



# ARBITRATION AWARD

Case No: **PSHS933-18/19**

Commissioner: **Thabe Phalane**

Date of award: **12 February 2019**

In the matter between:

**DENOSA obo Mpho Moses Masilo**

(Union/Applicant)

and

**Department of Health- North West**

(Respondent)

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## **DETAILS OF THE HEARING REPRESENTATION**

1. An arbitration hearing was held on 05 February 2019 at the Boardroom, General Delarey Memorial Hospital, Lichtenburg.
2. The Applicant attended and was represented by Mr. T.T Moeng, the Union Official, whilst the Respondent was represented by Mr. J Dlamini, the Respondent's Official.
3. The Applicant submitted a bundle of documents marked Bundle "A1 to A7" and the Respondent also submitted a bundle of documents marked bundle "B".
4. The Applicant testified and was cross examined and the Respondent called one witness who testified and was cross examined.

5. The parties then submitted closing arguments at the conclusion of the case. I also gave the parties until 12 February to supplement their arguments and at writing of the award the parties had not submitted supplementary arguments and I proceeded with writing the award.

### **ISSUE TO BE DECIDED**

6. I am determined to decide whether the Respondent committed an unfair Labour Practice against the Applicant by failing to approve study leave, thereby refusing to approve the Applicant going for training in the (PHC) Diploma in Clinical Nursing Science. In the event that I find that the Respondent acted unfairly, I am further required to determine the appropriate remedy.

### **JURISDICTIONAL ISSUE**

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

### **BACKGROUND TO THE ISSUE**

8. The Respondent refused to approve study leave for the Applicant. The Applicant submits that the SOP for study leave was applied inconsistently because other employees in the same or similar position as the Applicant were granted study leave.
9. The Respondent on the other hand submitted that the Applicant applied for and was granted study leave for private studies. He indicated that the course would take 4 years.
10. He now wants to apply again to study a 1-year full time PHC course and the Respondent cannot grant him study leave to go on both courses. He applied for study leave in 2017 and again in 2018. It was a personal development study which study leave was granted.

## **SURVEY OF EVIDENCE AND ARGUMENTS**

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

**Mr. Mpho David Masilo**

11. The Applicant submitted that he is working at Bodibe New Clinic in the Ditsobotla Sub-District. He has been appointed as a Professional Nurse since 2013 and has a Diploma in Comprehensive Nursing.
12. He lodged a grievance after his application for study leave was not granted yet some employees working in the same environment and situation like him were approved. He complied with the conditions for in terms of applications for study leave as contained in the SOP of the Ditsobotla Sub-District.
13. The issue of study leave was among the agenda in the meeting of 18 April 2018. He was recommended to study for PHC. There was no indication at the meeting that Midwifery was given preference to other courses.
14. It was instead recommended that each category had to apply. They used the FIFO grounds to recommend employees for training.
15. One employee, Ms. Bodigelo, was granted study leave when she was on Part time studies in Potchefstroom University.
16. One employee, Mr. Mediwane, was studying from 2014 for a 3-year course, but he went for a PHC course in 2016.
17. The letter rejecting his application led to the referral.

### **Under Cross- examination**

18. The Applicant applied for a Management course in 2017. He had started the course before he applied for study leave.

19. He used his own leave when attending in 2017. He was not informed of the part-time study leave. This he was informed by the Training officer.
20. He did not inform the Department about his status with the University regarding his private studies because his grievance was about the PHC, which came when he was studying. He completed in December 2018.
21. On the application form he stated that the years of study were 2017 and 2018. They had to approve a year in advance.
22. He stated that he is entitled to training for development.
23. He did not tell the Training officer that he has not completed his studies. There is no condition to submit after completion.
24. He conceded that recommendation is not an entitlement to training.
25. He accepted that the study leave was declined by a higher level of Management, the Training Committee. They have the powers to decline applications.
26. He conceded that some applications were also not approved, however there were inconsistencies. The policy says that one should not be given part-time study when on study leave. He should have been treated the same.
27. He does not know the criteria they used to approve or decline applications.
28. When he asked for the criteria, he was told that the SOP required that he must have completed the study leave previously granted at least 2 years before he applies again.
29. He has a problem in reapplying because he applied like anyone else, met all the requirements and was recommended for training.

## **Summary of the Respondent's submission and argument**

### **1<sup>st</sup> witness, Mr. Tebogo Marope**

30. The witness started on 01 May 2013 and is currently working in the HRD, as the Senior Training Officer. He facilitates training and co-ordinates study leave. He knows the Applicant as a Professional Nurse.

31. He received a complaint from the Applicants; Operational Manager that the Applicant was absent and he would give reasons that he was studying. He told the Applicant about the complaint and said he can be given special leave for studying, by applying for part-time studies.

