



# ARBITRATION AWARD

Commissioner: **Charles Oakes**

Case No: **PSHS518-25/26**

Date of award: **26 November 2025**

In the matter between:

**PSA obo Zwezwe, Ziningi Nozibusiso**

Applicant

and

**Department of Health- KwaZulu Natal**

Respondent

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## DETAILS OF HEARING AND REPRESENTATION

1. This is an award of an arbitration held on 07 November 2025, at Rietvlei Hospital. Mr Mbanjwa, an official of the Public Servants Association of South Africa, represented the Applicant. Mr Lembethe, a Labour Relations Officer of the Respondent, represented the Respondent.

## ISSUE TO BE DECIDED

2. I must decide whether the failure to pay the Applicant an allowance constitutes an unfair labour practice.

## BACKGROUND TO DISPUTE

3. The Applicant in the present matter is Nozibusiso Ziningi Zwezwe. The Respondent is the Department of Health, KwaZulu-Natal. It is common cause that the Respondent appointed the Applicant to act as an Operations Manager. The Applicant was appointed to the acting post on 23

October 2023. The Applicant was paid for August, September, and October 2023. She was thereafter not paid despite her continuing to work as an acting Operations Manager. She asserts that she is entitled to payment for the remaining 21 months of the acting period.

## **SURVEY OF EVIDENCE**

### **Applicant's case**

4. The first witness to testify was the Applicant, Nozibusiso Ziningi Zwezwe, who testified under oath as follows:
5. She is employed as a Professional Nurse by the Respondent at Rietvlei Hospital. She has a Diploma in Clinical Nurse Practitioner. She was appointed to act as Operations Manager at Mvubukazi clinic on 26 October 2023 for a twelve-month period, and on 01 April 2025, she was again appointed to an acting appointment for a further twelve months. She has been carrying out the duties of an operations manager since her initial appointment. She was paid an acting allowance for three months, namely August, September, and October 2023. She continues to act as an Operations Manager but has not been paid since October 2023. Her acting allowance was R10 000.00 per month. She was never informed verbally or in writing that the post was unfunded or that she would not be paid for acting in the role.
6. She was paid an acting allowance for only three months (August, September, October 2023). She received a monthly acting allowance of R10,000.00. She completed the forms for the acting allowance payment every month.
7. She believes it is unfair to perform higher duties without pay and seeks compensation for the 21 unpaid months. She considers the "unfunded post" claim a fabrication.
8. As far as she understands, the Operations Manager post is vacant, funded, and essential for the clinic's structure and operation.

### **Respondent's case**

9. The next witness to testify was Mr Philani Sixtus Biyase, who testified under oath as follows:
10. He is employed as a Finance Manager by the Respondent and is working at Rietvlei Hospital. He testified that the Applicant was appointed to act as Operations Manager in October 2023 and was paid for August, September, and October 2023. He testified that, in the 2024-2025 financial year, the Operations Manager post was not funded. A "funded post" is one where there are sufficient funds to advertise and recruit, which was not the case in the present instance. Further payments were not

made to the Applicant due to financial difficulties and to prevent "unauthorized expenditure" as per Section 39(b) of the Public Finance Management Act (PFMA) of 1999. The lack of funds was discussed at cash flow meetings, and Human Resources and the Primary Health Care Manager (PHC) were responsible for cascading this information to affected employees. He testified that neither of the Applicant's acting appointment letters (pages 2 and 3 of the bundle) explicitly stated that the position was unfunded or that she would not be paid. Some clinics can operate without an operations manager, and the acting appointment was made to fill gaps and ensure service delivery.

11. The three months of payment came from the same "objective" where Operations Manager salaries are linked, but the overall fiscal allocation was insufficient for full employment of the post. The post was unfunded from the beginning of the financial year (2024-2025), not just after payments stopped.
12. The next witness to testify was Nonthokoza Ntuzela, who testified under oath as follows:
13. She is employed as the Assistant Human Resources Manager at Rietvlei Hospital by the Respondent. The Applicant was appointed to act as an Operations Manager. An acting allowance requires a vacant and funded post, an employee who meets the requirements, an approved "application for acting in a vacant post" (Annexure A), and monthly claim forms.
14. The payments for August, September, and October 2023 were the only payments made to the Applicant. Other claims thereafter were not approved due to insufficient funds.
15. It was discussed that a meeting must be held with the Applicant to inform her about the cessation of payments due to insufficient funds, but it did not materialize. The Primary Health Care Manager was expected to cascade this information. The Applicant's appointment letters did not mention the post being unfunded or that she would not be paid. Budget allocations fluctuate, and funds for an objective can become insufficient without a specific "decision" to cut it.
16. The next witness to testify was Babalwa Dlikili, who testified under oath as follows:
17. She is employed as a Primary Health Care Manager by the Respondent. The Applicant is her subordinate and reports to her. She personally appointed the Applicant to act as Operations Manager in October 2023 and issued the extension in April 2025. She testified that Applicant has been performing all duties related to an operations manager.
18. She was initially unaware of the acting allowance policy and thought acting was without pay, based on her past experience. She learnt about the policy in 2024 when the Applicant presented a circular on acting allowances to her. The Applicant was paid an acting allowance for three months (August-October 2023), and the post was discovered to be unfunded at a cash flow meeting around June/July/August 2024. She testified that initial attempts to meet with the Applicant to explain the financial situation were delayed due to various commitments. A meeting eventually took place in

