



**PHSDSBC**

PUBLIC HEALTH AND SOCIAL DEVELOPMENT  
SECTORAL BARGAINING COUNCIL

# ARBITRATION AWARD

Commissioner: KM Moodley

Case No: PSHS883-16/17

Date of Award: 9 June 2017

In the matter between:

PSA obo Moodley S and 8 Others

**Applicant**

and

Department of Health- Kwazulu Natal

**Respondent**

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## DETAILS OF THE HEARING AND REPRESENTATION

1. The Arbitration was held over several sessions and was finally concluded on 18 May 2017 at the VIP Lounge, King Edward Hospital, Durban.
2. The Applicants were represented by PSA official, G Hassan. The Respondent, Department of Health (KZN) was represented by its official, T S Shezi.
3. The proceedings were mechanically recorded and all witnesses testified under oath. I am satisfied that the parties have been correctly cited and that the PHSDSBC has jurisdiction to hear this matter. No Points In Limine were raised by either of the parties.
4. The Applicants tabled bundles of documents, i.e. Bundles A, B, C, D, E, and F. The Respondent tabled a bundle of documents i.e. Bundle G. These bundles of documents were introduced and accepted as evidence by both parties and are deemed to be what they purported to be.
5. As the Applicants comprise of staff from the physiotherapy and pharmacy departments henceforth reference will be made to either Physiotherapists and/or Pharmacists wherever necessary, in order to distinguish between them.
6. No objection was raised to Commissioner Moodley presiding over the Arbitration.

### **ISSUE TO BE DECIDED**

7. The issue to be decided is whether or not the Applicants qualify for payment of their annual pay progression for the financial year 1 April 2013 to 31 March 2014.
8. Applicants sought to be paid the pay progression for the 2013/2014 financial year. The Respondent disputed that the Applicants qualified for payment of the pay progression.

### **COMMON CAUSE ISSUES:**

9. The following are issues of common cause:
  - If the Applicants qualified for the pay progression for the 2013/2014 financial year, the implementation date would have been with effect from 1 July 2014.
  - The deadline for the completion and submission of performance agreements by all employees was 31 May 2013.
  - Employees who did not submit their performance agreements, on/before 31 May 2013, are automatically disqualified from payment of a pay progression.
  - The Physiotherapists submitted their half yearly reviews and annual assessments before the required deadline.
  - The Physiotherapists had signed the performance agreements on/before the deadline of 31 May 2013, but their supervisor submitted the performance agreements to the HR department after 31 May 2013.

### **BACKGROUND TO THE DISPUTE:**

10. Applicants were appointed by the Respondent, at various times, to the posts of Physiotherapists and Pharmacists.

11. The Applicants are comprised of both Physiotherapists and Pharmacists, as follows;

#### **I. Physiotherapists:**

- S Moodley
- S Chetty
- G Naidoo
- P Pillay
- A Salie

#### **II. Pharmacists:**

- A Mamun
- Z Fakrodeen

- M Moodley
- S Singh

12. The Physiotherapists testified that they had completed their performance agreements and had handed it over to their supervisor before 31 May 2013, therefore, they qualified for payment of a pay progression.
13. They contended that it was their supervisor who had not submitted the documents to HR before 31 May 2013, therefore they should not be prejudiced because of this.
14. The Pharmacists testified that they had completed their documents before the deadline date and submitted it to their supervisor timeously.
15. It was their Acting Pharmacy Manager at the time who had retracted their documents as she wanted to review the performance indicators for Pharmacists. The Acting Manager then submitted their amended documents well beyond the deadline date of 31 May 2013.
16. The Applicants contend that as they had signed and completed their documents, and handed it over to their supervisor before the deadline they should not be penalised if their supervisor failed to submit their documents on/before 31 May 2013.
17. The Applicants believed that they qualified for the pay progression for the 2013/2014 financial year.

## **SURVEY OF EVIDENCE AND ARGUMENTS**

### **APPLICANTS**

#### **WITNESS 1: S Moodley - Physiotherapist:**

18. Moodley was employed as a Physiotherapist at the Addington Hospital. She stated that she was also leading evidence on behalf of those Applicants who were employed as physiotherapists.
19. She testified that the performance agreements of the Physiotherapists were signed and submitted to their supervisor, timeously. It was the usual practice at the physiotherapy department to fill in the documents, date it and sign it and then hand it over to their supervisor. The supervisor then signs off on the documents and hands it over to the HR department.
20. She could not say exactly on what date the documents were handed over to her supervisor, neither could she say on which date the documents were handed over by her supervisor to the HR department.
21. She expected the pay progression to be implemented in July 2014 and when this did not happen she contacted Shazi from the HR department to enquire about the non payment. Shazi then told her that the Physiotherapists did not qualify for a pay progression as the performance agreements were submitted late i.e. the documents were received by the HR department on 5 June 2013 as per the date stamp.

