



# ARBITRATION AWARD

Case No: **PSHS560-22/23**

Commissioner: **Allan Kayne**

Date of award: **13 February 2023**

In the matter between:

**NEHAWU OBO KEITSENG KEKESI**

Applicant

and

**DEPARTMENT OF HEALTH – NORTHERN CAPE**

Respondent

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## DETAILS OF THE HEARING AND REPRESENTATION

1. The National Education Health and Allied Workers Union (“NEHAWU”) referred an unfair labour practice dispute on behalf of the applicant to the Public Health and Social Development Sectoral Bargaining Council (“the Council” or “the PHSDSBC”) in terms of section 186(2)(a) of the Labour Relations Act, 66 of 1995 (“the LRA”). The arbitration proceedings took place on 26 January 2023 at the respondent’s EMS<sup>1</sup> base in Kimberley. Parties agreed to submit written closing arguments, which they duly did.
2. Velile Booi, a NEHAWU official, represented the applicant, while Paul Koopman appeared for the respondent.
3. Each party submitted a bundle of documents to be used during the arbitration proceedings.

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<sup>1</sup> Emergency Medical Services

4. The proceedings, conducted in English, were digitally recorded, and the record was filed with the Council's administration.
5. This award is issued in terms of section 138(7) of the LRA, which requires a commissioner to provide brief reasons for his outcome.

## **BACKGROUND**

6. The applicant commenced employment with the respondent on 01 May 2001 and held the position of Station Manager Grade 3 in Kathu, earning R365,583 per annum.
7. The respondent appointed her to caretake the position of EMS District Manager for the John Taolo Gaetsewe Health District ("JTG") from 01 December 2021.
8. It was agreed as common cause that the respondent appointed Abraham Reuben Malo to act in the position of EMS Sub-District Manager from 01 August 2022 to 31 January 2023.

## **PRELIMINARY ISSUES**

9. At the commencement of the proceedings, Mr Koopman raised a preliminary issue questioning the jurisdiction of the Council to arbitrate the matter. He submitted that the actual dispute related to a claim by the respondent that she ought to have been paid an acting allowance, which was governed by the PHSDSBC's Resolution 1 of 2002. Accordingly, as a dispute pertaining to this collective agreement, it ought to have been referred in terms of section 24 of the LRA.
10. Mr Booie declined to respond.
11. Having considered the respondent's brief submission, I ruled that it was not for the respondent to categorise the nature of the dispute or direct how the referring party should prosecute its claim. The applicant specifically referred an unfair labour practice dispute and should be permitted to deal with her case based on her particular chosen approach, bearing in mind that the onus of proving her case fell on her shoulders. If, based on the merits of the dispute, the applicant was unable to demonstrate the constituent elements of an unfair labour practice, only then should the matter be dismissed.

## ISSUE/S TO BE DECIDED

12. I must determine whether the respondent subjected the applicant to an unfair labour practice relating to benefits, in particular the payment of an acting allowance, and if so, to what relief she is entitled.
13. The applicant seeks to be paid an acting allowance from 01 December 2021. Alternatively, she seeks that the respondent permanently appoints her to the position of EMS Sub-District Manager for JTG.

## SURVEY OF EVIDENCE AND ARGUMENT

14. The following constitutes a summarised version of the parties' respective, **relevant evidence** and has not been captured verbatim. The fact that I have not captured all of it should not be misconstrued that I have not considered it. My findings are accordingly within the context of all the evidence tendered.

## APPLICANT'S EVIDENCE

### Keitseng Kekesi ("the applicant" or "Ms Kekesi")

15. The applicant testified under oath that the respondent appointed her to caretake the position of EMS District Manager from 01 December 2021 for JTG. While she acknowledged that she accepted the appointment without compensation, despite it being vacant and funded, it came to her attention that the respondent had later appointed Mr Malo to act in another vacant, funded position (EMS Sub-District Manager) reporting to her, in which he received an acting allowance. She believed that this demonstrated inconsistency.
16. The applicant explained that the former incumbent of the EMS District Manager position, Mr Gaetsewe, vacated it on 01 December 2021 when he was transferred to Forensic Pathology Services.
17. According to the witness, caretaking and acting in a position were the same concepts, as they both required the appointed employee to assume the responsibilities and perform the duties of the more senior role. However, the concept of caretaking was not defined in any of the respondent's policies, effectively meaning that she had been acting as EMS District Manager since 01 December 2021. Referring to the PHSDSBC's Resolution 1 of 2002, she submitted that she met the specified requirements, included

thereinto be paid an acting allowance being the difference between the remuneration of the two positions.

