



# ARBITRATION AWARD

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Case Number: **PSHS802-16/17**

Commissioner: **T ERASMUS**

Date of Award: **27 January 2017**

In the matter between:

**LOUISE VORSTER**

(Union/ Applicant)

and

**DEPARTMENT OF HEALTH- WESTERN CAPE**

(Respondent)

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## DETAILS OF HEARING AND REPRESENTATION

1. This matter was set down for Arbitration at the Public Health and Social Development Sectoral Bargaining Council in terms of section 186(2)(b) of the Labour Relations Act 66 of 1995 ("the LRA") and was heard at the offices of the 1<sup>st</sup> Floor Boardroom, Western Cape College of Nursing, Klipfontein Road, Athlone, Cape Town on 19 January 2017. The Applicant appeared in her personal capacity, whilst the Respondent was represented by Mr AG Solomon, Labour Relations Officer at Respondent.

## ISSUE TO BE DECIDED

2. I must decide whether Applicant was subjected to an unfair labour practice.

## **APPLICANT'S OPENING STATEMENT**

3. Applicant avers that she was subjected to an unfair labour practice dispute in that her services were utilised incorrectly. Applicant was employed as an assistant manager pharmacy directorate information management. Although she is a pharmacist, she does not work as a pharmacist. She referred to the job description of a production pharmacist in bundle A and stated that her duties are not included in the job description of a production pharmacist. Her duties include the implementation of the computer pharmacy system, such as stock control, dispensing, financial reporting and others.
4. The Applicant's position requires general management skills, negotiation, facilitation skills, project management, change management, communication and liaison skills, business process, re-engineering, data quality analysis and time management skills. These are management and specialized skills. Her job description is contained in annexures 8 and 9 of Applicant's bundle. Applicant performed duties on a much higher level than what she was compensated for.
5. Applicant seeks compensation for the time that she performed her duties from November 2009 until December 2015, as the position was upgraded during December 2015 and Applicant is currently remunerated correctly. If the post was graded correctly in 2009, she would have been upgraded by six notches by now. Applicant lost six notches over the past year.

## **RESPONDENT'S OPENING STATEMENT**

6. Respondent is concerned about the fact that Applicant does not refer to a loss of any benefits. Applicant only spoke of the incorrect salary she received. Respondent argued that the Council does not have jurisdiction to hear the matter if it deals with salary only, as disputes, regarding salaries can be dealt with in a different forum in terms of the Basic Conditions of Employment Act. Respondent therefore argued that the Council does not have jurisdiction to hear the matter. There was a request for a job evaluation of Applicant's post in 2015, which was investigated and approved during November 2015. In terms of the Public Service Regulation Act an upgrade can only be implemented in the following month. Reference was made to paragraphs 5, 6 and 7 of chapter 1.

## **APPLICANT'S CASE**

7. **LOUISE VORSTER testified in support of her own case (hereinafter referred to as "Applicant")**

8. Applicant testified that she was employed in 2009 in the capacity as a production pharmacist. She continuously requested an upgrade of the post and the post was eventually upgraded during November 2015. The position should have been graded correctly from the beginning. Applicant does not dispute the rule that a job can only be upgraded to a higher salary in the month following the grading. According to Applicant, everybody knew that the post was on a higher grade, but nothing was done about it. Her performance was satisfactory over the six years that she filled the position, but she was not compensated accordingly.
9. Applicant referred to annexure A and stated that the position of production pharmacist was advertised. Respondent was unable to attract suitable candidates. When the OSD came in, the principal pharmacist was translated to production pharmacist. It is a level 9 post. Subsequent to OSD, the other pharmacist post was upgraded in 2010 and converted to a policy specialist post, which is the same level as that of her present position. The two posts were on level 9 and they were both translated to production pharmacist post after OSD. Although the other post was evaluated and upgraded to a level pharmacy policy specialist, her own post remained unchanged.
10. Applicant testified that it became clear to her during her interview that her post is not a level 9 post, but at least a level 10 post, being a chief pharmacist post and it should have been translated to the level on which she is currently employed. The other post was correctly upgraded.
11. The need to upgrade Applicant's post was identified as early as 2005. She referred to the letter addressed to the director HR, Mr Koornhof, which is an undated letter, where the following is stated in paragraph 2 thereof:
  - “2. *The report on the post of System Manager: Pharmacy system J.A.C. and System Manager Pharmacy Regional Roll out has put the system manager in the same remuneration level 9 as the other system managers for the HIS Application. A further investigation also identified the need for the 3 system controllers (registered pharmacists) at level 8.*
  8. *It would therefore be highly appreciated if you can sanction an urgent investigation into the remuneration package of the System Manager: Pharmacy systems (2 posts).”*

