ARBITRATION AWARD

PHSDSBC
Public Health and Social Development Sectoral Bargaining Council

Commissioner: **James Matshekga**
Case No: **PSHS494-13/14**
Date of award: **20 June 2022**

In the matter between:

MAYIBUYE MTHETHO NDUBE AND 10 OTHERS Applicants

and

DEPARTMENT OF HEALTH- EASTERN CAPE Respondent

DETAILS OF HEARING AND REPRESENTATION

1. The matter was set down for arbitration before me on 1 and 2 June 2022. The hearing took place at the premises of the Department of Health- Eastern Cape (the respondent) in Gqeberha. Written closing arguments were submitted on 9 June 2022 by agreement between the parties.

2. There are eleven (11) applicants in this matter. They are Mayibuye Mthetho Ndube (Ndube), Veliswa Ngxangxeni (Ngxangxeni), Nombonga Njanjana, Xolelwa Mdyesha, Mawethu Bopi, Thembalani Mbangi, Mbuzo Mki, Lyndon Vesinyoue, Mojaki J Mojoro, Mncedisi Fumbeza and Mzwanele Dyani.

3. Only Ndube and Ngxangxeni were in attendance during the proceedings. The applicants were represented by Mr. Chris Unwin, a practicing attorney from the law firm Kaplan Blumberg.

4. The respondent was represented by its employee Mr. Quinton Van der Merwe.

5. The proceedings were digitally recorded.

ISSUE(S) TO BE DECIDED

6. The issue in dispute in this matter is about the application of Public Health and Social Development Sectoral Bargaining Council (PHSDSBC) Resolution 3 of 2009 ("the Resolution") to the applicants.

BACKGROUND TO THE ISSUE IN DISPUTE

7. The matter has a very long legal history. An arbitration award was previously issued by the Council in favour of the respondent but was successfully reviewed by the applicants at the Labour Court and the matter remitted to the Council for an arbitration *de novo*.

8. The respondent advertised various positions for Emergency Care Practitioners at Level 5 salary notch R72 738- R83 172 per annum. The applicants applied and were appointed into the positions on varying dates from 20 August 2010.

9. The applicants subsequently referred a dispute to the Council, through the registered trade union National Education Health and Allied Workers' Union (NEHAWU), alleging that the respondent incorrectly translated them in terms of the Resolution. The applicants contend that they were appointed to a Level 5 non- Occupational Specific Dispensation ("OSD") post and therefore had to be translated to a Grade 2 Emergency Care Officer in accordance with the Resolution. Instead, so the Applicants contend, the respondent incorrectly translated them to a Level 3, Grade 1 Emergency Care Officer. The respondent disputes that the Resolution applies to the applicants.

SURVEY OF EVIDENCE AND ARGUMENT

THE APPLICANTS' CASE

Documentary evidence

10. The applicants submitted bundle of documents that were marked bundle A and B. The documents in the bundle were agreed as being what they purported to be and their contents were also not in dispute (Unless stated otherwise). The individual documents are not listed here for the sake of brevity and due to the number of items involved (I will refer to relevant document where necessary).

Oral evidence

11. The applicants relied on the oral testimony of Ngxangxeni. The testimony of Ngxangxeni is fully captured on the record of proceedings. Therefore, it is not necessary for me to repeat it in this award.

12. The essence of Ngxangxeni's testimony was that in 2010 the applicants applied for the position of Emergency Care Practitioners at Level 5, pursuant to an advertisement that had appeared in the newspaper Herald, containing a closing date of 21 May 2010. The applicants were successful and received appointment letters from the respondent which confirmed that they were to be appointed at Level 5. The applicants commenced employment with the respondent varying dates from 20 August 2010.

13. The Resolution became effective on 1 July 2009 but was not implemented on that date. The applicants were not employees of the respondent on 1 July 2009.

14. When the Department undertook the translation process in order to give effect to the Resolution, it erroneously translated the applicants to Grade 1 instead of Grade 2 Emergency Care Officer, with the result that their salaries were adversely affected as compared to colleagues appointed in December 2009 and what their rates of remuneration ought to have been.

15. Ngxangxeni conceded that the Resolution did not apply to the applicants as they were not employees of the respondent on 1 July 2009.

The applicants' argument

16. The arguments submitted by Mr. Unwin on behalf of the applicants are a matter of record. I shall not repeat them in this award. In essence, Mr. Unwin argued that the applicants were appointed in terms of the old dispensation (i.e. the pre-OSD dispensation) and that was the result of the delay in the implementation of the resolution. Mr. Unwin further argued that the respondent's error consisted of translating the applicants to Emergency Care Officers Grade 1, when they should have been translated to Emergency Care Officers Grade 2. Mr. Unwin further argued that when the respondent captured the Applicants' post levels on its personnel administration system, it captured them as being at Level 3.

THE RESPONDENT'S CASE

17. The respondent placed no evidence before me.

The respondent's argument

18. The closing arguments submitted by Mr. Van der Merwe on behalf of the respondent are a matter of record. I shall also not repeat them in this award. In essence, Mr. Van der Merwe argued that the Resolution is not applicable to the applicants as they are outside its scope (i.e. they were not in the employ of the respondent as at 01 July 2009) which is the effective date of the Resolution.