22. Moodley believed that the HR department should have advised her in June 2013 that their documents were received late and that they will not qualify for the pay progression. Unfortunately, HR did not do so.
23. On 22 October 2014 she lodged a grievance to which she received no response to date.  
*"It was only the following year that we came to know that our documents were late. Had we not queried it we would not have known about it. HR should have informed us immediately that the documents were late."*
24. She then referred to HRM Circular 27 of 2014: Performance Management and Development System: Payment of pay provision for the assessment period 1/4/2013 to 31/3/2014 which states as follows:
  1. "In terms of the Performance Management and Development System for employees on salary levels 1-12, all staff are required to complete their performance agreements, reviews and annual assessments by the deadline dates given i.e. 31 May for performance agreements, 3 October each year for the September reviews and 31 May each year for annual assessments."
25. Her understanding of this circular is that the performance agreements must be "*completed*" on/before 31 May 2013.
26. She argued that nowhere in the circular does it state that the performance agreement should be submitted to the HR department by 31 May 2013.
27. She believed that as she had completed the documents before the deadline date she had complied with the circular, and therefore the physiotherapists qualified for payment of the pay progression.

**WITNESS 2: A Mamun – Pharmacist:**

28. Mamun was employed as a Pharmacist at the Addington Hospital and she testified on behalf of those Applicants who were Pharmacists.
29. She testified that when she became aware that she would not be getting her pay progression in July 2014 she enquired, and was informed by the HR department that the pharmacists' documents were submitted late and therefore, they did not qualify for the pay progression.
30. She testified that she, together with the other Pharmacists, had completed and signed their documents and handed it over to one Ms Hlongwana, the Acting Pharmacy Manager at the time, well before the deadline date.
31. It was Hlongwana who took the decision at the time, to revise the scope of practice of pharmacists in the pharmacy department after she had received the completed documents from the Pharmacists.
32. She pointed out that a revision of the scope of practice is permissible at any time and that Hlongwana had decided to do this.

33. On 7 June 2013 Hlongwana, in writing, informed one Mafunda the HR manager at the time, that there would be delays in the completion and submission of the documents, due to Hlongwana's revision of the scope of practice.
34. The Pharmacists then signed the revised documents on 23 September 2013.
35. Mamun further testified that at no stage whatsoever did Hlongwana inform them that the delay in revising the scope of practice would ultimately affect their pay progression.
36. She believed that as she had completed and submitted her documents before 31 May 2013 she should not be penalised for signing the revised documents on 23 September 2013.
37. She did not deny that she signed the second performance agreement after the deadline of 31 May 2013, but she argued that it was the responsibility of Smangele to inform the HR department of the delay and to seek permission from HR to submit the revised agreements after the deadline date. Therefore, she should not be penalised by being disqualified for a pay progression.

**WITNESS 3: S Singh - Pharmacist**

38. Singh was employed as a Pharmacist at the Addington Hospital. She testified that on 28 May she was due to perform duties elsewhere so she duly completed the performance agreements and submitted it to her supervisor on the same day, unsigned. She then performed other duties elsewhere. When she returned to her work station on 31 May 2013 she found that her supervisor had already signed her documents on 28 May 2013. She then duly signed the documents on 31 May 2013.
39. She testified that it was only in June 2014 that she came to know about the non payment of her pay progression due to the documents being submitted late.
40. She stated that for many years she was receiving her pay progression without fail. It was only for the 2013/2014 financial year, that she did not receive her pay progression.
41. The submission of the documents to HR was the responsibility of her supervisor. The deadline for the submission of the September review was 30 October 2013. Her supervisor signed the documents on 28 October 2013 but the date stamp from the HR department shows that the documents were only received on 1 December 2013 (1 month later). She believed that she should not be penalised as it was the supervisor who had submitted the documents late to HR.
42. It was also her understanding that in terms of the public service regulations it is a requirement for all employees to complete the necessary documents by the deadline date. Nowhere in the regulations or in the circulars does it state that the documents have to be submitted by the employees to the HR department by the deadline date.
43. Therefore, she was of the view that she qualified for payment of the pay progression.

