



ARBITRATION AWARD

Commissioner: **Bheki Khumalo**

Case No: **PSHS881-22/23**

Date of award: **22 May 2023**

In the matter between:

DENOSA OBO SLINDILE KHUMALO & 34 OTHERS

Applicant

and

DEPARTMENT OF HEALTH- KWAZULU NATAL

Respondent

DETAILS OF THE HEARING AND REPRESENTATION

1. The Applicants referred a dispute in terms of Section 24 of the Labour Relations Act (LRA) concerning the interpretation and application of a collective agreement. The proceedings were held at Ladysmith Hospital on 19 May 2023. A union official Ms Sindiswa Ngcobo represented the Applicants. While Mr Mzovukile Lembethe, the Labour Relations Officer appeared for the Respondent.
2. The Respondent objected to the Council's jurisdiction which point was opposed by the Applicants. I ruled against the Respondent and confirmed that Council has jurisdiction. Thereafter, Mr Lembethe preferred to abstain from the proceedings, but remained in attendance.

ISSUE TO BE DECIDED

3. I am required to interpret and apply the PSCBC Resolution 4 of 2015 (“the Resolution”). I have to determine whether the Applicants are entitled to the Standard Danger Allowance for nursing psychiatric patients as provided for in the Resolution.

BACKGROUND

4. The Applicants are 52 nurses whose names are stated in pages 1 and 2 of the Applicants’ bundle. They work at the hybrid wards 5 and 7 in Ladysmith Hospital. In these wards, patients are admitted for a 72 hours’ assessment and confirmation of diagnosis. Psychiatric patients are transferred to ward E3 on confirmation after the assessment period. Ward E3 is a dedicated psychiatric ward and the nurses who work there are paid an additional danger allowance provided for in the Resolution.
5. However, ward E3 has a limited 10 beds occupancy. The shortage of beds at E3 causes both wards 5 and 7 to retain a number of confirmed psychiatric patients beyond the 72 hours assessment period. In average 12 psychiatric patients monthly are retained by ward 7 beyond the 72 hours assessment period. But the nurses at wards 5 and 7 are not paid the danger allowance, probably because their wards are not classified as dedicated psychiatric wards.

JURISDICTIONAL CHALLENGE

6. The Respondent objected to the Council’s jurisdiction on the ground that a dispute concerning its interpretation or application must be referred to the Public Service Co-ordinating Bargaining Council (the PSCBC), which concluded the Resolution. In terms of clause 5 of the Resolution, this Council is deprived of a jurisdiction to arbitrate this dispute.
7. The Applicants opposed the jurisdictional point raised by the Respondent. They contended that the PSCBC is a collective bargaining body, it does not deal with sectoral disputes. Further, the Applicants argued that this case was dully conciliated by this Council and the Respondent freely participated without raising any objection to the Council’s jurisdiction.

8. This Council has dealt with many other disputes of this nature without any challenge or doubting of its jurisdiction. The Applicants referred to an arbitration award in case number PSHS988-18/19 issued on 29 November 2019, dealing with a similar issue.
9. I ruled and dismissed the Respondent's point in-limine. This Council derives its jurisdiction in terms of s27 of the LRA. It is a sectoral Bargaining Council designated as such by the PSCBC in terms of s37 of the LRA. While the PSCBC is, in terms of s35 of the LRA, the co-ordinating Bargaining Council for the public sector as a whole, its jurisdiction does not oust that of the sectoral Bargaining Councils. Therefore, I find that clause 5 of the Resolution concerning the dispute resolution refers to this Council and not necessarily the PSCBC.