32. The Applicant has indicated that his studies would take 4 years, a Bachelor in Nursing.

33. The Applicant was still studying and he did not indicate if he had completed.

34. They encourage applicants to indicate their current studies, and make them aware if they have completed if they apply again.

35. The Applicant's application for study leave in 2017, which indicates that his 4 year course was recommended, made his second application for 2018 to be declined because between 2017 and 2018 he was still studying.

36. Ms. Bodigelo applied in 2017 for 2018, a 1-year course. Her application in 2018 for 2019 was approved when looking at the scarcity of her course, midwifery, and that she had completed her previous course.

37. The committee looks at the whole sub-District Area, not only local. They also looked at the SOP on the objectives and strategies of the whole area. They look at the scarcity of skills and use the FIFO principle to select approvals.

38. He is not aware that Mr. Moduwane was studying in Potchefstroom University, only that he went for PHC and came back.

39. The facilities make their own discussions and make recommendations, but the Training Committee looks at the whole Sub-District, and dates of appointment.
40. The Committee does not approve or disapprove, but makes recommendations to the HOD who makes the approval.
41. In the provincial institutions it is the Sub-District that approves and in the Institutions, like Nursing Colleges, it will be the Principals who approve.
42. The Sub-District Manager prepared the letter to the Applicant. It is true that they relied on the clause of 2 years completion before applying again. The SOP does not operate outside the strategic goals and objectives of the Department.
43. The Committee is a structurally recognised and can make recommendations that bypass the SOP when looking at the performance of the whole Sub-District.
44. The Applicant does not have a right to training and it is a benefit granted after approval.

#### **Under cross examination**

45. The minutes of the Committee do not record the decision to bypass the SOP. They were not corrected.
46. The minutes were for a specific issue, study leave, and the meeting is held once a year.
47. It could be a human error that the issue of scarce skills or bypassing SOP was omitted.
48. There was however no attempt to discriminate against the Applicant.
49. The Applicant is Senior to Ms. Bodigelo.
50. He conceded that Ms. Bodigelo was studying, but submitted that according to the information at their disposal, she had applied in 2016 for studying in 2017.

51. He also conceded that the Supervisor approved study leave for her and that she did not inform the committee that she was still studying, and she was not supposed to have received the leave.
52. He agreed that it is factually inconsistent treatment but he does not have the application for Ms. Bodigelo studying in 2018 so the same clause prohibiting the applicant was not used for Ms. Bodigelo.
53. They do not have facts that she was studying in 2018. They looked at the Sub-District, the categories, the scarce skills and midwifery is a scarce skill.
54. He conceded that if she completed in 2017, she was not eligible.
55. They consider that the Applicant had midwifery as an alternative course, but the information they had however the Applicant was on study leave.
56. The Applicant had a duty to report after completion of studies or they would not know if he completed or not.
57. If they had all the information, they were not going to send Ms. Bodigelo to college.

## **ANALYSIS OF EVIDENCE AND ARGUMENT**

58. The Applicant has referred his matter in terms of section 186 (2) (a) of the Labour Relations Act 66 of 1995 (the Act). The parties submitted bundles of documents and argued their case at the conclusion which arguments and supporting documents I considered when arriving at this award.
59. The onus lies with the Applicant 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.
60. The evidence presented here evidence leans in favour of the Respondent for the following reasons. It is common cause that the Applicant qualified for training. The

Respondents witness admitted that he advised the Applicant to and he was applying for study leave which he qualified for.

61. The Respondents witness also admitted that had they known that the other applicant for study leave was currently studying, that candidate that was selected for training would not have qualified for the same reason given to the Applicant.

62. The remaining question is therefore whether the Respondent acted unfairly or made consideration of facts that were both irrelevant and prejudicial towards the Applicant's application for study leave.

63. The Applicant admitted that he had applied for study leave in 2017. The SOP of the Sub-District is very clear that an employee must complete two years after finishing his studies before applying again.

64. The Respondent acted consistently in this regard but the fact that the other applicant concealed the fact of current studies on the Training Committee does not automatically find a conclusion that the Committee was unfair in rejecting the Applicant's application.

65. Both Applicants for study leave would still not qualify when using the same objective criteria, that of 2 years before applying again.

66. It is for these reasons that I find that the Applicant has not succeeded in proving that the Respondent committed an unfair labour practice by excluding him from training.

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

## AWARD

68. The Applicant has failed to establish the existence of an unfair labour practice, related to the granting of study leave for purposes of training, committed by the Respondent.

69. The dispute referred by the Applicant is accordingly dismissed.

70. There is no order as to costs.



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Thabe Phalane (Panelist)