October 2025 (after a grievance was registered), during which the department explained its financial situation. The Applicant indicated she would continue with the grievance.

19. She testified that a clinic *could* function without an Operations Manager, as the senior registered nurse can "take charge" based on their nursing scope of practice, handling administrative and leadership duties. However, an acting letter is required to grant authority to sign official documents (e.g., SOPs).
20. The acting allowance policy has been in place since 2002, and she was unaware of it.
21. She testified that she was unable to comment on whether the employer committed an unfair labour practice.

## ANALYSIS OF EVIDENCE

22. It is a common cause that the Applicant was given a letter appointing her to act as an Operations Manager. The letter was given to her on 26 October 2023, and she accepted the acting appointment. The acting appointment was extended on 01 April 2025.
23. At issue in the present matter is whether the Applicant is entitled to an acting allowance. The issue regarding whether Applicant acted as an Operations Manager is not disputed. What is disputed is whether the post was funded.
24. The first issue to be determined in the present matter is whether the Applicant was entitled to an acting allowance.
25. Section 186 (2) of the LRA states that the meaning of unfair labour practice is "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 reasons relating to probation), or training of an employee or provision of benefits to an employee;"*

26. The conduct sought to be regulated in Section 186(2)(a) is the unfair conduct of the employer regarding the *provision of benefits* (my emphasis).
27. Therefore, what is required to be considered in the final analysis is whether the employer failed to provide a benefit to the employee. As a starting point, consideration must be given to whether what is claimed as a benefit falls within the definition of a benefit in law.
28. The court in *Apollo Tyres South Africa (Pty) Ltd v CCMA & others (2013) 5 BLLR 434 (LAC)* dealt with the definition of a benefit.

29. In agreeing with the court in *Protekon (Pty) Limited v CCMA & Others* (2005) 26 ILJ 1105 (LC) the court in *Apollo Tyres South Africa (Pty) Ltd v CCMA & others* (2013) 5 BLLR 434 (LAC) stated the following regarding the definition of a benefit at paragraph 28:

*“[28] In Protekon (Pty) Ltd v CCMA and Others, it was correctly, in my view, stated that the concern that a wide definition of ‘benefit’ might curtail the right to strike needs not persist. According to the learned Judge, one must look at the nature of the benefit dispute in order to decide whether it is a dispute that must be settled by way of industrial action or adjudication. This is so because disputes over the provision of benefits may fall into two categories: firstly where the dispute concerns a demand by employees that a benefit be granted or reinstated irrespective of whether the employer’s conduct in not agreeing to grant or in removing the benefit is considered to be unfair. This kind of dispute can be settled by way of industrial action. Secondly, the dispute may concern the fairness of the employer’s conduct. This kind of dispute may be settled by way of adjudication. This in my view also puts paid to Mr Pretorius’ argument that the wide construction would delineate some items of remuneration as benefits thereby sacrificing clarity.”*

30. The court in *Appollo supra* went on to state:

*“In IMATU obo Venter v Umhlathuze Municipality, the Labour Court followed the Protekon approach. It then concluded that:*

*‘The more plausible interpretation is that the term “benefits” was intended to refer to advantages conferred on employees which did not originate from contractual or statutory entitlements, but which have been granted at the employer’s discretion.’ “It seems to me that the court in IMATU was concerned that if benefits include a statutory or contractual right or entitlement, the right to strike may be curtailed. As pointed out above employees will have an election to strike or go the arbitration/adjudication route in respect of many rights disputes. In my view, the better approach would be to interpret the term benefit to include a right or entitlement to which the employee is entitled (ex contractu or ex lege including rights judicially created) as well as an advantage or privilege which has been offered or granted to an employee in terms of a policy or practice subject to the employer’s discretion. In my judgment “benefit” in section 186 (2)(a) of the Act means existing advantages or privileges to which an employee is entitled as a right or granted in terms of a policy or practice subject to the employer’s discretion. In as far as Hospersa, GS4 Security and Scheepers postulate a different approach they are, with respect, wrong.’*

31. More importantly, the court in *Appollo supra* stated the following:

*“The distinction that the courts sought to draw between salaries or wages as remuneration and benefits are not laudable but artificial and unsustainable. The definition of remuneration in the Act is wide enough to include wages, salaries and most, if not all benefits.”*

32. This perhaps properly encapsulates the wide approach adopted by the court to the definition of the term ‘benefit’ within the context of labour law.

