



PHSDSBC
PUBLIC HEALTH AND SOCIAL DEVELOPMENT
SECTORAL BARGAINING COUNCIL

ARBITRATION AWARD

Case No: **PSHS848-19/20**

Commissioner: **David Pietersen**

Date of award: **29 June 2020**

The matter between:

DENOSA obo ALBERT LINKS

APPLICANT

and

DEPARTMENT OF HEALTH- NORTHERN CAPE

RESPONDENT

DETAILS AND REPRESENTATION

1. The dispute between Democratic Nursing Organisation of South Africa (DENOSA) representing its member Mr. Albert Links, the applicant versus Department of Health- Northern Cape, the respondent was referred to arbitration in terms of section 186(2)(a) of the Labour Relations Act 66 of 1995 as amended (the LRA) under the auspices of the Public Health and Social Development Sectoral Bargaining Council (the Council).
2. The arbitration hearing took place on 10 June 2020 at the respondent's hospital in Kimberley. The applicant was present and represented by Mr. Anthony Vassen, the Provincial Secretary from the trade union DENOSA. The respondent was represented by Mr. Junaid Tswaile, its Labour Relations Officer. The hearing was digitally recorded.

ISSUES TO BE DECIDED

3. I am called upon to determine whether the respondent committed an act of unfair labour practice relating to promotion.
4. In so doing, I must decide whether a Job Evaluation (JE) outcome as approved by the respondent's executing authority on 10 April 2019 is accurate.
5. I must also decide whether the applicant should be declared the CEO of the Specialised Hospital consisting of two clinics, the DRTB and the Mental Health clinics.

BACKGROUND

6. It is common cause that the applicant is employed by the respondent since 04 June 2014 as the Chief Executive Officer (CEO) of the West End Specialised Hospital (WESH) in Kimberley. He is on a deputy director's salary level 12 and is earning R63 447.03 per month. The dispute follows a situation on 04 October 2019 where the respondent apparently refused to implement the outcome of the JE dated which sought to upgrade the post of the applicant to salary level 13 and to recognise the applicant as the CEO of both the Mental Health and DRTB clinics of the WESH.
7. The applicant lodged an unfair labour practice dispute with the Council on 14 October 2019. Conciliation took place on 07 November 2019 after which the dispute remained unresolved and a certificate of non-resolution of the dispute being issued.
8. The arbitration hearing then took place on 10 June 2020 following the delays caused by the Covid-19 pandemic. The matter was partly concluded as the parties requested to submit their closing arguments by 16 June 2020.

9. It is common cause that the JE outcome of 10 April 2019 which sought to upgrade the post of the applicant was never implemented. It is also common cause that the applicant still occupies the yet to be upgraded post. The parties have also agreed as common cause that the applicant oversees two clinics (Mental Health and DRTB) of which the Mental Health Clinic was moved to new premises as a stand-alone clinic. The West-End Hospital now only accommodates the DRTB Clinic. The parties also agreed that the applicant as CEO was also relocated to the new premises and is managing both clinics from the new hospital which happens to be the stand-alone Mental Health Clinic.

PRELIMINARY ISSUE

10. At the commencement of the hearing, the respondent raised a preliminary issue in which it argued that the dispute has to do with salary matters which makes it a dispute of interest. The applicant contended that this is a rights dispute in that he is entitled to be promoted in accordance with the Public Service Regulations of 2016 (PSR) which deals with the upgrading of posts following job evaluations.

11. Having considered the submissions of both parties together with the provisions of the PSR, I found that the PSR has created a right to be upgraded and appointed in such an upgraded post, and that the dispute before me is a rights dispute. I shall elaborate further in this award, on how I arrived at this conclusion.

THE MAIN DISPUTE

SURVEY OF EVIDENCE AND ARGUMENT

12. This section constitutes a brief summary of the relevant evidence and arguments put forward by the parties. It is not intended to be exhaustive, but I have taken all the submissions into consideration in arriving at my conclusions.