## **RESPONDENT**

### **WITNESS 1: M Van Rooyen (HR Officer):**

44. Van Rooyen is employed as a HR Officer at the Addington Hospital for +-26 years, of which 5 years she dealt mainly with EPMDS matters.
45. She testified that the Applicants did not qualify for a pay progression as the documents were received by the HR department after the deadline date.
46. She testified that the Respondent has an EPMDS policy which clearly spells out the deadline dates for submission of documents. The failure of any employee to do so on time will result in them being disqualified from receiving a pay progression.
47. The deadline dates for the submission of documents is as follows:
  - Performance Agreements..... 31 May 2013,
  - September Assessments.....30 October 2013
  - Annual Assessments .....31 May 2013,and
  - If an employee qualified for a pay progression the effective date for the payment of pay progression was 1 July 2014.
48. In addition, the Head Office regularly sends out circulars notifying employees of the deadline dates. Van Rooyen also draws up internal circulars and emails it throughout the hospital whereby she specifies the deadline dates. She also does follow up emails, usually 2 weeks before the deadline date and another follow up before the deadline. Regular workshops are also held for staff so that they become aware of the consequences if they do not submit their documents in time.
49. She testified that it was necessary for the Respondent to enforce compliance with the deadline dates because of the large number of staff who regularly fail to comply.
50. As a matter of procedure, when staff submits any documents to the HR department, the HR staff then check the documents for correctness and then date stamp them and then sign a register to acknowledge receipt of the documents.
51. Van Rooyen also pointed out that it is the responsibility of the employees as well as the supervisor to ensure that the documents are completed and submitted on time. She stated that in the case where an employee submits the required documents to the supervisor, on/before the deadline date, but that supervisor fails to submit those documents to the HR department on/before the deadline date, then that employee is automatically disqualified from a pay progression.
52. However, if the employee can prove that they had submitted their documents to the supervisor on time, then a case can be made for payment of the pay progression, as the supervisor in turn could be held liable.
53. In this case, she advised the Applicants to submit detailed motivations to the HR department, which she then forwarded to Head Office for their consideration. Head Office requested evidence from the

employees that they had submitted their documents to their supervisors on/before the deadline. Unfortunately, the Applicants could not prove that they had submitted their documents to their supervisor before the deadline. Therefore they did not qualify for the pay progression.

54. She further testified that in the case of the Pharmacists, the HR department was only informed by way of an email, on 7 June 2013 that the documents were going to be submitted late. By this date the documents were already late as the email was sent after the deadline date by the supervisor. Therefore they were disqualified.
55. However, if the Applicants could furnish proof, that they had submitted the documents timeously to their supervisors, then their supervisors would have been penalised.

### **ANALYSIS OF EVIDENCE AND ARGUMENT**

56. It is not in dispute that the Policy on EPMDS provides that, in order to qualify for a pay progression, employees are required to complete and submit their performance agreements and assessments on/before specified deadline dates.
57. It is also not in dispute, that the failure by an employee to submit any one of the required documents on/before the deadline date will result in disqualification and the employee will not be eligible for a pay progression for the performance cycle in question.
58. Clause 6.1 of the EPMDS provides as follows:
- “All employees must enter into and sign performance agreements before 31 May of each year. Failure to comply with the deadlines means the employee is not eligible/does not qualify for performance bonus or pay progression for the performance cycle in question and may result in the employee and/or his/her supervisor being subjected to disciplinary action.”
59. Clause 9 of the Amendment of the EPMDS Policy dated 4 October 2012 provides as follows:
- 9.” Pay progression is not automatic, but based on actual service in a particular salary level for the respective periods as determined in terms of this policy and based on the achievement of at least a satisfactory performance rating for this period, in line with departmental specific performance management systems.”
60. The Respondents internal circular No 4 dated 6 March 2013, makes mention of the following deadline dates for the submission of EPMDS documents:
- 1) The job description and performance agreement for the period 1 April 2013 to 31 March 2014, is 31 May 2013.
61. HRM circular no 78 of 2013, dated 23 July 2013 states that:
- Only those employees who have completed and submitted annual assessments for the respective HR offices by the deadline 31 May 2013.

62. HRM circular no 94 of 2013 dated 12 September 2013 also provides that:

- All staff are required to complete performance agreements, reviews and annual assessments by the deadlines given.

63. HRM circular 114 of 2013 dated 24 October 2013 also provides that:

- The deadline date for completion and submission of the annual assessment documents was 31 May 2013.

