



ARBITRATION AWARD

Case No: **PSHS116-19/20**

Commissioner: **Leonard Van Leeuwen**

Date of award: **09 August 2022**

In the matter between:

PSA obo Clark, Sheena and De Jonge, Analize

(Union/ Applicant)

and

Department of Health- Mpumalanga

(Respondent)

DETAILS OF HEARING AND REPRESENTATION

1. The arbitration hearing with regards to the interpretation and application of a collective agreement, referred in terms of Section 24(2) and 24 (5) of the Labour Relations Act 66 of 1995, as amended ("LRA") was held at the Provincial Hospital in Lydenburg on 26 July 2022. The Award is issued in terms of Section 138 (7) of the LRA and is a summary of the evidence I considered, with brief reasons for my findings and is not intended to be a verbatim record of the proceedings.
2. Only one of the employees Ms Clark was present. Ms De Jonge did not attend as she is no longer employed by the Respondent and has relocated to the Western Cape (hereinafter referred to as the Applicants), They were represented by Mr Flip Van der Walt, an official from The Public Servants Association (PSA). The Employer, Department of Health- Mpumalanga (hereinafter

referred to as the Respondent), was represented by Mr Stanley Malinga an Employee Relations Officer stationed at the district office.

3. The hearing was held in English and was both digitally and manually recorded.
4. At the conclusion of the arbitration, it was agreed that parties would submit written closing arguments on 01 August 2022.
5. The Applicants alleged that they qualified for accelerated grade progression to grade 2 in terms of Resolution 2 of 2010 on 01 April 2014 and to be paid accordingly from the said date and not from 15 December 2014 as was affected by the Respondent. Clark is employed as a Chief Radiographers were as De Jonge was employed as a Chief Occupational therapist at the time.
6. The Applicants being unhappy with the above stated tried with the assistance of management at the Hospital to resolve the issue for several years in which numerous written submissions was made requesting that the above should be rectified but to no avail were after they in July 2018 officially lodged grievances in this regard which was unsuccessful where after they referred a dispute to the Bargaining Council on 24 April 2019. The matter was set down for conciliated on 21 May 2019. The matter however could not be resolved and a certificate indicating such was issued whereafter the Applicants submitted a request for arbitration whereafter the matter was set down for Arbitration before me.
7. As to relief, the Applicant requested to be paid back pay as from 01 April to November 2014.

ISSUE TO BE DECIDED

8. I must determine whether the Respondent failed to comply with the provisions of Resolution 2 of 2010 with regards to the Occupational Specific Dispensation for Therapeutic, Diagnostic and Related Allied Health Professionals (OSD) in relation to Grade progression by not paying the Applicants from date of qualifying for grade 2 namely 01 April 2014.
9. If found that the Respondent had failed to comply with the collective agreement to award the appropriate relief namely back pay for the period 01 April to November 2014.

SURVEY OF EVIDENCE AND ARGUMENTS

Evidence

Documentary

10. Both parties submitted documentary evidence in support of their respective case. The Respondent's bundle was marked Bundle "R" and that of the Applicant marked Bundle "A".

EVIDENCE AND ARGUMENT FOR THE APPLICANTS

Sheena Clark, an applicant after having been sworn in, testified as follows:

11. In 2014 she was informed by the HR and Acting the LID Manager that she was due for exulcerated grade progression which entailed that she would have gone from grade 1 to grade 2.
12. Pages 7 to 9 of bundle "A" is an application for her grade progression from Chief Radiographer grade 1 to grade 2 with effect 01 April 2014 dated 27 March 2014. The application was supported by the Chief Executive Officer, Mr Mogane, The Chief Director: Ehlanzeni, Mr Mdluli as well as by the Deputy Director-General: District Health Services, Dr Mhlongo.
13. Page 10 of bundle "A" is a letter directed to her dated 19 August 2014 stating that there was a delay in processing her grade progression due to the fact the Department was under Curatorship and that the matter was receiving attention. Her grade progression was only implemented with effect 15 December 2014. According to her it should have been from the start of April 2014.
14. Pages 11 to 12 of bundle "A" is a memorandum shown to her by the Acting CEO dated 21 September 2015 from the Acting Chief Director: Human Resources Management, Mr Khalishwayo stating that the date of grading for non-OSD employees and nursing staff is in April of the year in which they qualify. It also states that it was decided to pay all submitted outstanding accruals in quarter 2 of the 2015/2016 financial year and that it would include the translations in rank and grading of all officials who qualified in 2014.

