



ARBITRATION AWARD

Commissioner: **Lindiwe Makhanya**

Case No: **PSHS781-21/22**

Date of award: **14 July 2022**

In the matter between:

NEHAWU obo SYDNEY BONGANI NKOSI

Applicant

and

DEPARTMENT OF HEALTH- KWAZULU NATAL

Respondent

DETAILS OF HEARING AND REPRESENTATION

1. This matter was scheduled for arbitration before me on 18 March 2022, 18 May 2022, and 30 June 2022 when it was finalised at the Respondent's premises in Newcastle. It was held under the auspices of the Public Health and Social Development Sectoral Bargaining Council ("the council") PHSDSBC in terms of section 191(5) (a) of the Labour Relations Act No.66 of 1995, as amended ("the Act").
2. The Applicant, Dr. Sydney Bongani Nkosi, was represented by Mr. S.J. Makhoba, a union representative from NEHAWU, and the Respondent, Department of Health -Kwazulu Natal, was represented by Ms. S.T. Mlotshwa, from Labour Relations department. The proceedings were digitally recorded.

PRELIMINARY ISSUES, JURISDICTION, AND ISSUES TO BE DECIDED

3. No jurisdictional issues were raised.
4. The issue to be decided is whether or not the Respondent committed an unfair labour practice related to benefits towards the Applicant. Should I find in the affirmative, I am required to determine the appropriate relief and provide brief reasons.

BACKGROUND TO THE DISPUTE

5. The Respondent is the Department of Health which is one of the government's executive departments assigned to health matters and is located in KwaZulu Natal.
6. The Applicant is currently employed by the Respondent as a Medical Manager / CEO. He commenced his employment with the Respondent in 2004.
7. The Applicant referred to his dispute as one relating to benefits, he lodged an unfair labour practice dispute with the council, claiming that the Respondent had acted unfairly by not paying his grade progression from March 2019 till current.
8. The Applicant sought retrospective payment of pay progression in the event that the award is made in his favour.

SURVEY OF EVIDENCE AND ARGUMENT

9. The Respondent presented a bundle of documents that were marked "B" and the Applicant presented a bundle of documents that were marked "A". Both parties submitted written closing arguments on 7 July 2022.

THE APPLICANT'S CASE

10. The Applicant testified that he was employed by the Respondent on 1 January 2004 as a Medical Intern. He was thereafter employed in various positions, in 2008 he was appointed as a chief medical officer. In 2009 he was translated through occupation-specific dispensation (OSD) to a clinical manager position which he occupied until April 2012 when he was appointed to a medical manager position but the job title of clinical manager did not change on the persal system and his payslip. Also, his remuneration remained the same as that of the clinical manager. When he enquired from the hr

department as to why his job title had not changed, he was informed that it was due to no change in salary. His job title was however changed to medical manager in September 2014.

11. In November 2014 he was appointed chief executive officer (CEO) in charge of Niemeyer Hospital but only his job title changed, his remuneration remained the same as that of a clinical manager. On 1 April 2017, he was grade progressed to Manager Medical service grade 2 but during November 2018 he was informed that an audit was conducted which revealed that he was incorrectly grade progressed as a result he had been overpaid and owed the Respondent money, his pay progression was stopped from March 2019.
12. According to the audit findings, he was supposed to be grade progressed on 1 September 2022 but the letter he had received from the hr department indicates that he was to be grade progressed on 1 April 2020 which he found very confusing.
13. Under cross-examination, he did not dispute that in 2012 he had applied for the medical manager position and was aware that there would be no change in salary, he had accepted the offer because the position was more of a managerial post. The Applicant said that since there was no change in the salary for the medical manager position, he was of the view that the clinical manager service was continuous. In 2017 when he was grade progressed, he had reached 8 years of actual service as a clinical manager which ran from 2009 to 2016 plus 1-year service as a chief medical officer as per HRM 106 of 2010 on page 30, "Bundle A".
14. During re-examination, he maintained that the hr department relied on the circular on page 30, "Bundle A" to grade progress him as he qualified to be grade progressed. According to him, he did not owe the Respondent any payment for grade progression but he is owed grade progression payment which was stopped by the Respondent in March 2019.
15. Mr. Ndumiso Ayanda Mange testified that he is employed as an assistant director of hr at Niemeyer Hospital. He referred to page 2, "Bundle A" annexure C where the calculations for the Applicant's grade progression are found. In terms of HRM circular 106 of 2010, the qualifying date for the Applicant's grade progression was 01 August 2016. He referred to page 30, "Bundle A" where the criteria adopted are found. He explained that they looked at the chief medical officer experience, clinical manager experience, and 8 years of service. He further explained that the Applicant was appointed chief medical officer from 2008 to 2009 which makes it one year of experience, from 2009 to 2016 he had 7 years of experience as a clinical manager which means in 2016, he qualified for a grade progression medical manager grade 2. The form was sent to head office for grade progression approval.
16. According to him the circular HRM 76 of 2012 was confusing to them as hr personnel because the information contained there was not similar to the one in the HRM circular 106 of 2010 which was

