dispute was issued.
- [9] The matter proceeded to arbitration. In terms of relief, the Applicant wished to be paid an acting allowance in accordance to the provisions of the Acting Allowance PHSDSBC Resolution 1 of 2002.

ARGUMENT FOR THE APPLICANT

- [10] The Applicant had no witnesses, his evidence was briefly as follows:
- [11] Mr **David Makhoba** testified under oath that he was appointed in writing by the Chief Executive Officer of the Mafikeng Hospital Complex to act as a Public Relations Officer from 1st June 2004 until the 15 January 2008. The Applicant indicated that at the time he was permanently appointed at level 6 as a

Communications Officer. The Applicant stated that the position of Public Relations Officer was a higher position at level 9 and was reporting directly to Mr Tshepo Moraka who was occupying the position at the time. The Applicant further indicated that Mr Tshepo Moraka resigned from the position and joined the private sector, hence he was asked to act in the position. The Applicant stated that he accepted the acting appointment in writing by submitting a letter to the office of the Chief Executive Officer. The Applicant further stated that he wrote numerous letters to the authorities requesting to be paid his acting allowance and he was not paid. The applicant also stated that the Acting Director-Hospital Services, Ms ME Kaude also submitted a motivation to her principals pleading with them to pay the acting allowance with no success. The Applicant lodged a grievance and was not satisfied with the response.

- [12] Under cross-examination the Applicant confirmed that he received a letter terminating his acting position. He said this was proof that he was appointed to act in a higher position.
- [13] Under re-examination the Applicant confirmed that the difference in salary that is due to him was calculated by Ms ME Kaude who was the Acting Director Hospital Services. The Applicant further confirmed that Ms ME Kaudi based these calculations on a difference in salary he was earning at the time and the salary that was earned by the incumbent of the position, that is, Mr Tshepo Moraka. The Applicant stated that these calculations cover the period he was appointed to act and the amounts were calculated by the Human Resources Department headed by Ms ME Kaude.
- [14] The Applicant prays that he be compensated his Acting Allowance for the period he acted in the position of a Public Relations Officer.

ARGUMENT FOR THE RESPONDENT

- [15] The Respondent had one witness in support of its case. The evidence was briefly as follows:
- [16] **Mr Joseph Dlamini** testified under oath that the Public Relations Officer was misconstrued as an Assistant Director-Communication position hence it cannot be proved documentary that he acted in a position as Assistant Director. The Respondent indicated that the Human Resources Department confirmed in writing to the Applicant that the post of an Assistant Director-Communication does not exist. The Respondent stated the position that the Applicant acted on was not vacant and was also not funded.
- [17] The Respondent further stated that nobody knows the salary of the Public Relations Officer.

- [18] The Respondent concluded by stating that the Public Service Regulations, clause B53 stipulate that if a person is acting for a period longer than 12 months he/she should not be paid an amount exceeding 12 months of his/her acting.

ANALYSIS OF EVIDENCE AND ARGUMENT

- [19] This is a collective agreement dispute and by definition in terms of the LRA, section 213, *collective agreement is a written agreement concerning terms and conditions of employment or any other matter of mutual interest concluded by one or more registered trade unions, on the one hand and, on the other hand, one or more employers, one or registered employers' organization, or one or more employers and one or more registered employers' organization. Section 23 of the LRA provides that the legal effect of a collective agreement is that it binds all the parties to the collective agreement.*
- [20] *The purpose of this agreement is to determine a policy on acting allowance and compensation to be paid to an employee appointed to act in a higher post.*
- [21] Clause 3.1. of PHSDSBC Resolution 1 of 2002 provide that *an employee appointed in writing to act in 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 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.*
- 3.3 *The provisions of paragraph 3.1 may be deviated from on good cause shown by the appointing authority.*
- 3.6 *An EMPLOYEE may not act in higher vacant post for an uninterrupted period exceeding twelve months.*
- [22] It is common cause that the Applicant was appointed to act as a Public Relations Officer from 1 June 2004 till 15 January 2008. I accept that the Applicant was appointed in writing by the Chief Executive Officer of the Hospital and he also accepted the acting appointment in writing. I am convinced that the position the Applicant acted on was vacant and funded. I agree with the Respondent in as far as the title of this position is concerned. However, there is no evidence before me that proves that the position of a Public Relations Officer was not a level 9 position. The documents before me indicate that the then

Acting Director-Hospital Services based her calculations and the difference in salary between the Applicant's position (Communication Officer) Level 6 and that of a Public Relations Officer at level 9. I expected the Respondent to prove that the position of a Public Relations Officer was not at level 9 at the time the Applicant acted. It is therefore my finding that the Respondent failed to prove that the Applicant acted in a position lower than level 9. I reject the Respondent's argument that the position that the Applicant acted on was not vacant and was also not funded. The reason for my rejection is that Mr Tshepo Moraka was permanently employed and received his full salary before he resigned. It is for this reason I say his post was funded. It is also my finding that the effect of his resignation left the position vacant.

- [23] It is my finding that the Applicant satisfied the requirements stipulated in clause 3.1.1 till clause 3.1.4 above.
- [24] I am convinced that the Applicant has established that he was acting in a higher position, and that he is entitled to be paid the acting allowance.
- [25] As a consequence of the above I determine that the applicant has succeeded to discharge the onus that the Respondent had failed or incorrectly interpreted and applied resolution 1 of 2002, and further determine that the Respondent has violated the provisions of the resolution by not paying the Applicant the acting allowance.
- [26] Having considered clause 3.6 above, and the fact that the amount due to the Applicant exceeds twelve months, there is no justifiable reason not to pay him the acting allowance because he has already performed the functions assigned to him.

AWARD

- [27] (a) The Applicant is entitled to the acting allowance due to him.
- (b) The Respondent has breached the provisions of Resolution 1 of 2002 by not paying the Applicant his acting allowance.
- (c) The Respondent is ordered to pay the Applicant (**Mr David Makhoba**) **R236 175. 97** being the difference of his salary (Communication Officer – level 6) and that of a (Public Relations Officer-level 9) for the period he acted starting from the 1 June 2004 till 15 January 2008.
- (d) The above amount, less statutory deductions, must be paid to the Applicant on or before 31 May 2017.



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PHSDSBC PART-TIME PANELLIST: PAUL PHUNDU