15. Pages 13 to 16 of bundle "A" is a memorandum drafted by De Jonge requesting back pay for Grade progression employees who were omitted in the 2014/2015 financial year. She was one of the employees whose name was submitted as contained on page 14 of bundle "A" as well as that of M Schulze who after an award which was in her favour received the said back pay.
16. Pages 20 to 29 of bundle "A" contains Resolution 2 of 2010. Clause 4.1.10 deals with grade progression. Clause 4.1.10.2 states that progression to the next salary grade attached to the post. Provided that the candidate met all the requirements to progress to the higher grades as indicated in annexure B. The requirements to be accelerated to grade 2 is on page 27 of bundle "A" for above average performance were 5 years of actual service in the grade and at least 4 annual assessment ratings of outstanding performance which she both had.
17. During cross examination she confirmed that in terms of annexure B the accelerated grade progression was applicable with effect of 01 April 2012.
18. She was only appointed to Chief Radiographer grade 1 on 01 February 2009.
19. She acknowledged that Resolution 2 of 2010 only came into effect in 2010 and if one counts from 2010 to 2014, she did not have 5 years' experience.
20. She agreed that the application for grade progression for her as contained on pages 7 to 9 of bundle "A" were not signed and recommended by the Acting Chief Director: HRM & D, the Chief Financial Officer or by the Head of the Department.
21. She further conceded that the request for back pay of grade progression to employees omitted in the 2014/2015 financial years as contained on pages 13 to 16 of bundle "A" is not signed and recommended by the Chief Director: HRM & D, Mr Nkosi or the Chief Financial Officer, Mr Mnisi nor the Head of Health, Dr Mohangi.
22. During clarification question posed to her she stated she is owed an amount of R19 642.75 for the period April to November 2014 as contained on page 14 of bundle "A" as well as De Jonge as the same facts are applicable to both.

23. In closing argument, the Applicant submitted that although the two submissions were not signed by the HOD no proof was submitted that the said submissions were not approved. Based on the letter received by the Applicant they are of the opinion that they indeed were approved.
24. The facts as stated by Clark in her evidence related to both her and De Jonge.
25. Clark and De Jonge were upgraded to grade 2 based on the submissions submitted by the CEO of Lydenburg Hospital which is an indication that they qualified.
26. The Respondent is the custodian for the implementation of the OSD agreement who confirmed that indeed Ms Clark, Ms de Jonge and Ms Shulze qualified for the accelerated grade progression in April 2014.
27. The Respondent further also agreed to pay Ms Shulze the OSD back dated as from 01 April 2014, which is proof of the inconsistent application of the OSD agreement.
28. The accelerated grade progression is applicable with effect from 1 April 2012 in relation to the first cycle when it was supposed to be implemented and not as from when it was supposed to be calculated. This is the reason why the Respondent indicated to the employees that they were due for grade progression which is also why the Respondent had paid Schulze the back pay as she qualified for it on 01 April 2014.
29. The two Applicants qualify to be paid R19 642,75 each as per the calculations on page 14 of bundle "A".
30. They request the Commissioner to find that the Respondent applied the OSD agreement incorrectly in that the Applicants ought to have been upgrade to Grade 2 with effect of 01 April 2014 and they as such are entitled to the said back pay as claimed.

EVIDENCE AND ARGUMENT FOR THE RESPONDENT

31. The Respondent did not call any witnesses to testify but only submitted closing argument in support of their contention that the Applicants did not qualify for accelerated grade progression on 01 April 2014.
32. In Closing argument, the Respondent submitted that during cross examination it was put to the Applicant that accelerated grade progression was only applicable with effect from 01 April 2012 as per Annexure B on page 27 of bundle "A" and based on such her grading was premature and therefore her claim is unsubstantiated in terms of the Resolution.
33. As PHSDSBC Resolution 2 of 2010 was only implemented in 2010 the Applicant would only have been eligible for grade progression in 2016. Should one however bear in mind that according to annexure B it was only applicable as from April 2012 then she would only be eligible in 2017.
34. The fact that Schulze was paid following an arbitration award is not relevant as the commissioner must apply his mind to the facts before him.
35. The Applicants failed to prove eligibility in terms of Resolution 2 of 2010 and as such they request that the Applicants referral be dismissed.

ANALYSIS OF EVIDENCE AND ARGUMENT

36. The dispute concerns the interpretation and application of a collective agreement namely PHSDSBC Resolution 2 of 2010 with regards to the interpretation and application of clause 4.1.10 of the agreement read with Annexure B. The said clause deals with accelerated grade progression.
37. In coming to a finding, I have taken into consideration the oral and documentary evidence and written closing arguments submitted by the parties during the Arbitration.

38. Although De Jonge was not present at the arbitration and no longer employed at the time of the arbitration she was however still employed at the time the dispute was referred. Since she was represented by an official of the PSA at arbitration who was mandated to represent her, I found that the Bargaining Council had the required jurisdiction to determine her dispute together with that of Clark as per the referral.
39. It is common cause that the Applicants were both employed in different capacities at Lydenburg Hospital during 2014. It is also common cause that both the Applicants were in terms of the accelerated grade progression as contained in Resolution 2 of 2010 translated from grade 1 to grade 2 with effect of December 2014 and that the facts as presented in the arbitration relate to both Applicants.
40. It is however the Applicants submission that they in terms of the Resolution should have been translated from grade 1 to 2 as from 01 April 2014 as they had met the requirements as contained in Annexure B of the Resolution and not in December 2014 and as such is claiming back pay for the period between April and November 2014.
41. It is however the Respondent's submission that the Applicants interpretation of clause 4.1.10 read with Annexure B is incorrect. According to the Respondent's submission the accelerated grade progression was only with effect from 01 April 2012 and that the Applicants who met the minimum criteria for translation namely 5 years' service in a grade together with at least 4 annual assessment ratings of outstanding performance as contained in the requirements in Annexure B on page 27 of bundle "A" only actually qualified for translation to grade 2 in 2017 and not in 2014 and as such their translation to grade 2 in December 2014 had been premature and incorrect as one only start to count the said qualifying period from 2012 onwards and not before the said date.
42. It is the interpretation of the clause which is the center of the dispute.
43. Clause 8.2 of the Resolution states that the accelerated grade progression for employees based on above average performance will only be effective as from 01 April 2012.
44. Pages 7 to 9 of bundle "A" is a memorandum dated 27 March 2014 by the then CEO, Mr Mogane in which he applied for grade progression from grade 1 to grade 2 for Clark in terms of Resolution

