

Date: 04 April 2024

**Enquiries:**

Name: Sonja Xulu  
Tel: 012 663 7446  
Fax: 012 643 1601  
Email: SonjaX@elrc.org.za

TO: PSA obo Levona Windvogel (Applicant)

Email: bradely.benson@psa.co.za

TO: Department of Higher Education (Respondent)  
East Cape Midlands TVET College  
Labour Relations:  
Mr S Chamane  
Email: Chamane.s@dhet.gov.za

Dear Colleagues,

**RE: ARBITRATION AWARD**

**CASE NAME: PSA obo LEVONA WINDVOGEL vs DHET**  
**CASE NUMBER: ELRC402-23/24EC**

I transmit herewith a copy of the arbitration award for the above-mentioned matter for your attention and information.

The matter is now closed.

We thank you for your co-operation in this regard.

Kind regards

General Secretary  
**Education Labour Relations Council**



**OFFICE OF THE GENERAL SECRETARY**

*All correspondence should be addressed to:*

The General Secretary  
ELRC  
Private Bag X126  
Centurion  
0046  
Gauteng  
RSA

**Enquiries:**

Dr N.O Foca (LLD)

Tel: 012 663 7446

Fax: 012 643 1601

E-mail: [cindyfoca@elrc.org.za](mailto:cindyfoca@elrc.org.za)

Website: [www.elrc.org.za](http://www.elrc.org.za)

**Physical Address:**

ELRC Building  
261 West Avenue  
Centurion  
0046  
Gauteng  
RSA

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*[Handwritten date: 04/4/24]*



# ARBITRATION AWARD

Panelist: Clint Enslin  
Case No.: ELRC402-23/24EC  
Date of Award: 03 April 2024



In the ARBITRATION between:

PSA obo Levona Windvogel  
(Union / Applicant)

and

East Cape Midlands College

(Respondent)

Applicant's representative: Mr Bradley Benson  
Applicant's address: \_\_\_\_\_

Telephone: 0828808981

Telefax: \_\_\_\_\_

Email: bradley.benson@psa.co.za

Respondent's representative: Mr Lungisa Mpati  
Respondent's address: \_\_\_\_\_

Telephone: 0782522086

Telefax: \_\_\_\_\_

Email: lungisa@emcol.co.za

## **DETAILS OF HEARING AND REPRESENTATION**

1. This dispute was scheduled for arbitration in terms of Section 191(5)(a)(iv) of the Labour Relations Act 66 of 1995 as amended ("the LRA") read with Clause 17 of the ELRC Constitution: ELRC Dispute Resolution Procedures. The hearing was held at the Respondent's Brickfields Road Campus in Kariega, on 19 January, and 7 March 2024 and the proceedings were digitally recorded.
2. The Applicant, Ms Levona Windvogel, was represented by Mr Bradley Benson, an official from PSA, a registered trade union. The Respondent, East Cape Midlands College, was represented by Mr Lungisa Mpati, an Assistant Director – Labour Relations.

## **ISSUE TO BE DECIDED**

3. Whether or not the Applicant was paid the correct acting allowance for the period of 1 February until 31 May 2023;
4. If not, whether the incorrect payment amounted to an unfair labour practice; and
5. If so, determine appropriate relief.

## **BACKGROUND TO THE ISSUES**

6. The following facts were agreed to between the parties as common cause and there existed no dispute of fact.
  - 6.1 The Applicant worked for the Respondent as a PL 1 Educator / Lecturer.
  - 6.2 She was on salary notch R312 324 per annum for the period of February to April 2023 and salary notch R338 856 per annum for May 2023.
  - 6.3 The position of Deputy Campus Manager is a PL 3 post.
  - 6.4 The position of Campus Manager is a PL 5 post.
  - 6.5 The Campus Manager position has an entry level of salary of R535 011 per annum, which was applicable for the period of February to May 2023.