Documentary Evidence

13. The applicant handed in a bundle of evidence marked "Bundle A".

14. The respondent also handed in a bundle of evidence marked “Bundle B”.

The Applicant’s Case

15. Mr. Albert Links, the applicant, was sworn in and he testified as the only witness in his case. He testified that he was confirmed permanently in the post of CEO for WESH which consists of two clinics (DRTB and Mental Health). The applicant stated with reference to Health Regulations (GN 35101 dated 02 March 2012) that both clinics (DRTB and Mental Health) under his specialised hospital provides specialised health services. The applicant stated that the new premises which were specifically designed for the Mental Health Clinic and does not qualify to be recognised as a separate hospital because the National Minister of the respondent did not gazette it to be a separate stand-alone hospital in accordance with the Regulations.

16. The applicant stated that the Mental Health Clinic was moved from WESH to the new premises. He stated that this move did not signify the establishment of a new separate hospital since no re-classification of hospital was gazetted by the National Minister of the respondent. The applicant stated that the respondent’s Member of the Executive Council (MEC) also never applied to the National Minister to have the Mental Health Clinic re-classified as a new stand-alone hospital in terms of the Mental Health Care Act 17 of 2002.

17. The applicant testified that he applied to his provincial head for a JE process to be conducted on his post following a circular from the Department of Public Service and Administration (DPSA) 1/8/8/18 dated 20 April 2004 in which the DPSA indicated that the said benchmark job descriptions and JE results of hospital CEO’s did not address the positions of provincial specialised hospitals amongst others. He stated that him being a CEO of a provincial specialised hospital, deemed it fit that his position be evaluated.

18. The applicant stated that he wrote a follow-up letter to his provincial head regarding the need to conduct a JE on his position. He stated that following his request, a JE

was done (1st JE) with its outcome on 03 July 2017. He stated that this 1st JE concluded that his post should remain on salary level 12 since this 1st JE targeted CEO's of district hospitals only, to the exclusion of specialised hospitals.

19. The applicant stated that his supervisor then wrote to the Office of the Premier – Northern Cape (OTP), requesting a 2nd JE to be conducted. The applicant stated that a 2nd JE was eventually conducted with its outcome dated 28 May 2018, which concluded that his post be upgraded to salary level 13. He stated that the MEC also approved the JE.
20. The applicant also referred to a summary of the Public Service Regulations of 2016 (PSR) which states that an executive authority like the MEC should not have a discretion on whether to absorb an employee if the post is upgraded. The applicant also referred to his qualifications and stated that he meets all the requirements for the post of CEO Specialised Hospital. He stated that he engaged his superiors by various means and on different dates after the outcome of the 2nd JE was approved by the MEC but they never cooperated with him.
21. The applicant stated that the dispute was triggered by a phone call and a 'whatsapp' message which he received from his superiors requesting him to nominate someone to act at DRTB and for him to act over the Mental Health clinic. He stated that he disagreed with this move as he was and is the CEO of both clinics and that the respondent should have implemented the second JE. The applicant stated that he wants to be recognised as the CEO of both clinics and to be remunerated respectively from May 2019 on salary level 13 in accordance with regulation 45 of the PSR.
22. The applicant stated that soon after he received the telephone communications about the acting appointments, he also became aware at their year-end function that a new post for the Mental Health clinic was advertised by the respondent. He stated that he and his union obtained an interdict regarding the advertisement of the post, which the respondent subsequently retracted the advertisement following the interdict.

23. In cross-examination, the applicant stood by his version and reiterated that the dispute has to do with promotion in relation to the second JE which required that his post be upgraded to level 13. The applicant referred to the outcome of the second JE in which it was promised that the recommendation would be submitted to the DPSA for consultation and that the prove of the submission was never produced as evidence.