64. From all of the above, including the testimony of all the witnesses, there is no doubt whatsoever that there were clear deadline dates for the completion and submission of performance agreements and assessments, and by which dates all employees had to comply, failing which they will not qualify for a pay progression.

### **Physiotherapists:**

65. The Physiotherapists argued that they had completed the performance agreements and submitted it to their supervisors on/before 31 May 2013. Therefore they believed that they had qualified for the pay progression as they had complied with policy on EPMDS.

66. Once the physiotherapists had completed and signed the documents and handed it to their supervisor the responsibility to submit the completed documents to the HR department then shifted to their supervisor. The Applicants believed that they should not be held liable for the failure of the supervisor to submit the documents timeously.

67. A perusal of the performance agreements of the Physiotherapists revealed the following:

- i. Moodley, Chetty, Naidoo and Pillay all signed their performance agreements on/before 31 May 2013.
- ii. The performance agreements of Moodley, Chetty, Naidoo and Pillay, were all signed by their supervisor on/before 31 May 2013.

68. From this it can be seen that the supervisor was in possession of the performance agreements of the four Physiotherapists as at 31 May 2013. Once the supervisor had taken possession of the performance agreements from the Physiotherapists, and then appended a signature onto the documents, the supervisor automatically assumed full responsibility and accountability for the submission of the completed documents timeously to the HR department.

69. I therefore conclude that there was no failure on the part of the Physiotherapists to complete and submit their performance agreements before the deadline date. They had acted responsibly and had done everything that was reasonably expected of them by completing and submitting the documents to their supervisor on/before the deadline date.

70. The only person to offer a reasonable explanation as to why the signed performance agreements only reached the HR department on 5 June 2013 was the supervisor herself. Unfortunately for the

Respondent, and for some unknown reason, the supervisor was not called in to testify in this regard. I found this to be a material omission on the part of the Respondent.

71. Accordingly, and on a balance of probabilities, I find that the version put forward to me by the Physiotherapists is more probable than the version put forward by the Respondent.
72. I therefore accept, the version of the Applicants, that they had competed, signed and submitted their performance agreements on / before 31 May 2013.
73. The Respondent argued strongly that in terms of the EPMDS policy, together with the relevant circulars arising out of this policy, it was the responsibility of the Applicants to ensure that the documents were submitted to the HR department by the deadline date. However, I could find no evidence to show that the completed documents had to be submitted to the HR Department on / before the deadline date.
74. The EPMDS policy and the circulars that emanated from the policy, talks repeatedly of the requirements of all employees to complete and submit the required documents by the deadline date. No mention is made that the completed and signed documents are to be submitted to the HR department by 31 May 2013.
75. I therefore conclude that by completing, signing and submitting their documents, albeit to their supervisor, by 31 May 2013 the Physiotherapists had complied fully with the EPMDS policy. Once the Physiotherapists had submitted their documents to the supervisor, the supervisor automatically assumed full responsibility for ensuring that the completed documents were forwarded to the HR department timeously. If the documents were submitted late by the supervisor to the HR department, then the supervisor must be held liable.
76. From all of the above it is quite clear that it was the Supervisor, and not the Applicants, who failed to submit the documents to the HR department on or before the deadline dates.
77. To prejudice the Physiotherapists for the shortcoming on the part of the supervisor is in my view, grossly unfair. Van Rooyen, the Respondent's only witness, concurred with this view. When she was asked under cross examination whether it was fair that the Applicants did not get a pay progression , she replied 'I don't think it is fair'
78. I note with concern that the supervisor was not subjected to any disciplinary action for her shortcoming in this matter despite the EPMDS policy calling upon the respondent to do so.
79. Under the circumstances, I find in favour of the Physiotherapists and I propose to rule accordingly.
80. In respect of Pharmacist, A Salie, I find that she and her supervisor both signed the performance agreement on 31 May 2013 but that the supervisor only submitted the documents to the HR department on 17 June 2013.
81. I therefore, propose to rule in her favour on a similar basis to that of the Physiotherapists.

