



ARBITRATION AWARD

Case No: **PSHS908-17/18**

Commissioner: **THABE PHALANE**

Date of award: **27 MARCH 2018**

In the matter between:

PSA obo Le Kay, P.C

(Union/ Applicant)

and

Department of Health- Northern Cape

(Respondent)

DETAILS OF THE HEARING REPRESENTATION

1. An arbitration hearing was held on 16 January and 16 March 2018 at Kimberley Hospital Complex, James Exum Building, Kimberley.
2. The Applicant attended and was represented by Mr R Abercrombie, a Union Official from PSA, whilst the Respondent was represented by Mr R Khoali, the Respondent's Official.
3. The parties submitted a common bundle of documents marked Bundle "A", and the Applicant testified and was cross examined and the Respondent then called a witness who also testified and was cross examined.

4. The parties then agreed to submit written arguments on 23 March 2018. The Applicant submitted his arguments on 23 March 2018 and the Respondent also submitted on 23 March 2018.

ISSUE TO BE DECIDED

5. I am required to consider whether the Respondent applied the provisions of the Resolution 1 of 2002, Agreement on Acting Allowances, correctly or not and consequent thereof, to issue the appropriate remedy.

JURISDICTIONAL ISSUE

6. There was no jurisdictional point raised by the parties.

BACKGROUND TO THE ISSUE

7. The Applicant was asked to stand in for a person who was on maternity leave. He performed the duties in the post, which was a higher post than his.
8. The Applicant submits that a deviation can occur on good cause and in this case the Director gave an instruction to his supervisor to find for someone to act in the post of the person who was on maternity leave.
9. The Applicant was therefore instructed by his supervisors to act.
10. The respondent on the other hand submitted that the Applicant was never appointed to act in line with the provisions of the Resolution.
11. He did not have any appointment to act in a vacant and funded post. The person was on maternity leave.
12. The Applicant wanted compensation for the four months he acted, from 06 December 2016 to 29 March 2017.

SURVEY OF EVIDENCE AND ARGUMENTS

Herein follows a summary of the Applicant's submissions and argument.

Mr Phillip Charles Le Kay

13. The Applicant is the Administration Clerk, recruitment and selection, from 01 November 2013.
14. On 06 December 2016 there was only one official in the departmental unit as Ms Hilda Montoedi had gone on maternity leave. His supervisor, Ms Zelda Botha, the Assistant Director-recruitment, was approached by the Director, HR, Ms Pearl Ntsiko, to identify someone to assist in the unit.
15. He is on post level 5, and he was assisting on post level 8. He performed the work satisfactorily and even continued after Ms Montoedi came back but stopped after his request to be paid which was made on 29 March was not accepted.
16. On 01 June a request was made that an official from Social Development was transferred to Health. The HOD commented that she recommends only if there is a vacant and funded post. This official came to Health as a level 8 employee.

Under cross-examination

17. The Applicant submitted that he was approached on 06 December 2016 because he asked Ms Botha to obtain proper authority from the Director.
18. The post establishment Controller is a level 8 position. He was asked because he had previously assisted the unit before.
19. Ms Montoedi left for maternity on 06 December 2016.

20. He conceded that he did not receive the letter to act and did not accept the appointment in writing. He was assisting, not acting.
21. He requested compensation on 08 May 2017. He did not request compensation previously because the period then was shorter than what he acted in this dispute.
22. He asked for compensation because he was told that the compensation was for a vacant and funded post however the Respondent instead made a submission for a lateral transfer.
23. Ms Montoedi was on level 6. She was also compensated for acting in the position in dispute.

Summary of the Respondent's submission and argument

Ms Funeka Pearl Ntsiko

24. The witness is the Director, HRM for the Department of Health.
25. She submitted that she wrote the e-mail to Ms Botha to identify someone who was able to create posts whilst Ms Montoedi was on maternity leave.
26. This person was to assist in the creation of posts because for a person to act, the post must be vacant and funded. Hilda Montoedi's post was not vacant.
27. She does not have the powers to appoint a person but can request the HOD to appoint through a process that recommends an individual to act.
28. She responded to the Applicants request for acting allowance that he must include the additional tasks in the PMDS assessments where they would have been recognised.
29. The post that the Applicant was assisting was a level 6/7 and the post filled by the Social Development post was a level 8.

30. The Applicant assisted on an ad-hoc basis when he was asked to assist whenever there was a request to create a post and was not stationed in the unit permanently.

Under cross-examination

31. She submitted that the Applicant wanted an acting allowance when he was asked to assist.

32. The additional tasks the Applicant was performing were to be recognised and included in performance assessments that he was working the extra mile and should be rewarded.

33. The HOD was not aware that the Applicant was performing these tasks because they deal with strategic issues, not operational.

34. She told Ms Botha when the Applicant was identified that he should be recognised.

35. She conceded however that it was after the Applicant complained.

36. The Applicant assisted for longer than 6 weeks.

37. She is not aware of any complaint about the Applicant's work but she recommended for PMDS to cover his extra duties.

38. Ms Montoedi was paid during her maternity leave

ANALYSIS OF EVIDENCE AND ARGUMENT

39. The Applicant has referred his matter in terms of section 24(2) (a) of the Labour Relations Act 66 of 1995 (the Act), interpretation and application of a collective agreement No 1 of 2002. The parties submitted a common bundle of documents and argued their case at the conclusion which arguments and supporting documents I considered when arriving at this award.
40. The onus lies with the Applicants when there is a dispute about an unfair labour practice to establish that the Respondent committed an unfair labour practice and the Respondent has to then prove that the conduct was fair.
41. The evidence presented here evidence leans in favour of the Respondent for the following reasons. The agreement requires that an appointment must be in writing and accepted by the employee. The Applicant does not have this confirmation in writing and has also admitted that he was assisting, which assistance was also not accepted in writing by the Applicant.
42. It is common cause that the Applicant qualified for appointment to a higher post.
43. The Applicant was therefore not unfairly excluded from acting because all the requirements to appoint were not complied with.
44. Clause 3.1 of the Resolution provides that an employee must be appointed in writing, to a higher post, provided that the post is vacant, he acted for longer than 6 weeks, the appointing authority is a level higher than the acting appointee and that the employee must accept the acting appointment.
45. The Applicant has in these circumstances not demonstrated that the provisions of the Collective agreement have been fulfilled. The post was not vacant as the person who occupied it was on maternity leave.

46. The Applicant has himself agreed that he was assisting the Respondent as he had previously done so but, in this instance, he wanted to be paid because he was assisting for a period longer than 6 weeks.

47. It is for these reasons that I find that the Applicant has not succeeded in proving that the Respondent failed to comply with the provisions of the Collective Agreement 1 of 2002.

48. In the premises the following award is in order:

AWARD

49. The Applicant has failed to show the failure by the Respondent to comply with the provisions of the Collective Agreement 1 of 2002.

50. The referral made by the Applicant is accordingly dismissed.

51. There is no order as to costs.



Thabe Phalane (Panelist)