used to grade progress the Applicant. The Applicant was owed payment for pay progression that was stopped in March 2019 for an amount of R 75 589.00.

17. Under cross-examination when he was asked about HRM circular 76 of 2012, he did not provide a specific answer except stating that the hr department had used HRM circular 106 of 2010 to do the calculations for the grade progression of the Applicant in 2017. He conceded that clinical manager and medical manager posts were different.
18. During re-examination, he said if an employee changes title or level it is a promotion and according to the persal system it can be recorded as relocation.

THE RESPONDENT'S CASE

19. Ms. Ntombizombuso Sithembile Ngcobo testifies that she was employed as a senior hr practitioner level 8, labour relations. She pointed to a document on page 3, "Bundle A" where she approved a document with the calculations for the Applicant's grade progression to Manager Medical service grade 2. She was not aware that she had no authority to approve the document but had been requested by Mr. Mtshali, the then hr manager. At the time of completing the grade progression document, the Applicant occupied the position of manager medical service. She said she did not check the circular when she approved the grade progression calculation form. The document was sent to the head office for upgrading of the post.
20. Under cross-examination, she said the institution had no power of upgrading the post on its own, the head office, and staff establishment section had to approve it once it has been completed by the hr department.
21. During re-examination, she maintained that she signed after being instructed by Mtshali but did not know that she was not supposed to approve the document, however head office had the powers to upgrade the post.
22. Mr. Bhekisisa Cyprian Mbatha testified that he is employed as a deputy director in the recruitment section. He said the clinical manager supervises medical officers whereas the medical manager is overall in charge of the medical component. He referred to page 12, "Bundle A" where an offer of employment for the position of a medical manager is signed by the Applicant. On page 7, "Bundle A" the Applicant's job title on the persal system needed to be changed by the hr department with effect from April 2012 to be that of a medical manager.
23. He said the Applicant was in charge of the hospital in line with the Government gazette issued in 2011 where hospitals were reclassified depending on the number of beds. Since Niemeyer was a

small hospital the Applicant as a medical manager was also appointed to perform the duties of the CEO.

24. Under cross-examination, he reiterated that the Applicant was not forced to accept the position of the CEO/ medical manager, if he was not in agreement with the appointment, he was at liberty to refuse the offer.
25. He conceded that it was the responsibility of the hr department to effect changes such as job titles on the persal system, in this instance, the Applicant ought to have his job title changed to the medical manager after he was appointed in 2012.
26. During re-examination, he said although there was an omission on the side of the Respondent the Applicant's job title was changed in 2014 to be that of medical manager.
27. Ms. Renitha Pillay testified that she was employed as an assistant director in the EPMDS section since 2001. She said pay progression was a reward attached to the performance of an employee which ran from April until March of the following year. The employee needed to be fully compliant in terms of meeting the requirements and submitting relevant documents to qualify for pay progression. Pay progression is effected on 1 July each year. The delegations are with the hr managers at the institution to identify all qualifying employees, a spreadsheet is compiled with all the information and is sent to the head office. Her office did not verify what had been sent to them by the hr department as they did not have access to performance management and development system (PMDS) files because they were kept at the institutions. The hr department had to ensure that all qualifying employees were included in the spreadsheet, thereafter the affected institutions and hospitals would be advised to process the payments.
28. She pointed to page 2, "Bundle A" where there is a calculation sheet for grade progression which means that an employee may be moved from one level up after a certain number of years. She explained that according to the calculations for the Applicant's grade progression, there was a discrepancy because the column "present rank" is written manager: medical service but in paragraph 8 under qualifying period it refers to the clinical manager; these were two different job titles. She said two different categories cannot be used for grade progression. According to her, a medical manager/ CEO is responsible for the overall management and clinical staff whereas the clinical manager is responsible for clinical personnel.
29. The Applicant was wrongly grade progressed in 2017 because he was appointed a medical manager in April 2012 so in paragraph 8 on the calculation spreadsheet it was supposed to be 8 years of actual service as a medical manager, not the clinical manager. He would have qualified to be grade progressed to medical manager grade 2 on 1 April 2020 not in 2017.