## **Pharmacists:**

82. The Pharmacists together with the previous supervisor of the Pharmacy, A. Sukraj, had completed and signed the performance agreements before the deadline date.
83. It was Acting Pharmacy Manager, Hlongwana who decided on her own accord, not to submit the completed documents as she intended to revise the scope of practice of the Pharmacists. As an Acting Pharmacy Manager, Hlongwana was empowered to make such a decision. Accordingly, the revised scope of practice was drawn up and new performance agreements were completed by the Pharmacists. As a result of this revision, a new set of performance agreements were signed by the Pharmacists and duly submitted on 29 September 2013.
84. Evidence was led that Hlongwana, in a letter dated 7 June, informed the HR department about the revision of the scope of practice and advising them that the performance agreements would be submitted late. i.e. they would not be able to meet the deadline.
85. The Respondent however, argued that the email from Hlongwana was dated 7 June 2013 and was submitted to HR department long after the closing date of 31 May 2013. (7 Days Late). Had Hlongwana informed the HR department that she was revising the scope of practice and that this would result in new performance agreements being drawn up, and being submitted after the deadline, it might have had a different outcome. But as the email was submitted 7 days after the deadline, this automatically disqualified the Pharmacists from receiving a pay progression.
86. The email dated 7 June 2013, from Hlongwana to Mafunda of the HR department, confirms that Hlongwana intended to revise the scope of practice of Pharmacists with the KRA's and that this would result in delays in the finalisation of performance agreements of the Pharmacists.
87. This evidence was also corroborated with the evidence of Mamun. I therefore accept Mamun's version of the reason for the late submission of the performance agreements.
88. The Respondent on the other hand, argued that the email was only received on 7 June 2013 i.e. 7 days after the deadline of 31 May 2013 and therefore this automatically disqualifies the Pharmacists from a pay progression.
89. I disagree with the Respondent's version for the following reasons.
- The decision to revise the scope of practice was made by Hlongwana alone and not the Pharmacists.
  - It was the responsibility of Hlongwana, not the Applicants, to inform the HR department, *before 31 May 2013*, that she intended to revise the scope of practise and that this would entail a late submission of the performance agreements, and to then seek the prior approval of the HR department for the late submission of the documents. Hlongwana clearly failed to do so and this was a serious omission on her part. She simply forwarded

an email to HR on 7 June 2013, i.e. long after the deadline date, merely informing them of the delay. Her email was already too late. (No evidence was led to show that the HR department even responded to Hlongwana's email of 7 June 2013).

- Simply put, to penalise the Pharmacists for Hlongwana's negligence, is grossly unfair.

90. I also note with concern that Hlongwana was not subjected to any disciplinary action for her gross negligence in this matter despite the EPMDS policy calling upon the Respondent to do so.
91. Unfortunately for the Respondent, and for some unknown reason, Hlongwana was not called in to testify in this regard.
92. Accordingly, I find that the action of the Respondent in denying the Pharmacists the pay progression due to no fault of their own, is grossly unfair and I propose to rule accordingly.
93. The Respondent also challenged Pharmacist Singh as to how it was possible that her supervisor signed the documents on 28 October 2013 whereas Singh signed the documents on 31 October 2013.
94. Singh did not deny that she signed the documents on 31 October 2013. She testified that she filled out the documents on 28 October 2013 and then gave it to her supervisor on the same day, as she was posted to do extra duties elsewhere. She only returned back to her post on 31 October 2013 when she duly signed the forms. Singh's version that she was posted elsewhere to perform other duties, was not challenged.
95. A more pertinent question for me was how the supervisor signed the documents on 28 October 2013 when Singh was not present at the time, and without Singh's signature appearing on the documents.
96. Therefore on a balance of probabilities I accept Singh's version to be the more probable version.

### **CONCLUSION:**

97. In the final analysis I find that the version put to me by the Applicants is more probable than the version put to me by the Respondent and therefore I accept the version of the Applicants.
98. I find that it was the Supervisors of the Applicants who were grossly negligent in the performance of their duties in this instance, and which ultimately resulted in the Applicants not receiving a pay progression.
99. Accordingly, I find that the Applicants qualify for payment of the pay progression for the 2013 /2014 financial year.

### **AWARD**

100. I make the following award:

100.1) The Applicants, Moodley S. And 8 Others, qualify for payment of a pay progression for the 2103/2014 financial year.

100.2) The Respondent is directed to process and implement a pay progression for the Applicants for the 2103/2014 financial year.

100.3) The Respondent is also directed to recalculate the financial impact upon the Applicants' salary notches and benefits to date, and to place them in the same situation that they would have been in, had the pay progression been implemented in July 2014.

100.4) The Respondent is further directed to implement Clause 100.2 and Clause 100.3 above by no later than 15 July 2017.

100.5) I make no order as to costs.

Dated at Durban on this the 2<sup>nd</sup> day of June 2017.



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COMMISSIONER: KM MOODLEY