12. According to Applicant it was a well-known fact that the post was on a higher level than advertised when she was appointed in the position as per annexure 2. Applicant referred to annexure 3, being an letter from Aletta de Witt, dated 20 November 2009, to the Applicant where the following is stated:
- “Wat ek nog moet doen is om die pos wat ek het te omskep vir ‘n hoofapteker en nie assistent direkteur nie. Die aanstel van ‘n persoon is nie hiervan afhanklik nie aangesien dit eerder ‘n regstelling van my diensstaat is. Vir die verandering van die posbeskrywing gaan ek jou en Elaine se insette benodig. Hoe meer ons dit kan laai met apteekverwante verantwoordelikhede, hoe beter vir die pos.”*
13. Aletta De Witt gave Applicant an undertaking that the grading would be sorted out. Both posts were on level 9, whilst the one was the upgraded one. Reference was made to annexure 4 where the difference in salaries in terms of OSD translation posts is summarized. It shows the difference it would have made then if the post was upgraded. Unfortunately Aletta de Witt passed away in 2013 and can therefore not be called to testify.
14. Reference was made to annexure 5, which is an e-mail trail with regards to Applicant’s request for the upgrade of the post, yet nothing was done about it, until Jashmeer Maharaj was appointed as new manager in Aletta De Witt’s position. Applicant approached Maharaj during October 2014 as nothing was forthcoming from Ian de Vega. Only after she brought the matter to Maharaj’s attention did he refer the matter to the Human Resources Department. Michelle Moodley replied on 5 November 2014 that she would look into the matter and discuss it with her manager, Johan Walters.
15. Maharaj followed the matter up on 3 December 2014 with Michelle Moodley and asked if she spoke to Walters. She stated that she had not been able to do so yet and nothing happened until 2 March 2015, when Maharaj sent an e-mail to enquire about the progress.
16. Applicant also submitted an e-mail trail that she sent to Ian De Vega, requesting him to assist her with the evaluation of the post, as she is appointed as production pharmacist grade three, but she does not do the work of a production pharmacist.
17. Michelle Moodley replied on 23 March 2015 and apologized for the delay, as per annexure 6. Respondent decided to compare Applicant’s duties with the other post of pharmaceutical policy specialist. The process started moving for the first time as per annexure 7, being the translation to a higher grade post:

*“Approval has been granted for your translation in rank and absorption into the higher graded post of Assistant Manager: Pharmaceutical Services in terms of Chapter 1, Part V.C.6 of the Public Service Regulations, 2001 with effect from 01 December 2015 in accordance with the following particulars:”*

18. Applicant's salary was increased by 70% and the employer's contribution to the Government Employee Pension Fund of her inclusive salary package was adjusted accordingly.
19. Applicant testified that in spite of the upgrade the job description did not change. Applicant referred to annexure 8, being a performance agreement. Applicant's performance was satisfactorily and she received a pay progression as per annexure 11. Reference was made to annexure 11, where the following is stated:

*“You received accelerate pay progression, which means you received 2 notches on 1/7/2012 due to your above average performance assessment. Therefore you are correctly placed on the 5<sup>th</sup> notch.”*

20. The upgrade should have taken place during 2011, the same as the other post. Applicant lost out on at least 5 years of pay progression. The other issue that Applicant has is when she was transferred to her present post during December 2015, she was placed on the bottom notch of the grade. Applicant does not believe that the policy should apply. The bottom salary applies in case of an upgrade. It does not apply to her, as she was doing the same work and her job description remained unchanged.
21. Reference was made to annexure 12, being a comparison between the pharmacist grade 3 (production pharmacist) and assistant manager pharmacist services. It works out to about R500 000.00 over the period. Applicant referred to her current salary as per annexure 13.