30. She referred to page 30, "Bundle A" and stated that before the OSD, the position of the chief medical officer was included in the experience of grade progression for the clinical manager but a new HRM circular 76 of 2012 was introduced, she referred to page 11, "Bundle B" where the circular is found; It states that 8 years of actual service as manager: medical services grade 1 or manager dental services grade 1 is required for grade progression medical manager grade 2. At the time when the grade progression of the Applicant was processed, he was a manager medical which means the progression measures for medical services were required to be used. HRM circular 106 of 2010 was not supposed to be used for the Applicant's grade progression.
31. When PMDS audits were conducted it was discovered that the Applicant was incorrectly grade progressed on 1 April 2017 instead of 1 April 2020 as a result there was an overpayment. She further said that there were circulars in place which guided the hr department in terms of calculations for grade progression.
32. Under cross-examination, she reiterated that the Applicant was supposed to be grade progressed in April 2020 in terms of the HRM circular 76 of 2012 which was the applicable circular at that time. She disputed that the workshops were not conducted for circular HRM circular 76 of 2012 because all circulars were placed on the intranet and training was given to hr personnel, all other institutions were using this particular circular for grade progression.
33. When she was asked about spreadsheet calculation forms as to who had compiled them, she said it was the responsibility of the hr department of the institution which was supposed to check if everything was in order. The Head office's role was solely to upgrade the post not to check what was being done at the institution.
34. She maintained that in terms of HRM circular 76 of 2012, medical manager experience was considered for grade progression not clinical manager experience, this means that since the Applicant was appointed medical manager in April 2012, he would have qualified for grade progression in April 2020 but no one was paid grade progression that year due to Covid19 budget constraint, the Applicant would only qualify to be paid for 2021 which was payable in 2022. According to her, the hr department was required to change the Applicant's job title on the system with effect from 1 April 2012 to be that of medical manager.
35. When asked the reason why there was contradicting information in the letter written by her department and the audit report with regards to the Applicant's grade progression qualifying dates, she said when the audit report was compiled in November 2018, they did not have a PMDS file but after obtaining it the information was corrected as seen on the letter dated 28 September 2021, page 5, "Bundle A".

36. During re-examination, she maintained that the Applicant was overpaid therefore he would not be able to be paid as he owed the Respondent for the payment made from 01 April 2017 until March 2019.
37. She also reiterated that hr personnel had access to the intranet and they had a duty to check it to familiarise themselves with any changes. She was adamant that the workshops were conducted per district for all HRM Circulars.

ANALYSIS OF EVIDENCE AND ARGUMENT

38. I have taken note of section 186(2)(a) which reads “Unfair labour practice” means any unfair act or omission that arises between an employer and an employee involving – (a) unfair conduct by the employer relating to the promotion, demotion, probation, or training of an employee or relating to the provision of benefits to an employee.” I read this section together with section 185 (b) of the LRA which states as follows; “Every employee has the right not to be: (b) subjected to unfair labour practice.
39. The applicant bears the onus to prove that he was subjected to an unfair labour practice related to benefits.
40. It was common cause that the Applicant was grade progressed to Medical Manager grade two in 2017. It was also common cause that the Respondent stopped paying the Applicant grade progression in March 2019.
41. It was disputed by the Respondent that the Applicant qualified to be paid grade progression from April 2017 until March 2019, on the other hand, the Applicant claimed that he qualified to be grade progressed in 2017 and therefore was owed grade progression payment from March 2019.
42. The Applicant claimed that when he was grade progressed in 2017, he had already reached 8 years of actual service as a clinical manager, however, this was disputed by the Respondent as it stated that in April 2012 the Applicant had accepted an offer of medical manager which was a different position from that of a clinical manager. The Applicant’s bone of contention was that when he accepted this offer, his salary remained the same, and also on the persal system his job title of clinical manager had not changed. The evidence of Pillay and Mbatha which indicated that clinical manager and medical manager positions were two different posts was not challenged by the Applicant. Also, the Applicant conceded that he took the offer of a medical manager position because it was a managerial post and was aware that his salary would not be changed. I accept that the Applicant was no longer a clinical manager in 2017 when he was grade progressed. The Applicant could not have been of the view that he still occupied a position of clinical manager when he knew that he had