18. She testified that her appointment letter, signed by the Head of Department ("HOD"), was dated 30 November 2021 and was not date bound. It was based on her drive, commitment, competence and experience with the respondent's operations, implying that she was more than capable of performing the duties required of her. The correspondence further referred to her accepting overall accountability for the daily operations relating to the position.
19. Under cross-examination, Ms Kekesi reaffirmed that, according to the declaration she was required to sign when accepting the appointment, the respondent recorded the position as being vacant and funded, adding that Mr Gaetsewe was no longer based in the district and had been transferred to Forensic Pathology Services. She disputed that he still occupied the position in which she acted as she physically performed those duties.
20. She refuted the respondent's submission that, to be considered for the position of EMS District or EMS Sub-District Manager, an applicant would need to have an ECT<sup>2</sup> qualification, rather than the ILS<sup>3</sup> qualification that she had. She submitted that it was commonplace within the respondent's EMS facilities to have an ILS-qualified employee appointed as an EMS Sub-District Manager and questioned why that exception could not be made for her.
21. She did not dispute that section 32 of the PSA allowed the HOD to appoint an employee to take on additional duties temporarily. However, the EMS District Manager position had still not been filled, and she continued to perform those duties daily.
22. She reiterated that, while she initially accepted the caretaking appointment without compensation, it was the respondent's conduct when it appointed Mr Malo to act as EMS Sub-District Manager that aggrieved her and made her aware that it was not acting fairly and consistently when it came to acting appointments, especially given that she was performing District Manager duties but was not being remunerated commensurately.

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<sup>2</sup> Emergency Care Technician

<sup>3</sup> Intermediate Life Support

## RESPONDENT'S EVIDENCE

### **Point *in limine***

23. Before dealing with the respondent's case, Mr Koopman argued that Mr Malo might be prejudiced by the outcome of the present matter and requested that he be joined to the proceedings, given that his appointment letter had been presented in evidence, thus necessitating that he be afforded an opportunity to present his version of events.
24. Mr Booij replied that joining Mr Malo would serve no purpose as the dispute related to the respondent's conduct and nothing more. Had the respondent believed that Mr Malo could add value to the proceedings, it ought to have made the necessary arrangements to call him as a witness to support its case.
25. I refused the joinder application, noting that Mr Malo had only been appointed to act as EMS Sub-District Manager from 01 August 2022 to 31 January 2023. His appointment was temporary, and the relief sought in the present matter would not impact him, given that he did not permanently occupy the position.

### **Philip le Kay ("Mr le Kay")**

26. Mr le Kay testified under oath that he was a Human Resources Manager for the respondent. He was aware that the position of EMS District Manager for JTG was still being occupied by Mr Gaetsewe, who was to be accommodated in a position within the respondent's Forensic Pathology Services from 2021. However, that request could not be endorsed.
27. Under cross-examination, he explained that, although Mr Gaetsewe still occupied the JTG District Manager post, he was responsible for duties within the Forensic Pathology Services as its Regional Coordinator. The respondent accepted his request to transfer out of JTG but faced several challenges in appointing him within the new department because of his salary. Accordingly, he was still active in his former position, despite not performing those duties. His transfer was as a result of labour instability in the JTG district. Once he transferred out of the district, the applicant was called upon to perform his duties in a caretaking role.

