



ARBITRATION AWARD

Commissioner: **Mbuso Mbuli**

Case No: **PSHS993-21/22**

Date of award: **31 August 2022**

In the matter between:

HOSPERSA obo KILUFYA MANSENSU

Applicant

and

DEPARTMENT OF HEALTH- KWAZULU NATAL

Respondent

DETAILS OF HEARING AND REPRESENTATION

1. This matter was initially placed on the roll before me for arbitration at Niemeyer Memorial Hospital on 13 July 2022 when it remained part heard. It was set down again on 16 and 17 August 2022 and moved to Newcastle Provincial Hospital, when it was finalized. The Applicant was represented by Mr. T. Sokhela, a trade union official from the Health & Other Services Personnel Trade Union of South Africa (HOSPERSA), and the Respondent was represented by Mr. T. Ntshangase: Assistant Director Labour Relations. The parties were given seven (7) days within which to file written closing arguments. The proceedings were digitally recorded.

JURISDICTION AND ISSUES TO BE DECIDED

2. No preliminary or jurisdictional issues were raised, and the Public Health and Social Development Sectoral Bargaining Council (PHSDSBC) has the required jurisdiction to hear the matter.
3. I need to decide whether or not the Respondent had correctly applied and interpreted Resolution 1 of 2002 concluded in the PHSDSBC.

BACKGROUND TO THE DISPUTE

4. All the following issues were common cause and were agreed upon before the commencement of the arbitration process:
 - The Applicant commenced his employment with the Respondent on 1 August 2016, as a Medical Officer and he is currently a Medical Officer Grade III.
 - The Applicant filed a grievance with the Respondent as he believed that he was supposed to be paid and acting allowance from 1 August 2016 until 19 July 2021.
 - The grievance was not resolved and the Applicant referred interpretation and/or application of collective agreement.
 - The dispute was not resolved at conciliation and a certificate was issued indicating that the dispute remained unresolved after the conciliation process. The Applicant's representative thereafter submitted a request for the matter to be resolved through arbitration and the dispute was scheduled for arbitration as indicated above.

5. Both parties handed in bundle of documents which were marked “A”, “B” and “C” respectively, and I was enjoined by both parties to accept the documents for what they purport to be, and to consider them to the extent that it may be required for the purpose of this award.

The Applicant’s case

6. The Applicant testified under oath and stated that he was employed by the Respondent as a Medical Officer Grade III. On 1 August 2016, he was appointed by Dr S.B. Nkosi who is the Chief Executive Officer of the hospital to act as a Clinical Manager and he accepted the appointment (page 17 of bundle A). He did not claim acting allowance as he believed his current salary was equivalent to the salary of a Clinical Manager.
7. In October 2020 he had a problem with his pay progression after the issue was not resolved internally. He decided to approach an attorney to help him with his pay progression issue. During the consultation the attorney advised him that as he was acting, he was supposed to be paid acting allowance and that is when he decided to raise the acting allowance issue with the Respondent. In 19 July 2021, he wrote a letter to the Chief Executive Officer of the hospital advising him that he will no longer be acting on the position of Clinical Manager as he was not paid acting allowance (page 39 of bundle A).
8. The Clinical Manager position is higher than his current position and it has got a lot of responsibilities and that is the reason why he was supposed to be paid acting. The only reason why he did not claim the acting allowance was that at the beginning he firstly believes his current salary was equivalent to that of a Clinical Manager
9. He further testified that after failing to resolve the issue of his acting allowance with the Respondent, he decided to lodge a formal grievance.

10. Under cross-examination, he testified that he is not aware that there is no Clinical Manager position at Niemeyer Memorial Hospital as that was never explained to him. When it was put to him that Dr. S.B. Nkosi will come and testify that he had explained to him in their meeting that the position of the Clinical Manager was downgraded, he responded by saying, he does not remember that.
11. When he was asked why did it took so long to raise the issue of the acting allowance. He responded by saying at the beginning he believe that his current salary was equivalent to that of a Clinical manager but after getting an advise from his attorney, he decided to lodge a dispute.