24. In closing arguments, the applicant's representative stated that the respondent, by violating regulation 45 of the PSR, infringed upon the applicant's constitutional right to fair labour practice. He stated that the applicant meets the requirements as outlined in regulation 45 and that the respondent failed to implement the second JE and remunerate the applicant as required by the regulation.

25. The representative submitted that the respondent failed to have the Mental Health Clinic reclassified as a stand-alone hospital which caused the advertisement of a CEO post for it to be set aside by means of an interdict. He stated that the *status quo* of the Specialised Hospital in the Northern Cape still exists, and that the respondent should have upgraded the applicant's post to level 13. The representative requested that the applicant's prayers be granted.

The Respondent's case

26. Mr. Bennet Aaron, the respondent's Job Analyst, was sworn in and he testified as the only witness in the respondent's case. He stated that the second JE had to do with a CEO post for the new Mental Hospital since the JE panel was unclear about the statuses of the two hospitals and therefore sought guidance from the DPSA.

27. The witness stated that the DPSA replied to the submission made by it but that the post of the applicant was excluded in the feedback. He stated that he does not know why the DPSA omitted to provide feedback on the post as per a provincial policy.

28. In cross-examination, the witness stated that he is aware of the PSR which supersedes the provincial policy. He stated that he is not aware of the Constitutional Court precedent on JE's which binds the respondent. The witness stated that he is also not sure whether the new Mental Health Clinic building is classified as promised in its business plan. He confirmed that a CEO cannot be appointed to the Mental Health Clinic if it is not classified as a stand-alone hospital. The witness also stated that he is not aware of any communication which has taken place between the MEC and the Health Minister regarding a classification of the clinic as a stand-alone hospital.
29. The witness testified that the post was advertised without a JE having been conducted for the clinic which in his view was irregular. He stated that the post should not have been advertised because the clinic is not a stand-alone hospital. The witness stated that the Northern Cape has only one stand-alone specialised hospital. He stated that he is also not aware of political developments emanating from the split of the two clinics.
30. In closing arguments, the respondent's representative submitted that the case of the applicant revolves around a matter of interest (salary) and that it is not a rights dispute. He stated that based on case law, promotion disputes involve recruitment and selection processes and that the applicant's dispute fall short of these processes. The representative submitted that a promotion is different from an upgrading and that the applicant's disputes is premature, opportunistic, and miscalculated.
31. The representative stated that the post of the applicant was omitted from the feedback from the DPSA and that the applicant was never in a salary level 13 post, thus making the applicant's claim interest driven. The representative prayed that the applicant's post be dismissed.

ANALYSIS OF EVIDENCE AND ARGUMENT

32. In order to simplify this dispute, it is trite to note that oral and documentary evidence was presented in order to substantiate the divergent views of the parties. Apart from the two issues which I must determine, I will briefly touch on a third issue which appears to be the basis on which this dispute rest. I will for the sake of brevity commence with this third issue, which is the statuses of the two clinics over which the applicant happens to oversee and manage.

The West End Specialised Hospital

33. It is common cause amongst the parties that the Northern Cape province has one specialised hospital based in its Francis Baard Area in Kimberley. This hospital is known as the West End Hospital which consists of two clinics, a DRTB clinic and a Mental Health clinic. The applicant has been the CEO of this hospital with both clinics since 04 June 2014. It is also common cause that this specialised hospital, is the only specialised hospital in the province and that it is listed as such in the Government Gazette dated 2 March 2012 (the Gazette).

34. The parties also agreed as common cause that the list which appears in the Gazette was never listed and that the National Minister of the respondent has never reclassified the hospitals in the province since then. Evidence was led that the respondent decided to split the two clinics by building a new facility in which the Mental Health Clinic was separated from West End and moved to this new facility. The West End hospital therefore only has the DRTB clinic operating on it. It is also common cause that the applicant accompanied this development and that his office was also shifted to this new facility, retaining him as the CEO of both clinics as it used to be.