- 6.6 The Applicant Acted as Campus Manager from 1 February to 31 May 2023.
- 6.7 For the period of February to May 2023, the Applicant was paid an acting allowance of R10 149,50 per month.
- 6.8 The Applicant was given a letter, dated 9 February 2023, signed by the Principal, Mr van Heerden, confirming her acting appointment as Campus Manager from 1 February to 31 May 2023 and she signed for acceptance of same. (see page 14 of A.)
- 6.9 The abovementioned letter confirms that the salary of the Campus Manager is R535 011 per annum and that it is a PL5 position.
- 6.10 The Applicant was given a letter, dated 27 October 2023, signed by the Principal, Mr van Heerden, stating that they had incorrectly informed her that she would receive an acting allowance equal to the difference between PL1 and PL5 and that it would in fact be the difference between PL1 and PL2.
- 6.11 The Principal is authorised to make acting appointments.
- 6.12 The four month period that the Applicant acted as Campus Manager was due to the then Acting Campus Manager going on maternity leave.
- 6.13 The post of Campus Manager is a vacant and funded post.
- 6.14 The relevant Collective Agreements and/or PAM confirm that acting is for 1 position higher than an employee's current position, but it allows for deviation in certain circumstances.
7. The parties submitted a joint bundle, which was marked "A" and which they agreed documents contained therein were what they purported to be.
8. Both parties submitted written closing arguments.
9. The matter was digitally recorded.

## **SURVEY OF EVIDENCE AND ARGUMENT**

10. This award constitutes a brief summary of evidence, argument and my reasons for the award issued in

terms of Section 138(7)(a), of the LRA, relevant to the dispute at hand and does not reflect all the evidence and arguments heard and considered in deciding this matter.

## **Applicant's case**

### **Applicant's evidence**

11. The Applicant, Ms Levona Windvogel, testified that, as per page 14 of A, she had accepted an appointment as Acting Campus Manager. She later received a letter, as per page 12 of A, but she did not sign for acceptance thereof. She had not accepted the letter on page 12 of A as it came after she had already acted and her dispute was already at arbitration stage. Pages 15 to 22 of A was her contract as PL3 Acting Deputy Campus Manager, of the Grahamstown campus, from 1 January 2023. This was a PL3 position.
12. Page 23 of A was part of the PAM document, which dealt with acting allowances. C.4.1.3 on this page reads *"An educator may only be appointed to act in a post that is one post level higher than his/her current post. It allowed for deviation in extraordinary circumstances. She had been acting as Deputy Campus Manager before her appointment to act as Campus Manager. She had been asked to act as Campus Manager as she was familiar with the daily operations, processes and daily teaching and learning. Pages 45 to 58 of A was the "Acting Appointment Policy" of the Department of higher Education and Training. This was the policy in place when she was appointed to act. Page 52 of A, at paragraph 4.2.3(b) read "Employee shall only act one level higher than his/her substantive post or in a lateral post. The exception would be if there are no post on a level between the incumbent and the acting position. In this instance the acting allowance would only be the difference between the employee's notch and the start salary of the next level, e.g. assume a person on Salary Level (SL) 7 need to act as ASD, the allowance will only be the difference between the employee's notch and the start notch of SL 8, which would be the next level. In an instance where acting allowance should be at two levels up deviation may be sought from the DPSA. She had been acting in a level 3 post and there was no level 4 post between the said post and the level 5 post. It was the HR Manager's duty to motivate for the deviation.*
13. She did not feel it was fair for the employer to ask her to perform a task and not pay her for doing so. She had agreed as the incentive was in writing. Page 61 of A was a scenario calculation done for her on Acting Campus Manager PL5 notch 286, which was done by the Respondent. She believed that the reference to "current position" in C.4.1.3 on page 23 of A was referring to what she was doing at the time, being the PL3 post she was acting in. Page 26 of A was ELRC resolution 8 of 2001, which dealt with payment for

acting. Paragraph 4 of annexure A thereof read *"In extraordinary circumstances, the employer may deviate from clauses 2 and 3, above (including instances where the School Governing Body / Council for Further Education and Training Institution fails to make a recommendation)*. She had also put in a grievance about the situation.

14. She had signed page 14 of A which *inter alia* stated that should it be found that an error had been made in the calculation of her acting allowance, it would be rectified and any overpayment resulting therefrom would be recovered. She was therefore aware that if there was an error in the calculation it would be rectified. Her issue was, however, the length of time it took as the Respondent had waited for her to complete the acting period and for her dispute to get to arbitration. She felt this was unjust. The employer had deviated for her to act in a level 3 post and she therefore felt they could have deviated for the level 5 post as well. She believed that she should be paid the contractual amount as per the letter given to her. She agreed that she had signed and was made aware that if there were calculation errors they will be rectified.