SURVEY OF EVIDENCE AND ARGUMENT

Applicant's case

10. The version of the Applicants which is summarised below, was conveyed by one witness Mr Mkhumbuleni Sibiyi and their representative. The Respondent dedicated a ten beds ward E3 as a psychiatric ward. Ward E3 admits and treats only confirmed psychiatric patients who have been assessed and underwent a 72 hours observation.
11. In wards 5 (females) and 7 (males) which are hybrid wards is where the screening and 72 hours observation are conducted. The shortage of beds at E3 causes both wards 5 and 7 to retain a substantial number of confirmed psychiatric patients beyond the 72 hours assessment.
12. The average numbers of the psychiatric patients who are retained by ward 7 is 12 monthly. While both wards are hybrid wards, they are forced to nurse psychiatric patients because of the shortage of beds in E3.
13. In ward 7 which has 48 beds, about 90% of the patients the majority of whom are psychiatric, remain admitted beyond the 72 hours observation period. But the nurses (Applicants) at these wards are not paid the danger allowance for nursing the psychiatric patients and their wards are not dedicated psychiatric wards.

14. In annexure “A” clause 1, the Resolution provides for the nurses who treat psychiatric patients to be paid a danger allowance. The nurses who work at ward E3 are paid the danger allowance which compensates for exposure to the potential dangers of treating psychiatric patients.
15. The Respondent purportedly relied on paragraph 3 of Circular 78 of 2009 to deprive the Applicants of the danger allowance. But in the same Thukela Districts, two other hospitals being Estcourt and Emmaus the nurses in hybrid wards who nurse the psychiatric patients are being paid the danger allowance.
16. Further, the Applicants contended that they do fall within the provisions of annexure “A” of Resolution 4 of 2015 which entitles them to the danger allowance.

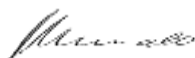
ANALYSIS OF EVIDENCE AND ARGUMENT

17. The dispute in this case is about the application of a collective agreement which exercise requires at a minimum, a difference of opinion about whether it can be invoked. Refer to a judgement in *Hospersa obo Tshambi v Department of Health, KwaZulu-Natal* [2016] 7 BLLR 649 (LAC). In simple terms, it concerns a dispute whether the provision of the Standard Danger Allowance provided for in the Resolution is applicable to the Applicants.
18. The Resolution is a collective agreement as opposed to a “Circular” which is a management directive issued by the Respondent. It is trite that the law gives primacy to a collective agreement.
19. The Resolution provides that the employer shall pay the Standard Danger Allowance to an employee who, in the course of his or her employment experiences a genuine risk to his or her life and who is employed in the specified occupational categories and identified areas; inclusive of “Nurses working with psychiatric patients”.
20. Further, the Resolution determines the frequency of payment of the danger allowance depending on the genuine exposure to the risk, being either monthly or daily.

21. The evidence placed before me clearly indicates that the Applicants whose names appear in pages 1 and 2 of the Applicant's bundle, fall within the categories which are covered by the provisions of the Resolution mentioned in 18 and 19 above.
22. I find that the Applicants mentioned in 20 above are entitled to the Standard Danger Allowance and to the monthly payment thereof from the time that they started working with the psychiatric patients in wards 5 and 7. In my decision, I am guided by the wording of the document (Resolution) as well as all relevant and admissible context, including the circumstances in which the document came into being. As authority, I relied on *Bothma-Batho Transport (Edms) Bpk v S Bothma & Seun Transport (Edms) Bpk [2014] 1 All SA 517 (SCA); 2014 (2) SA 494 (SCA)*.
23. In particular, I considered the massive challenges faced by the Respondent, in providing an adequate health public service generally. I also considered that in wording the Resolution, the Parties were probably alive to this reality by not restricting the payment of the danger allowance only to the nurses who work at the "dedicated psychiatric wards" within the non psychiatric institutions.

AWARD

24. The Applicants mentioned in paragraph 4 above are entitled to the Standard Danger Allowance and to the monthly payment thereof from the time that they started working with the psychiatric patients in wards 5 and 7.
25. The Respondent is hereby ordered to pay the Applicants mentioned above, the Standard Danger Allowance in terms of annexure "A" of Resolution 4 of 2015, for every month from the dates that they started working with the psychiatric patients in wards 5 and 7.
26. The Applicant union is to, within 7 days of its receipt of this award, submit to the Respondent, a list indicating the periods (dates) during which the Applicants, identified by full names and persal numbers, worked with psychiatric patients in wards 5 and 7.



Bheki Khumalo