



PHSDSBC

PUBLIC HEALTH AND SOCIAL DEVELOPMENT
SECTORAL BARGAINING COUNCIL

ARBITRATION AWARD

Case No: PSHS857-16/17

Commissioner: Anna Maria Fourie

Date of Award: 6 April 2017

In the matter between:

PSA obo Bafana Elias Ngwenya

(Union/Applicant)

and

Department of Health- Free State

(Respondent)

DETAILS OF HEARING AND REPRESENTATION

- [1] The Applicant referred a dispute regarding an alleged unfair labour practice relating to promotion for arbitration in terms of section 191(5)(a)(iv) of the Labour Relations Act, No 66 of 1995, as amended (the LRA). The matter was set down for arbitration at Bophelo House, Bloemfontein, on 29 March 2017 at 10h00.
- [2] The Applicant was represented by Mr Greeff from the Union. The Respondent was represented by Mr Majola, a Labour Relations Officer employed by it. Both parties relied on verbal arguments only.

ISSUE TO BE DECIDED

- [3] I had to determine whether the Respondent committed an unfair labour practice against the Applicant. In the event that I find that there was an unfair labour practice, I must award the appropriate relief.

BACKGROUND

- [4] The Applicant was employed by the Respondent as a Nursing Assistant. On 23 November 2015, he was appointed as a Staff Nurse in the Lejweleputswa District after he applied for the position. However, he struggled ever since he took up the position to get the Respondent to elevate his salary accordingly.
- [5] The dispute was partly resolved when the Applicant received a letter signed by the MEC for Treasury, Mrs Rockman and co-signed by the MEC: Health, Mr Khomphela in which it was indicated that his salary would be adjusted with effect from 1 April 2017. However, since the Applicant performed the duties of a Staff Nurse from November 2015, he sought to the salary adjustment to be implemented from the date on which he assumed duty as a Staff Nurse.
- [6] The parties were in agreement about the facts of the case.

SURVEY OF EVIDENCE AND ARGUMENT

- [7] Since there was no factual dispute, the parties relied on verbal arguments and the submission of some documents only.

APPLICANT'S ARGUMENT

- [8] The Applicant applied for the position of Staff Nurse in November 2015. He was appointed as such and took up the position of Staff Nurse on 23 November 2015. He was not paid accordingly ever since.
- [9] In February 2017, the Applicant received a letter signed by the MEC: Treasury and co-signed by the MEC: Health, in which he was informed that his salary would be adjusted according to his position with effect from 1 April 2017. Although the date was not mentioned in the letter, the Applicant was telephonically advised by the local HR office that the salary adjustment would be implemented on 1 April 2017 and not from 1 January 2017 as initially proposed.

[10] The Respondent could not correct the wrong only partially. The Applicant had been performing the duties of a Staff Nurse since November 2015 and thus he should be paid accordingly from the said date.

[11] The fact that the Respondent was under administration should not prejudice the Applicant. The Respondent advertised the position irrespective and appointed the Applicant. In addition, the Respondent had two financial years to budget for the adjustment to the Applicant's salary. The poor administration and financial miss-management on the part of the Respondent should not prejudice the Applicant. The salary adjustment according to the promotion of the Applicant should be back-dated from the 23rd of November 2015.

[12] The Applicant's salary had to be adjusted from R140 559.00 to R192 565.83 per annum.

RESPONDENT'S ARGUMENT

[13] The Applicant was indeed appointed and assumed duty as per his letter of appointment on 23 November 2015.

[14] It was commonplace that the Respondent was under administration. Thus, approval had to be obtained from the MEC: Treasury. In terms of the letter of approval, no mention was made of retrospective implementation of the salary adjustment.

[15] The Applicant should shortly receive a further letter in terms of which the date of implementation of his salary adjustment would be communicated to him. It would be in the new financial year.

ANALYSIS OF EVIDENCE AND ARGUMENT

[16] It was common cause that the Applicant had been promoted to the position of Staff Nurse with effect from 23 November 2015. The Respondent also did not dispute the Applicant's statement that he was not paid according to his elevated position ever since his promotion.