#### **Respondent's evidence**

##### **Mr Lisolomzi Blani**

15. Mr Lisolomzi Blani, Assistant Director – HR, testified that he had been in his current position since April 2021. To his understanding, paragraph 4.3.2, on page 52 of A, confirmed that if a person was acting in a position that was more than one level up, the acting allowance would only be the difference between the that persons notch and the entry notch of the next level above the persons substantive position. For example, if a person on level 2 acted in a level 5 position, the acting allowance would be the entry notch of level 3. The Applicant was a PL1 and as such when acting at level 5, it was 3 levels up. There was no level 4 posts. 4.3.2 (b) on page 52 of A stated that if a person was to act in position more than one level up, permission needed to be obtained, however, as the College paid the difference this was not required. They therefore did not need permission for deviation.
16. Page 26 was ELRC Resolution 8 of 2001 which dealt with payment of acting allowance. It confirmed the acting policy. Page 12 of A was the letter rectifying the error they had made and it was rectifying in terms of paragraph 3 of page 14 of A. The Applicant had been informed in advance that if there was an error made it would be rectified. He agreed that the Applicant's duties and responsibilities would have increased during the acting period. He further agreed that paragraph 3 on page 14 of A spoke of a case where the person was paid more allowance than what they should have received, which would then be recovered, but that the Applicant had not been paid the higher allowance and as such the paragraph, as far as

recovery was concerned, was not applicable to her situation. No overpayments had been made to her. The paragraph did, however, allow them to rectify any error in the calculation of acting allowance. In terms of paragraph 4.3.2 on page 52 of A, the acting allowance was always the entry notch of the next level up. The deviation that it spoke of was not for higher pay (allowance). The College covered the cost of acting allowance no matter what the cost of same was.

## ANALYSIS OF EVIDENCE AND ARGUMENT

17. Section 186(2) of the LRA states "**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 (excluding disputes about dismissals for a reason relating to probation) or training of an employee or related to the provision of benefits to an employee.*"

### Was the Applicant paid the correct allowance between 1 February and 31 May 2023?

18. The Applicant was appointed to act in a PL5 post as Campus Manager. Prior to this she was acting in a PL3 post of Deputy Campus Manager. Her normal position is a PL1 position. Paragraph 4.3.2(b) on page 52 of A, which is from the Department of Higher Education and Trainings' Acting Appointment Policy reads as follows: "*Employee shall act only on one level higher than his/her substantive post or in a lateral post. The exception would be if there are no post on a level between the incumbent and the acting position. In this instance the acting allowance would only be the difference between the employee's notch and the start salary of the next level, eg. assume a person on Salary level (SL) 7 need to act as ASD, the allowance will only be the difference between the employees notch and the start notch of SL 8, which would be the next level. In an instance where the acting allowance should be at two levels up deviation maybe sought from the DPSA.*" Sic.
19. On a plain reading of the aforementioned paragraph the following is, to my mind, clear:
- 19.1 The acting post which would be lateral, one level higher or by exception more than one level is measured against the employee's substantive post. I am of the view that substantive post refers to the position post the employee is employed in and not any other acting position the employee is acting in. An acting position is not the employee's substantive post and it is for this very reason that an employee receives an allowance for doing so.

19.2 The exception, which would allow for acting in a post more than one post higher than the employee's substantive post, would be where there are no post on a level between the incumbent and the acting position. It is clear that there were posts between the Applicant's substantive position of PL1 and her initial acting position of PL3 as well as between her PL1 position and the PL5, second acting position. There was only no PL4 position. I must state that based on this policy, I am not sure how they managed to appoint the Applicant to Act in the PL3 position in the first place, but this is not the dispute in front of me and will in any event be dealt with further on.

19.3 In instances where the exception mentioned does apply, the employee will only be paid an allowance equal to the difference between his/her substantive post notch, in this case PL1, and the start notch of the next level, PL2.