2 of 2010 with effect of 1 April 2014. In the said memorandum he states that Clark has completed 5 years' experience as a Chief Radiographer grade 1 on 01 February 2014 and as such qualifies to be translated to Chief Radiographer grade 2. The said application for translation to grade 2 was supported by the then Chief Director, Ehlanzeni, Mr Mdluli and the Deputy Director General: District Health Services, Dr Mhlongo. The only reasonable conclusion one can come to is that the said memorandum was also further approved by the Head of the Department, Dr Maphanga as both Applicants Indeed were translated to grade 2 in December 2014.

45. The Applicant in August 2014 was also then informed that there was a delay in processing her translation since the Department was under Curatorship. The letter in my view confirms that she qualified for grade translation with effect of April 2014.
46. The memorandum issued by the Acting Chief Director: Human resources Management and Development, Mr Khalishwayo dated 21 September 2015 at paragraph 1 to 3 states the following. .1"*the Department of Health has taken a decision to pay all submitted outstanding accrual in the 2ND quarter of the financial year 2015/2016*". 2 "*These accruals include the translation in rank and grading of all officials whose names were submitted by various institutions in 2014*". 3."*Plaese note that the date of grading for non OSD employees and Nursing personnel is April of the year they have qualified. The rest will be graded when they meet the qualifying period*".
47. The above communication confirms that there were employees who had qualified for grade translation in 2014 which if one is to believe the submission of the Respondents representative would not be possible as the first employees who would have been eligible for translation would only on the earliest have been eligible in 2017 as the accelerated grade translation only came into effect on 01 April 2012. Which explanation I find to be disingenuous to say the least and is directly contradicted by the memorandum dated 21 September 2015 which clearly states that those employees who qualified for translation in 2014 would be paid.
48. If this was not the correct interpretation, then why was there no correction and or retraction issued by the Respondent in relation to the said memorandum dated 21 September 2015. The only reason for such is that it was indeed the correct interpretation of the Resolution namely that anyone who met the minimum criteria with effect 01 April 2012 was entitled to be translated to the next grade.

49. The mere fact that the Respondent had also paid Ms Schulze back pay after an award which was rendered as per pages 30 to 33 of bundle "A" in which it was found that she was eligible for translation in April 2014 is further confirmation that the correct interpretation is that employees were indeed eligible for translation as from April 2012 if they met the said requirements.
50. It is common cause that that Clark as per page 1 of the bundle "R" was appointed to Chief Radiographer grade 1 on 01 February 2009. As such she in February 2014 had 5 years' service on the grade. It was also common cause that she at the time also had 4 annual assessment ratings of outstanding performance and in fact the Respondent's representative praised her as an outstanding performer during the arbitration and as such she on 01 April 2014 as stated in the memorandum dated 21 September 2015 qualified for accelerated grade translation from grade 1 to grade 2.
51. Having regard to the above evidence I find that the Applicants have successfully discharged the onus in proving that the Respondent's interpretation of clause 4.1.10 relating to grade translation read with annexure B of Resolution 2 of 2010 was incorrect and had failed to apply the provisions in accordance with the requirements as contained in Resolution 2 of 2010.
52. The Applicants were in terms of the Resolution eligible for translation from grade 1 to grade 2 with effect of 01 April 2014.

Relief

53. As to relief, the Applicants requested to be paid back pay the period April to November 2014.
54. I am obliged to concede to this request.
55. The Applicants submitted calculation of the amount owed for the said period April to November 2014 as contained on page 14 of bundle "A" namely R19 642,17. In the absence of any contradicting submission I have no reason as to not accept this to be correct amount owed to the Applicants.
56. I make the following award:

AWARD

57. The Applicants Clark, S and De Jonge, A M were eligible for grade translation on 01 April 2014.
58. The Applicants Clark, S and De Jonge A M are entitled to the difference in the payment of the grade progression between grade 1 and 2 due to them.
59. Respondent, Department of Health- Mpumalanga is ordered to pay arrear salary to each of the Applicants in the amount of **R19 642,17**(Nineteen Thousand Six-Hundred and Forty-Two Rand and Seventeen Cents).
60. The Respondent, Department of Health- Mpumalanga is ordered to pay the said amount as stipulated in par. 59 by no later than **31 August 2022**.



Leonard van Leeuwen