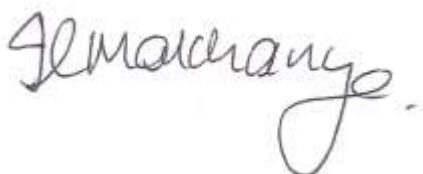
accepted a position of medical manager in 2012. Moreover, the Applicant testified that he consulted with the hr department on numerous occasions regarding the change of his job title which was eventually effected in September 2014. So even if the Applicant is correct in saying he was correctly grade progressed in 2017 he would still have been incorrectly grade progressed because his job title changed on the system in 2014 to be that of medical manager.

43. The Respondent argued that the Applicant assumed new responsibilities in 2012 when he accepted an offer of a medical manager position which means he ought to have completed his 8 years of actual service on the post in April 2020. The evidence of Pillay revealed that the grade progression calculation form had discrepancies because it states that the current rank is medical manager, the grade progression rank is medical manager grade 2 but the qualifying criteria is that of a clinical manager experience, this was not challenged by the Applicant. I accept that the clinical manager and medical manager posts are two different positions, more so because even the HRM 106 of 2010 which the Applicant relied on refers to the clinical manager, not the medical manager. The Applicant cannot expect to have been grade progressed in 2017 for a clinical manager position when he was not holding that position at that time.
44. With regards to the HRM circular 106 of 2010, the Applicant and his witness argued that this was the circular that was used to grade progress him in 2017, but what the Applicant did not take into consideration is that he was no longer a clinical manager after April 2012. Also, the Respondent disputed that circular 106 of 2010 ought to have been used in 2017 as it was no longer valid. Although Mange denied any knowledge of HRM circular 76 of 2012, Pillay's evidence suggests that workshops had been conducted per district concerning the 2012 circular and that it was the responsibility of the hr department to update itself with the new circulars which were uploaded on the intranet. It is clear that the then hr manager did not familiarise himself or herself with such circulars this is so because Ngcobo testified that she did not refer to any circular when she approved the grade progression of the Applicant. It cannot be correct that an old circular could be used for grade progression when there is a new circular. I accept that HRM circular 76 of 2012 was the correct circular which ought to have been used to grade progress 2 the Applicant
45. Although the Applicant had accepted the terms and conditions of his appointment as a medical manager in 2012 in that his salary would remain the same as that of a clinical manager it would appear that the hr department made some errors when it did not change his job title on the system until 2014 however, Pillay's stated that it would not affect the Applicant's grade progression under the category of medical manager which ought to have been effected in April 2020 as he would have reached 8 years of actual service as medical manager.

46. I accept that the Applicant qualified to be grade progressed as a medical manager grade two in April 2020, but none of the Respondent's employees were grade progressed during this period. It would appear that grade progression would be applicable in April 2021 which would be payable in July 2022 if the Applicant is eligible however, I am unable to make the determination in this regard as it would appear that the process of grade progression for this period had not been finalised when this arbitration was concluded.
47. I accept the Respondent's version and find that the Applicant was wrongly grade progressed in 2017 for the medical manager grade two as he did not meet the requirements in terms of HRM circular 76 of 2012. Clearly, there was an overpayment as stated by the Respondent from April 2017 until March 2019.
48. It is trite that an employee who complains that the employer's decision or conduct constitutes an unfair labour practice must first establish the existence of such decision or conduct. If that decision or conduct is not established, that is the end of the matter. In the circumstances, it is my finding that the Applicant has failed to establish the existence of an unfair labour practice case within the context of section 186(2)(a) of the LRA.
49. I, therefore, make the following award:

AWARD

50. The Applicant has failed to prove unfair labour practice conduct.
51. The Applicant is not entitled to any relief.



LINDIWE MAKHANYA