19.4 Deviation can be sought from the DPSA if the acting allowance should be at two levels up.

The Respondent's witness confirmed that they would not need to get the permission referred to for an acting allowance higher than one level up, as the Respondent paid same and not the DHET.

20. Paragraph 2 of Annexure A of ELRC Resolution 8 of 2001, on page 30 of A, dealing with payment of Acting Allowance for an Educator Acting in a Higher Vacant and Funded Post, again confirms that the acting appointment may be for one post level higher than his or her current position. It, however, in paragraph 4, on the same page, confirms that in extraordinary circumstances the employee may deviate from this. Here there is no limitation placed on how far the deviation can be. There is also no reference to a situation where there is no post in between. This clause, unlike the ones in paragraph 19 above, would in my view, with its less strict limitation, allow for deviation of more than one level in extraordinary circumstances. Put differently it would allow for an acting appointment such as the Applicant's if there were extraordinary circumstances. There can be little doubt that the Respondent believed such extraordinary conditions existed given that she was initially requested to act in PL3 position and later in a PL 5 position. It is also not disputed that the PL5 post was a vacant funded post and that as such this Resolution is applicable. ELRC Resolution 8 of 2001, at paragraph 7 on page 31 of A, further confirms the acting allowance that will apply is the difference between the acting person's current salary (without benefits) and the commencing notch of the higher post (without benefits) that applies to the position in which the person is acting. (Own underlining)

21. On a plain reading of the aforementioned paragraphs, the following is, to my mind, clear:




- 21.1 The one level up acting can be deviated from.
- 21.2 No limitation is placed on such deviation, provided that there are extraordinary circumstances.
- 21.3 The Acting Allowance to be paid is the difference between the acting person's normal salary and the commencing notch of the higher post that applies to the position in which the person is acting.
22. The policy in paragraph 18 and 19 seems to be in conflict with ELRC Resolution 8 of 2001 on certain issues that are important in the current dispute. I believe ELRC Resolution 8 of 2001 should take precedence in regards to these issues. I say this because it would appear that it was the Resolution which the Respondent relied on to appoint the Applicant in the acting positions. I can find no basis for doing so in terms of the policy. The Respondent's witness also confirmed that they do not need to seek permission, as per the policy, as the Respondent pays the acting allowance. Even if I am wrong in this, the second reason for preferring the Resolution, which I believe is the more important reason, is that the Resolution is a Collective Agreement. It is trite that Collective Agreements trounce any internal policies.
23. Based on the above, I do not believe the Applicant was paid the correct allowance between 1 February and 31 May 2023. She was paid an allowance at PL3 whilst she acted at PL5. The Applicant was paid an acting allowance of R10 149, 50 per month from February until May 2023. From February until April 2023, the Applicant was on salary notch R312 324 per annum, which equates to R26 027 per month. In May she was on salary notch R338 856 per annum, which equates to R 28 238 per month. She received an acting allowance of R10 149, 50 for all these months. Therefore she effectively earned R36 176, 50 per month from February until April 2023 and R38 387, 50 in May 2023. The salary notch on the PL5 position, per the letter given to her, was R535 011 per annum, which equate to R44 584, 25 per month. The Applicant was therefore paid short of R44 584, 25 – R36 176, 50 = R8 407, 75 per month from February to April 2023. Total amount for this period is therefore R8 407, 75 x 3 = R25 223, 25. In May 2023 she was paid R44 584, 25 – R38 387, 50 = R6 196, 75 short. The total amount for the period of February to May 2023 is R25 223, 25 + R6196, 75 = R31 420.

**Did the incorrect payment of the acting allowance amount to an unfair labour practice?**

24. It is not disputed that an acting allowance amounts to a benefit. Given this and the definition of an unfair labour practice, as set out in Section 186(2) of the LRA, there can be little doubt that the incorrect (short or non-payment) of the acting allowance amounted to an unfair labour practice.

## AWARD

25. The Respondent, East Cape Midlands College, has committed an unfair labour practice against the Applicant, Ms Levona Windvogel, by failing to pay her the correct acting allowance for the period of February to May 2023.
26. As a result of the unfair labour practice, the Respondent is ordered to pay the Applicant an amount of R31 420, by 30 April 2024

  
Name: Clint Enslin  
(ELRC) Arbitrator