## THE FOLLOWING ENSUED FROM CROSS-EXAMINATION:

22. Applicant confirmed that she was appointed to the position of principal pharmacist on 21 December 2009. Although there is no job description for the post, it was subsequently written. Applicant confirmed that she performed her duties as set out on page 9 of bundle B. The duties are exactly the same, but there was an undertaking to upgrade the post as per Aletta De Witt's e-mail. Applicant was challenged as to whether the Human Resources Department received the letter in question.
23. Applicant was challenged on whether she ever lodged a complaint with the manager with regards to the failure to evaluate and upgrade the post. She stated that she did not do so, as it was explained to her that it is a lengthy process. The request for an upgrade was first put to the compensation department in 2014 by Maharaj. It was put to Applicant that there was no proof that it was forwarded to any other manager. It was put to Applicant that there was only one e-mail to Ian De Vega. Applicant was challenged as to why she did not take it up and that Maharaj was the only person who did something about it. It was put to Applicant that she expects Respondent to compensate her for something her managers failed to do. Applicant was challenged as to why she did not lodge a grievance. Applicant explained that Ms Moodley from Human Resources Department did not explain the process of the grievance to her in her letter. Applicant conceded that she performed management tasks and that she was aware of the grievance process. She however had no need or reason to go that route, as she was led to believe that Respondent was working on the matter. She spoke to Mr Ian De Vega in 2013, once she realised that Aletta de Witt was unable to do anything. Applicant was told that they were looking into the matter, although she was unable to explain what is meant by the reply "they were looking into the matter".
24. Applicant was challenged as to whether it would have made any difference to the situation if she completed a grievance form. She stated that she was unsure of this. De Vega should have informed her of what she should have done, as she believes that it is her supervisor's responsibility to guide her. Applicant was challenged as to whether she was happy when the right thing was done in 2015. She replied that she was. The point of her complaint was that the grading was done too late. She accepted the position on the understanding that the position would be upgraded and she was satisfied when Aletta de Witt informed her that the post would be upgraded. Bester informed Applicant that he will discuss the matter with Mr Maharaj and from there onwards the matter started moving. It was put to Applicant that the Human Resources Department can only do something about the matter if it is brought to their attention. Applicant replied that she is holding the whole Department responsible

for dragging their feet. She did not lodge a grievance, as she was informed that the matter was underway.

25. During July 2015 she lodged a grievance about her incorrect utilization. Applicant was not incorrectly appointed, as she fulfilled the duties to which she was appointed. It should have been on the higher level all along. There is a huge difference between a production pharmacist and duties performed by Applicant. It was put to Applicant that is why the Respondent translated her post to a position of assistant manager.

26. Reference was made to page 22, section c, grading and remuneration. It is the only place where grading of posts are dealt with. The bottom of page 22 forms part of the Public Service Regulations, 2001. Specific reference was made to C.5:

*“An executing authority may increase the salary of a post to a higher salary range in order to accord with the job weight, if-*

*(a) The job weight as measured by the job evaluation system indicates that the post was graded incorrectly; and*

*(b) The department’s budget and the medium-term expenditure framework provide sufficient funds.”*

27. Applicant was challenged whether the Department dealt with her request by applying this section. Applicant was unsure, but she believes that it was honoured. Reference was made to page 15, being a submission for the upgrading of the post, together with background. The Department followed the correct process in the investigation and application of the Act. Reference was made to C.7 on page 23, where the following is stated:

*“The absorption of the incumbent employee in the higher-graded post as provided under regulation V C.6 shall take effect on the first day of the month following the month during which the executing authority approves that absorption.”*

28. It was put to Applicant that she is expecting the Department to abandon the prescript and deal with her matter differently. The same job has been performed for the past 7 years. Applicant conceded that she does not have proof of the request for an upgrade in 2010, other than an e-mail from Aletta De Witt.

## RESPONDENT'S CASE

29. **MICHELLE MOODLEY testified on behalf of Respondent (hereinafter referred to as "Moodley")**
30. Moodley is the assistant manager in the compensation management component of Respondent. She dealt with various matters in OSD. She confirmed that Applicant is now the assistant manager: pharmacy.
31. Moodley confirmed that she received a request from Applicant's manager, Mr Maharaj, whereafter the investigation ensued and the request for the upgrade of Applicant's post. The post occupied by Applicant cannot be job evaluated as it forms part of OSD and OSD positions cannot be job evaluated. Moodley referred to C.5 and C.6 and stated that Respondent compared the functions of the post to that of Applicant's current job description and they found that she was definitely not performing the duties of a production pharmacist. She was however on the incorrect level. The approval of the upgrade was made on 24 November 2015, whereafter the upgrade followed and was implemented in December 2015. Applicant was originally appointed in November 2009 and according to her she performed supervisory functions.
32. Moodley explained that an upgrade occurs once a request is received from the manager. Several forms need to be completed and an interview conducted if it is a matter of job evaluation. This could however not take place, as Applicant's position forms part of OSD. The Human Resources Department will investigate the job description and performance of the individual. Moodley confirmed that she went back to information management, as she had discussions with Mr Maharaj. According to Moodley she did not receive a request to look into the upgrade of the post before Maharaj's request, nor did she have any discussions with either Aletta De Witt or Ian De Vega. Her department only became aware of the request for upgrade towards the end of 2014. The investigation undertaken by the Department led to the approval. She was not aware of Applicant's situation prior to the request of Mr Maharaj. Moodley had not ever seen the letter from Aletta De Witt before. She is unsure whether the Human Resources Department received it as it is unsigned, nor has any other person spoken to her about the letter or Applicant's request for upgrade.
33. Moodley confirmed that she has been employed in the compensation department since April 2008 and nobody had ever spoken to her about Applicant's upgrade, other than Maharaj.



