

ARBITRATION AWARD

Case No: PSHS599-21/22

Commissioner: Kelvin Kayster

Date of award: 30 January 2023

In the matter between:

DENOSA obo Lungisa Lubisi

Applicant

and

Department of Health – Eastern Cape

Respondent

DETAILS OF HEARING AND REPRESENTATION

1. The arbitration hearing in this dispute took place on 15 September 2022 and 17 January 2023 in Humansdorp.
2. The applicant is Ms. Lungisa Lubisi. She was represented by Mr. Nkosekhaya Mona of DENOSA.
3. The respondent is the Department of Health, Eastern Cape, and was represented by Mr. Deon May.
4. The arbitration hearing was finalised. I received the parties' written closing arguments by 24 January 2023.

ISSUE TO BE DECIDED

5. I am called upon to determine whether or not the Respondent correctly interprets clause 3.1.13.2 of PHSDSBC Resolution 3 of 2007.

BACKGROUND

6. The applicant, a registered nurse, obtained a post-graduate diploma in Clinical Nursing Science in 2014. Since then, she had been performing certain duties related to the qualification, as there was an urgent need in the establishment. On 01 December 2017 she was appointed to the post of Clinical Nurse Practitioner Grade 1 (primary health care), and was placed on the first salary notch. She contends that by virtue of her experience of more than three years since obtaining the qualification, she should have been placed on the second salary notch. She accordingly argued that the respondent's interpretation of clause 3.1.13.2 of Resolution 3 of 2007 was incorrect, as it did not recognize her work experience in the position. She seeks an award in terms whereof she should be placed on the salary notch with backdated effect and to be remunerated retrospectively.

EVIDENCE

7. The applicant, Ms. Lungisa Lubisi-Mbali testified that the Subdistrict Manager requested her in 2013 to consider studying a post-graduate diploma in Clinical Nursing Science as there was an urgent need in the district for the service. She completed the diploma in 2013. Upon her return, she was required by the subdistrict manager to immediately perform those duties as from 2014, even though she was not formally appointed to the post. The post was eventually advertised in 2016 and she was formally appointed on the first notch of the post on 01 December 2017.
8. In January 2020 she realised that because of her recognizable experience after obtaining her diploma, she should have been placed on the second notch of the post level. The Subdistrict Manager Mr. Ntuli confirmed it in writing. He drafted a memo to seek approval for the payment of her arrear salaries. The District Manager approved it on 07 October 2020. It was however never implemented.
9. In cross-examination, the applicant conceded that she was not appointed in the post in 2014, neither was she appointed to act in the post. The PERSAL system shows that she was serving in her previous position until her appointment in December 2017. She however argued that performing the duties since 2014 should be regarded as recognizable service. She further insisted that the District Manager's approval is sufficient, and the situation did not require approval from the HOD to be placed and remunerated on the second notch.
10. For the respondent, Mr. May elected not to call any witnesses. He explained that he agrees with the factual background offered by the applicant. In closing arguments he conceded that the applicant had since 2014 been performing duties of Clinical Nurse Speciality related to her latest qualification, but argued that she was never formally appointed/translated and therefore did not occupy such a position. The duties she

performed are therefore not regarded as experience gained in that speciality nursing field. Although the subdistrict that she works in recommended that she be placed on the second salary notch in 2017, the HR Director and HOD did not approve such placement, because she was not formally translated or appointed to such a position. Although she performed the duties unofficially, she was not appointed in the speciality field, neither was she appointed to act in such a position.

ANALYSIS

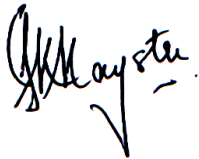
11. The Applicant contends that upon her promotion on 01 December 2017, she should have been placed on the second notch of her salary scale, because she had been performing speciality duties attached to her postgraduate diploma for more than 3 years. She referred to clause 3.1.13.2 of PHSDSBC Resolution 3 of 2007, which reads as follows:
Professional Nurses on production grades and who are promoted to a higher post, shall gain at least one notch on such promotion.
12. The applicant also relied on Annexure A OSD 001, which states that Clinical Nurse Practitioners Grade 1 with 3 years or more, but less than 5 years *appropriate/recognizable experience* in Primary Health Care after obtaining the 1-year post basic qualification, shall be placed on the second notch of the salary scale.
13. The respondent conceded that the applicant had been helping out with speciality duties since obtaining her postgraduate diploma, but argued that she was never formally appointed or translated to such a post, and can therefore not claim to have appropriate/recognizable experience. He further argued that she was also not officially appointed to act in a speciality position. The respondent submitted the applicant's PERSAL record to show that she was appointed to perform the duties of a professional nurse (general nursing) and not as a clinical nurse practitioner.
14. To fall within the scope of section 24(4) of the LRA, a dispute must concern the interpretation or application of the agreement, not the fairness of its application. This was confirmed in *PSA obo Liebenberg v Department of Defence* (2013) 34 ILJ 1769 (LC) and also in *Department of the Premier, Western Cape v Plaatjies NO* [2013] 7 BLLR 668 (LC). Therefore, even though the applicant performed the duties attached to the post of Clinical Nurse Practitioner, my duty as arbitrator is to interpret the relevant clauses of the collective agreement that the applicant relies on.
15. The clause 3.1.13.2 that the applicant relies on specifically states that "*Professional Nurses on production grades and who are promoted to a higher post, shall gain at least one notch on such promotion.*" It implies

that the placement at the higher notch only takes effect once the employee is promoted to the relevant post. It is common cause that the promotion only happened in December 2017.

16. Furthermore, in order to have appropriate/recognizable experience, one has to be able to verify it. The applicant did not refer me to any documentary proof that she has gained appropriate/recognizable experience in Primary Health Care. The respondent conceded that she has helped out because of the urgent need, but correctly argued that there is no verifiable proof of such experience. As such, I cannot fault the respondent for placing the applicant on the first notch of her salary scale when she was promoted in December 2017.

AWARD

17. The Respondent correctly interpreted Clause 3.1.12.3.2 of PHSDSBC Resolution 3 of 2007.
18. The Applicant is not entitled to be placed on the second notch of her salary scale.



Kelvin Kayster