35. The respondent apparently decided to rather have the two clinics operating as two separate and stand-alone hospitals without following due process such as having its National Minister to reclassify the provinces hospitals as such. This means that

the legal status of the hospitals in the province remains the same as published in the Gazette of 2012.

36. Be that as it may, the dispute has as its genesis the respondent's decision to ask the applicant to act as the CEO of the Mental Health Clinic and to nominate someone to act as the CEO of the DRTB clinic at the old West End facility. The applicant felt aggrieved because he expected the respondent to implement a JE which concluded that his post be upgraded to level 13 and that he be appointed in it. The respondent apparently also placed an advertisement in the media for a CEO post for the Mental Health Clinic only which was subsequently retracted following an interdict.

37. The applicant was then left to continue to manage the two clinics as one specialised hospital and as the CEO thereof. The applicant argues that a new stand-alone hospital was never formed and that only a clinic of his specialised hospital was moved to new premises. The respondent has never challenged the interdict but has chosen to retract the advertisement. This leaves the applicant as the CEO of both clinics.

38. This development brings me to a conclusion that the province is still having one specialised hospital with two clinics although situated on two different premises. The applicant, with his office at the new premises, is the CEO of both clinics under the auspices of one specialised hospital.

The Dispute

Accuracy of the second JE for implementation

39. Evidence was led that two JE's were conducted for this CEO post, one in 2017 and another one in 2018. The 2017 JE concluded that the post of CEO as occupied by the applicant should remain on level 12. However, this 1st JE was aimed at district hospitals only and it excluded specialised hospitals, like the one currently managed by the applicant. It was on this basis that the applicant requested on 23 October 2017 that the 1st JE be reviewed based on the fact that the DRTB clinic was

excluded from the 1st JE and also based on a DPSA circular of 2012 which stated that specialised hospitals must be assessed separately.

40. A 2nd JE was subsequently conducted on WESH on 24 May 2018 which concluded that the post of the applicant be upgraded to level 13. This recommendation was approved on 10 April 2019 by the MEC of the respondent in the Northern Cape Province. The respondent's witness, Mr Aaron, testified that this JE was subject to the approval of the DPSA Minister before it could be implemented. He stated that this procedure was based on a provincial policy, a policy which was unfortunately not presented as evidence at the arbitration hearing.

41. The applicant contended that even if such policy did exist, that 'policy' could not overrule the PSR which happens to be a national policy. He stated that after the MEC's approval was obtained, the JE should have been implemented which could have allowed him to be promoted in the process. I shall now turn to the PSR to determine the legality of the applicant's claim.

42. Regulation 45(1) of the PSR provides the following:

45. Undergraded posts

1. *If the job weight demonstrates that a post is undergraded and the department's budget and the medium-term expenditure framework-*
 - (a) *provides for sufficient funds, an executive authority shall increase the grade of the post to a higher salary level; or*
 - (b) *does not provide for sufficient funds, an executive authority shall redesign the job to equate with the grade of the post prior to regrading.*

43. It is common course that the PSR is a national policy of the respondent which binds it. It is clear from regulation 45(1)(a) that a peremptory duty exists on the MEC as the applicant's executing authority to increase the grade of the post to the higher level (level 13) following the JE which he approved on 10 April 2019. No evidence was placed before me by the respondent that it lacked sufficient funds in its budget to implement the second JE of 2018.

44. Regulation 45(2) of the PSR further states:

2. *If an executive authority increases the grade of a filled post as provided under subregulation (1)(a), he or she shall continue to employ the incumbent in the higher-graded post without advertising the post if the incumbent-*
 - (a) *already performs the duties of the post;*
 - (b) *has received a satisfactory rating in his or her most recent annual moderated and approved performance assessment in the post and the incumbent has not been assessed, his or her performance shall first be assessed to determine whether the performance is satisfactory;*
 - (c) *meets the inherent requirements of the post; and*
 - (d) *has been in the post for at least twelve calendar months.*

45. Uncontested evidence was led by the applicant that he meets the requirements laid down by paragraphs (a) – (d) of regulation 45(2) of the PSR. This brings me to a conclusion that the respondent failed to comply with its duties as laid down by its own national policy which binds it.