The Respondent's case

12. The Respondent's first witness, Dr. Sydney Bongani Nkosi, testified under oath and stated that he is employed by the Respondent as a Chief Executive Officer (CEO) at Niemeyer Memorial Hospital and the Applicant reports directly to him.
13. After the resignation of Dr. L Anis from a position of a Clinical Manager he received a letter from Head Office (Pietermaritzburg) informing him that due to the size of the hospital there is no need for a position of a Clinical Manager. The position of the Clinical Manager was then downgraded to a Medical Officer. Thereafter, the position of the Medical Officer was advertised and Dr. Mailula was appointed as a Medical Officer.
14. In August 2016, he approached the Applicant and informed him that the position of the Clinical Manager had been downgraded to Medical Officer's level. He also requested the Applicant to help with the other duties that were performed by the Clinical Manager as the other duties were going to be performed by him. During that meeting, he explained clearly to the Applicant that there will be no change in salary and the Applicant agreed to those terms and conditions. The reason he approached the Applicant was that he was the only senior doctor at the hospital

15. Under cross-examination, he insisted that there is no position for a Clinical Manager at Niemeyer Memorial Hospital and this was explained to the Applicant. He denied that the Applicant was performing all the duties of a Clinical Manager and indicated that he was performing some of the duties of a senior doctor at the Hospital. He confirmed that he wrote the letter (page 17 of bundle A) but indicated that letter made it very clear that the Applicant will not be paid any acting allowance.

16. The Respondent's second witness, Mr. Ndumiso Ayanda Mange, testified under oath and stated that he is employed by the Respondent as a Human Resources Manager and is based at Niemeyer Memorial Hospital. The hospital does not have a vacant position for a Clinical Manager. The position that was available for a Clinical Manager was downgraded to a Medical Officer.

17. In terms of clause 3.1 of Resolution 1 of 2002 the acting allowance can only be paid if there is a vacant and funded position. If an employee is acting in a higher position, he must fill in a claim form monthly and submit the same to the Human Resources Department to be process for payment. The Applicant had never submitted any claim form to the Human Resources Department claiming acting allowance.

18. Under cross-examination, he insisted that there is no vacant and funded position for a Clinical Manager at Niemeyer Memorial Hospital.

ANALYSIS OF THE EVIDENCE

19. The Applicant declared a dispute with the PHSDSBC. The grounds for his dispute are the following: that the Respondent failed to interpret or apply Resolution 1 of 2002 correctly, in that the Respondent failed to pay him the acting allowance from 1 August 2016 until 19 July 2021 when he was acting as a Clinical Manager.

20. In terms of clause 3.1 of Resolution 1 of 2002 an employee appointed in writing to act in a post of a higher grade than the grade of the employee by the Head of Department or his/her delegate at provincial or national level (here-after the appointing authority) be paid an acting allowance to act in vacant posts provided that:

- The post is a vacant and funded post
- The acting is longer than 6 weeks
- The appointing authority is a level higher than the acting appointee
- The EMPLOYEE must accept the acting appointment

21. The first requirement for an employee to be paid acting allowance in terms of Resolution 1 of 2002 is that “the post should vacant and funded”. The Applicant alleges that he was appointed to act in the position of a Clinical Manager from 1 August 2016 until 19 July 2021 but was never paid acting allowance. On the other hand both the respondent witnesses testified that there was no vacant and funded position available for a Clinical Manager at Niemeyer Memorial Hospital and this was explained to the Applicant. The position that was available was downgraded into a Medical Officer level and was advertised and filled as such.

22. Obviously, in the present case there is no vacant and funded post. There is no way for the Applicant to be paid for acting allowance on the vacancy that does not exist as this is the main requirement of the resolution. If the parties had intended that the acting allowance shall be paid in the manner testified on by the Applicant they would have stated that explicitly in the collective agreement.

23. Therefore, the Applicant cannot rely on the provisions of Resolution 1 of 2002 to be paid or claim entitlement to receive the acting allowance.

24. In the circumstances I make the following award:

AWARD

25. It is my finding that the Applicant had failed to prove that he was entitled to receive acting allowance as contemplated in clause 3.1 of Resolution 1 of 2002.

26. Accordingly, the Applicant's application is dismissed.

27. There is no order as to costs.



M Mbuli
COMMISSIONER