34. Moodley confirmed that the letter confirming the upgrade of Applicant's post was issued by the Respondent's Directorate as per page 14 of bundle B. She referred to pages 20 to 23, being the Public Service Regulations, 2001. Moodley confirmed that they did not do the job weight, but looked at Applicant's functions and according to the post structure, evaluated where Applicant's post would fit in. Certain areas need to be covered and the salaries do overlap and the functions had to be compared, because the job was not evaluated. Moodley confirmed that the requirements of VC6 were complied with and the backdating of Applicant's salary was prohibited by virtue of VC7. The upgrade was approved on 24 November 2015.

#### **THE FOLLOWING ENSUED FROM CROSS EXAMINATION:**

35. Moodley confirmed that she was employed in her current capacity since 2008. Moodley was challenged as to whether she was aware that there were two production manager pharmacy posts. She said she did not. Applicant put it to Moodley that the one was Applicant's position and the other post was upgraded in 2010. Moodley was challenged whether she was aware of that upgrade or what process was followed. She replied that she was unaware of the upgrade. Moodley was challenged why the one post was upgraded and the other not. She replied that if there is a request and motivation then the upgrade would follow.

#### **APPLICANT'S CLOSING ARGUMENT**

36. Applicant stated a clear case of incorrect utilization. She does not dispute the prescripts in terms of section C of the Public Service Regulation. The process should have started long before 2009 and should have completed in 2010. There is no reason why the one post was upgraded in 2010 and the other one not. The fact that they are both on the same level supports that argument. Applicant believes that her supervisors and the Human Resources Department dragged their feet. There were three different supervisors involved in the case. The work was done and the post filled, therefore it was not a priority for the Department, whilst the other post was vacant and advertised, therefore it took priority. The work is the same and the job description remains unchanged. Applicant's job performance was above average. Applicant lost out on a higher income and it has a direct influence on her future retirement. Applicant is on the bottom notch in 2015 instead of in 2009. It is unjust on the part of the Department.

## **RESPONDENT'S CLOSING ARGUMENT**

37. Applicant was appointed in 2009. With OSD, the position was translated to pharmacy grade 3 with supervisory functions. Applicant was appointed and her job description was in line with the key areas. Whether any promises were made to Vorster by her supervisors, are unknown to Respondent as they only heard about it during December 2014. No request was ever made to compensation management in the Human Resources section, therefore no attention could be given to the upgrade request on behalf of Applicant. The only person who ever submitted a request for the upgrade of the post, was Mr Maharaj, which he sent at the end of 2014. The result of Maharaj's request was the approval by the executive authority and Applicant's position was upgraded as from 1 December 2015. The Department can only deal with matters that are brought to their attention. Applicant did not file any grievances from her side in order that the Human Resources Department could investigate the matter. Applicant's referral is not in line with section 186 of the Labour Relations Act, 66 of 1995 and Respondent requests that a ruling is made that the Council does not have jurisdiction to deal with the matter, as there are no benefits or any promotion involved. The Bargaining Council does not have jurisdiction to deal with the matter. Upgrading does not form part of normal benefits.

## **REPLICATION**

38. Applicant is unaware of which benefits Respondent is referring to. She does not dispute the benefits at all, she only states that she was incorrectly utilized.

## **ANALYSIS OF EVIDENCE AND ARGUMENT**

39. The Applicant referred an unfair labour practice dispute to the Council. Respondent disputed the referral and objected against the Council's jurisdiction and submitted that Applicant's dispute does not fall within the ambit of an unfair Labour Practice Dispute as contemplated by section 182(2)(a) of the Labour Relations Act, 66 of 1995. The Applicant seeks compensation for work performed. The undisputed evidence before me, is that Applicant's duties and job description remained unchanged when her position was correctly graded during November 2015. Applicant however seeks retrospective compensation for the difference between her salary from date of appointment until the date when the post was correctly graded in November 2015. Applicant also seeks compensation for the period between her date of appointment and the date of the upgrade of her position, for Respondent's failure to upgrade her to the correct notch earlier.

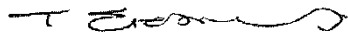
40. I now turn to the Jurisdictional issue first. In terms of section 186(2)(a) – “*Unfair labour practice*” means any unfair act or omission that arises between an employer and an employee involving—

(a) *unfair conduct by the employer relating to the promotion, demotion, probation (excluding disputes about dismissals for a reason relating to probation) or training of an employee or relating to the provision of benefits to an employee;*”

41. The dispute before me is related to Respondent’s failure to upgrade Applicant’s position timeously and includes a loss of correct remuneration. I find that the dispute does not fall within the ambit of an unfair labour practice dispute.

#### **AWARD**

42. I find that the Applicant was not subjected to an unfair labour practice, therefore the Council does not have jurisdiction to adjudicate the matter.



**COMMISSIONER: T ERASMUS**