46. The applicant in his prayer requested that his upgraded remuneration should be implemented with retrospective effect from 01 May 2019 as per regulation 45(3) of the PSR, which provides the following:

3. *The higher salary applicable to the incumbent employee in the higher-graded post as provided under subregulation (2) shall take effect on the first day of the month following the month of approval by the executive authority in terms of subregulation (1).*

47. I shall deal with this evidence later in the award.

48. The respondent avers that the Public Service Act 103 of 1994 (the PSA) requires that the Minister of the DPSA must grant its approval first before a JE can be implemented. I shall now turn to the PSA to determine the accuracy of the respondent's averment.

49. Sections 3(1)(c) and 3(2) of the Public Service Act 103 of 1994 (the PSA) stipulates as follows:

3 Functions of Minister and executive authorities

(1) The Minister is responsible for establishing norms and standards relating to-

(a) the functions of the public service;

(b) the organisational structures and establishments of departments and other organisational and governance arrangements in the public service;

(c) the conditions of service and other employment practices for employees;

(2) The Minister shall give effect to subsection (1) by making regulations, determinations and directives, and

by performing any other acts provided for in this Act.

50. The sections of the PSA cited and relied upon by the respondent does not spell out the averment made out by it. In fact, subsection 3(2) of the PSA proves and confirms the validity of the PSR, which the applicant is basing his right to a promotion on. The mere fact that the claim of the applicant is found in regulation 45 of the PSR, shows that this cannot be a dispute of interest but rather a dispute of right which is established by the PSR. I am not persuaded by the respondent that this is an interest dispute because of the rights established under regulation 45 of the PSR.

51. Having obtained the approval of the MEC on 10 April 2019, the JE is in my view valid and accurate for implementation within the meaning of Regulation 45 of the PSR.

Is the applicant the CEO of the Specialised Hospital with two clinics on salary level 13?

52. Based on the fact that the applicant is placed at the new premises and that he is managing both clinics as he used to, it therefore becomes obvious that the applicant is the CEO of the Specialised Hospital which consists of the Mental Health Clinic and the DRTB Clinic. The respondent's failure to implement the JE of 10 April 2019 does not render it invalid or null and void. I am stating this in light of the fact that the respondent has never done another JE to replace the current 2nd JE of to have it reviewed and set aside.

53. It is accordingly my declaration in accordance with section 138(9)(c) that the post occupied by the applicant as CEO of a Specialised Hospital is on salary level 13.

Is this dispute having the consequence of a promotion?

54. In the final analysis, this is the main question to be answered. The respondent contended that a promotion dispute is separate from an upgrade dispute, in that an upgrade dispute is more of an interest dispute than a rights dispute.

55. Having found in paragraph 50 above that this is a rights dispute as established in Regulation 45 of the PSR, it therefore is safe to say that the respondent, by refusing to implement the JE of 10 April 2019, deprived the applicant from an opportunity to be promoted. In the same way a reduction in salary levels is tantamount to a demotion, so too does it apply to the other side of the coin that an upgrade to a higher salary level amounts to a promotion.

56. It is accordingly my finding that the respondent has committed an act of unfair labour practice relating to a promotion.

AWARD

62. The respondent, Department of Health- Northern Cape has committed an act of unfair labour practice relating to promotion towards the applicant, Mr. Albert Links.
63. The applicant is declared to be the CEO of the Specialised Hospital in the Northern Cape Province which consists of two clinics, namely the Mental Health Clinic and the DRTB Clinic.
64. The respondent is ordered to adjust the applicant's salary from salary **level 12** to salary **level 13** with retrospective effect from **01 May 2019**.
65. The respondent is further ordered to pay the applicant backpay in the amount of **R173 404.00** by no later than **15 July 2020**.



David Pietersen