ANALYSIS OF EVIDENCE AND ARGUMENTS

19. The legal principles relating to interpretation of collective agreements were set out by the Labour Appeal Court in *Western Cape Department of Health v Van Wyk and Others* (2014) 35 *ILJ* 3078 (LAC) at para 22 and succinctly summarized by the Labour Court in *Tabane v Vlieger-Seynhaeve N.O. and Others* (C27/15) [2017] ZALCCT 43 (28 September 2017) at para 15 as follows:

a) When interpreting a collective agreement, the arbitrator is enjoined to bear in mind that a collective agreement is not like an ordinary contract, and he/she is therefore required to consider the aim, purpose and all the terms of the collective agreement;

b) The primary objects of the LRA are better served by an approach which is practical to the interpretation of such agreements, namely to promote the effective, fair and speedy resolution of labour disputes. In addition, it is expected of the arbitrator to adopt an interpretation and application that is fair to the parties.

c) A collective agreement is a written memorandum which is meant to reflect the terms and conditions to which the parties have agreed at the time that they concluded the agreement.

d) The courts and arbitrators must therefore strive to give effect to that intention, and when tasked with an interpretation of an agreement, must give to the words used by the parties their plain, ordinary and popular meaning if there is no ambiguity. This approach must take into account that it is not for the Courts or arbitrators to make a contract for the parties, other than the one they in fact made;

e) The "parole evidence" rule when interpreting collective agreements is generally not permissible when the words of the memorandum are clear.

f) Collective agreements are generally concluded following upon protracted negotiations, and it is expected of the parties to those agreements to remain bound by their provisions. It therefore follows that such agreements cannot be amended unilaterally.

20. In *Hospersa obo Tshambi v Department of Health, KwaZulu-Natal* [2016] 7 BLLR 649 (LAC), the Labour Appeal Court held that a dispute about the application of a collective agreement requires, at minimum, a difference of opinion about whether it can be invoked. That is the issue I am faced with in the current matter.

21. It is common cause that the Resolution came into force on 1 July 2009. Clause 6 of the Resolution reads as follows:

DATE OF IMPLEMENTATION

The agreement will be implemented as follows:

…

6.2. 1 July 2009: The implementation of the revised salary scales, career and salary progression measures as contained in Annexures A1, A2, and A3 of the agreement.

…

22. In terms of clause 4.2 of the Resolution, the details of the OSD for Emergency Care Practitioners are contained in annexure A3.

23. Annexure 3 of the Resolution provides that, in respect of Emergency Care Officer Grade II, that there cannot be "no direct **appointment** to this grade" (my emphasis) and that "Grade can only be reached by Basic Ambulance Assistants Grade 1 who are registered with the HPCSA as BAA and who comply with prescribed grade progression criteria."

24. The Resolution was signed by representatives of NEHAWU and Democratic Nursing Organisation of South Africa (DENOSA) on the one hand and the employer on the other on 7 August 2009.

25. The words used by the parties in the Resolution are very clear and unambiguous. The OSD was implemented with effect from 1 July 2009 (the applicants cannot lead any evidence to the contrary because (a) they were not a party to the agreement but beneficiaries and (2) there is no contrary agreement by the parties that the implementation date will be different from that agreed to in clause 6 of the Resolution). The applicants were not employees of the respondent at that time. The applicants were appointed on varying dates from 20 August 2010. Annexure 3 of the Resolution prohibited direct appointment into the position of Emergency Care Officer Grade II. Therefore, the applicants' argument that they should have been "translated" to Emergency Care Officer Grade II on the date of their appointment is not supported by the clear and unambiguous wording of the Resolution.

26. The position of Emergency Care Practitioner salary levels 4 to 8 ceased to exist on 01 July 2009 when the Resolution took effect. It is common cause that the salary scale that the applicants were appointed into is equivalent to the salary scale of Emergency Care Officer Grade I as provided for in Annexure 3 of the Resolution. The applicant's argument that they should have been "translated" into Emergency Care Officer Grade II on the date of their appointment is baseless.

27. The translation keys that the applicants sought to rely on (page 138 and 139 of bundle A) clearly show that those translation keys deal with "translation of registered Basic Ambulance Assistants on salary levels 4-8 who perform production work to Grades 1 and 2 of the post Emergency Care Officer" on 30 June 2009 and translated with effect from

1 July 2009. The applicants were not on salary levels 4 to 8 and did not perform production work on 30 June 2009. Therefore, the translation keys and the Resolution did not apply to them on the date of their appointment from 20 August 2010.

28. In so far as Mr. Unwin's submission that the respondent incorrectly captured the applicants' post levels on its personnel administration system is concerned, that issue does not fall within the provisions of the Resolution. In other words, the Resolution does not regulate such matters. The Council also does not have jurisdiction to deal with such matters. Those matters are regulated by the provisions of section 38 of the Public Service Act 103 of 1994.

29. I make the following award:

AWARD

30. I make the following award:

31. The Resolution did not apply to the applicants.

32. The applicants' claim of incorrect translation is hereby dismissed.

Commissioner: **Adv James Ngoako Matshekga**
Sector: **Public Health**