## ANALYSIS OF EVIDENCE AND ARGUMENT

28. The facts of the present matter, adduced in evidence, can effectively be summarised as follows:
- 28.1. The respondent employed the applicant as an EMS Station Manager.
- 28.2. With the transfer of the former EMS District Manager, Mr Gaetsewe, to a different position within Forensic Pathology Services, and noting the labour instability in the district, the respondent, on 30 November 2021, appointed the applicant to caretake the role of EMS District Manager without additional remuneration, based on her drive, commitment, competence and experience.
- 28.3. She accepted the appointment and overall accountability for the role, which was “until further notice”. Up to the date of the arbitration proceedings, the respondent had not notified Ms Kekesi that her caretaking had ended. According to both the applicant and respondent’s witness, she continues to perform the duties of EMS District Manager.
- 28.4. Despite the non-payment of any additional remuneration while she caretook the District Manager position, on 01 August 2022, the respondent appointed Mr Malo to act in another position, that of EMS Sub-District Manager (JTG). However, in this instance, his appointment letter provided for the payment of a monthly acting allowance from 01 August 2022 to 31 January 2023.
29. Ms Kekesi and Mr le Kay presented opposing versions regarding the status of the EMS District Manager position. While Ms Kekesi submitted that it was vacant and funded as her appointment letter confirmed this to be the case, Mr le Kay testified that Mr Gaetsewe continued to occupy that position, despite not performing its duties, as a result of technical difficulties relating to his remuneration that prevented him from being appointed to his new role in Forensic Pathology Services. However, both parties agreed that the applicant was the one performing the duties of the Kuruman post and, as a result, whether the position was vacant and funded was irrelevant to the determination.
30. The applicant contends that, although she accepted the caretaking appointment without additional compensation, the unfairness arose when the respondent decided to appoint an EMS Sub-District Manager, not to caretake the position but to act in it, for which he would receive an acting allowance. As a result of the inconsistent treatment, albeit for a

different position, she believed that she should have similarly been paid an acting allowance backdated to 30 November 2021.

31. Although the respondent attempted to suggest that caretaking a position and acting in a position were different concepts, this claim was unsupported by any policy, collective agreement or legislation. Using simple dictionary-based definitions, the concepts within the context of employment are largely synonymous in which an individual temporarily fulfills the role of another. The term caretaking appears to have been created by the respondent in an attempt to have employees act in positions without them being compensated for performing the senior role.
32. The suggestions by the respondent that the applicant could not be appointed to act in the position of EMS District Manager, given her lack of an ECT qualification, are entirely without merit since neither the OSD for EMS Workers nor the acting allowance policy sets out such requirements. Even if it were documented in one of the respondent's policies, it would not detract from the fact that they requested and allowed the applicant to act in the senior role for more than a year and, therefore, must have been satisfied with her capabilities.
33. Whilst noting that the applicant accepted the terms and conditions of the caretaking appointment, it is reasonable for her to have become aggrieved by the respondent's conduct when she noted the disparate treatment she was receiving compared to that of Mr Malo from 01 August 2022.
34. Accordingly, having considered the evidence tendered during this arbitration hearing, it is my considered view that the respondent's conduct toward that applicant was unfair from when Mr Malo was appointed in the district. The respondent has effectively enjoyed the fruits of Ms Kekesi's labour whilst not remunerating her appropriately, mainly due to technicalities pertaining to the post being vacated by its former incumbent.
35. Section 185(b) of the LRA provides that "*every employee has the right not to be subjected to an unfair labour practice*", while section 186(2)(b) of the LRA defines an unfair labour practice to include "*any unfair act or omission that arises between an employer and an employee involving unfair conduct by the employer relating to the promotion, demotion, probation (excluding disputes about dismissals for a reason relating to probation) or training of an employee or relating to the provision of benefits to an employee*".

36. In the present matter, the benefit sought by the applicant is the acting allowance she believes should have been paid to her while performing the duties of EMS District Manager. Given that respondent's unfair action can be directly linked to the acting appointment of Mr Malo from 01 August 2022, there is no reason why the applicant should not be similarly compensated from that date in the form of an acting allowance. The alternate relief sought by the applicant to be permanently appointed to the position of EMS Sub-District Manager is not appropriate, given the nature of the dispute referred.
37. Accordingly, based on the difference between the applicant's annual remuneration of R365,583 and that of the position of EMS District Manager, being R560,478, the applicant is entitled to an acting allowance of R16,241.25 per month from 01 August 2022 to the date of this award, amounting to R105,568.13.

$$[(R560,478 - R365,583) \div 12 \times 6\frac{1}{2} \text{ months} = R105,568.13]$$

#### **AWARD**

38. The conduct of the respondent was unfair in the circumstances and constitutes an unfair labour practice in terms of section 186(2)(a) of the LRA.
39. The respondent, the Department of Health – Northern Cape, is ordered to pay the applicant, Keitseng Kekesi, an acting allowance from 01 August 2022 to the date of this award, amounting to R105,568.13 (One Hundred and Five Thousand Five Hundred and Sixty-Eight Rand and Thirteen Cents) by no later than 15 March 2023.



**Allan Kayne**