[17] The issue of the timing of the Applicant's referral had already been dealt with by myself in a jurisdictional ruling issued under the same case number on 30 January 2017.

[18] It was held by the Labour Court in the matter of **Jele v Premier of the Province of KwaZulu-Natal & others (2003) ILJ 1392 (LC)** that in determining whether a dispute related to promotion, one had to compare the employee's current job with the job he applied for with reference to amongst others, the following factors:

- differences in remuneration levels,
- differences in status and level of responsibilities and
- differences of authority and power.

[19] It was not in dispute that the Applicant was elevated in position in terms of status, level of responsibilities and authority. It was also not in dispute that the elevated position is regarded to be at a higher level of remuneration than the level of the Applicant's previous position. The question now remains whether the Respondent acted unfairly in not paying the Applicant the elevated remuneration from his date of appointment in the elevated position. I am of the view that the Respondent's failure to pay the Applicant accordingly indeed constituted a failure to promote. The practical implication of the Respondent's failure is that the Applicant was deprived of the benefit of a higher income, despite the fact that he was, in theory, promoted and expected to, in practice, take up a higher position with more responsibilities and authority. The Applicant in fact assumed such higher responsibility in the more authoritative post on 23 November 2015.

[20] In the matter of **City of Cape Town v SA Municipal Workers Union on behalf of Sylvester and others (2013) 34 ILJ 1156 (LC)**, the Court held that the overall test is one of fairness and required a consideration of amongst others the following factors:

- whether there was insubstantial reasons for the employer's decision not to promote,
- whether the employer's decision not to promote was based on a wrong principle,
- whether the failure to promote was caused by an unacceptable or irrelevant consideration on the part of the employer and
- whether the employer's decision was arbitrary or unfair.

[21] The Respondent submitted that the reason for the failure to pay the Applicant according to his elevated position was that the Respondent was under administration. No explanation was provided as for why the position was advertised and approved in the circumstances. Furthermore, no evidence was presented in support of the submission that there were not enough funds available to pay the Applicant

in line with his promoted position from the date that he occupied the position. The Respondent thus based its defence on a mere submission that funds were not available. No factual proof was submitted to convince me that the Applicant's position could not be funded.

[22] In light of the absence of any factual support for the Respondent's submission that it could not pay the Applicant due to being under administration, I find that the Respondent failed to prove that it did not act unfairly. The relevance of the Respondent being under administration to its failure to pay the Applicant the remuneration he should have received since his appointment in the promoted position was not established by the Respondent. It is simply not sufficient for an employer to forward a certain reason for its conduct, without providing any form of substantiation in support of the advanced reason. The only document submitted to me, was dated 23 January 2017 and it related to the approval of an adjustment to the Applicant's remuneration with effect from the financial year 2016/2017. This document did not address the situation prior to 2016, nor did it explain why the Applicant was not paid according to the position he occupied since his appointment on 23 November 2015.

[23] In light of the aforesaid, it follows that the Respondent did commit an unfair labour practice against the Applicant.

AWARD

[24] The Respondent, **The Department of Health Free State**, did commit an unfair labour practice relating to promotion against the Applicant, **Bafana Elias Ngwenya**. The Respondent must pay the Applicant the difference between the remuneration that was paid to him and the remuneration that he should have earned from 23 November 2015 to 31 March 2017. The said payment should be made by no later than 28 April 2017. It amounts to **R70 482.31** and is calculated as follows:

R192 565.83 per annum – R140 559.00 per annum paid = R52 006.83 per annum short-paid.

24 to 30 November 2015, 8 days: $R52\,006.83 / 365 \text{ days} \times 8 = \underline{R1\,139.87}$

1 December 2015 to 30 November 2016, one year: R52 006.83

1 December 2016 to 31 March 2017, 4 months: $R52\,006.83 / 12 \text{ months} \times 4 = \underline{R17\,335.61}$

Total amount short-paid = **R70 482.31**

[25] I make no order as to costs.

Signature:



Commissioner: Anna Maria Fourie