33. An acting allowance in the Department of Health is regulated by Resolution 1 of 2002.

34. As stated earlier, it is not disputed that the Applicant acted as an Operations Manager. She received two acting appointment letters from the Respondent. The first appointment letter was received on 26 October 2023.

35. The letter states as follows:

*“You are hereby appointed to act in a post of Operational Manager for Mvubukazi Clinic with effect from 26 October 2023 until further notice. All delegations relating to the Operational Manager are hereby vested on you. (sic)*

36. Clause 3.6 of Resolution 1 of 2002 states the following with respect to the period of an acting appointment:

*“An employee may not act in a higher vacant post for an uninterrupted period exceeding twelve months.”*

37. Clearly, an employee’s acting appointment cannot exceed 12 months. An employee may serve in a position for consecutive periods, provided the appointment complies with Resolution 2 of 2002. Each period must be preceded by a written acting appointment for 12 months.

38. The second acting appointment letter was issued to the Applicant on 1 April 2025 and states the following:

*“You are hereby appointed to act in a vacant post of Operational Manager in the component Mvubukazi Clinic for a period of 12 months (from 01/04//2025 to 31/03/2026).*

*You are authorized to exercise the delegation and perform the duties attached to the post. Your appointment in an acting capacity does not create a right to legitimate expectation to be appointed when the post is advertised. (sic)”*

39. The latter acting appointment letter complies with Resolution 1 of 2022, particularly clause 3.6.
40. The first letter dated 26 October 2023 exceeded 12 months as the Applicant worked continuously from 23 October 2023 until 01 April 2025. The Applicant served as Operations Manager for 17 months. The first acting appointment does not comply with Resolution 2 of 2002 regarding the term of the appointment.
41. Resolution 1 of 2002 does not allow for the payment of an additional allowance for acting beyond 12 months; therefore, the Applicant is not entitled to payment for acting beyond 12 months.
42. It is not disputed that she was paid for only three months, namely, August, September, and October 2023. Thereafter, the payments stopped.
43. Clause 3.1 of Resolution 1 of 2002 states:

*“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 (hereafter the “appointing authority”) shall be paid an acting allowance to act in vacant posts provided that:*

*3.1.1. the post is a vacant and funded post,*

*3.1.2. the acting period is longer than 6 weeks*

*3.1.3. the appointing authority is a level higher than the acting appointee*

*3.1.4. The EMPLOYEE must accept the acting appointment.*

*3.2. An EMPLOYEE may only be appointed to act in a higher post that is one post level higher than her/his current position.”*

44. It was not disputed, and it is common cause that the post in which the Applicant acted was a post higher than the post that she holds. She is a professional nurse, and the post she acted in was a higher post, that is, Operations Manager. It is also clear from the evidence that the post was funded when she was engaged to act as an Operations Manager. She was informed of the financial constraints only in October 2025, a month before the arbitration hearing.
45. It is also common cause and clear that the Applicant acted for more than 6 weeks. Lastly, it is common cause that the person (Primary Health Care Manager) who appointed her holds a post higher than hers (Applicant).

46. The defence raised by the Respondent was that the post was not funded, and that is the reason why the Applicant was not paid an acting allowance. This fact was never communicated to the Applicant whilst the Applicant was acting in the position. It was only communicated to the Applicant in October 2025. For this reason, it cannot be said that the post was not funded. The Applicant had an appointment letter and acted in the position. More importantly, the Respondent had an opportunity to inform the Applicant before issuing the second letter of appointment in April 2025, but did not do so. The Applicant acted in the position of Operations Manager up until the arbitration hearing. Her acting position has not been withdrawn or terminated. The Respondent tendered no evidence in this regard.
47. I am satisfied that the Applicant is entitled to an acting allowance as per the appointment letters and Resolution 1 of 2002.
48. I am accordingly satisfied that the failure of the Respondent to pay the Applicant an acting allowance constitutes an unfair labour practice.
49. As per Resolution 1 of 2002, the Applicant is entitled to the payment of an acting allowance.
50. Resolution 1 of 2002 states that:

*“The acting allowance will be calculated on the basis of the difference between the current salary notch of the EMPLOYEE and the commencing notch of the higher post. An EMPLOYEE acting in a post in the Senior Management Service will receive the difference between her/his current salary notch and 60% of the commencing total cost to employer package applicable to the post level. The allowance is payable as a monthly non-pensionable allowance.”*

51. The Applicant was paid R10000.00 per month as an acting allowance when she was paid for August, September, and October 2023. It was not disputed that this was the amount of the acting allowance payable to the Applicant. The Respondent made it clear that the Applicant will not be paid for the remainder of the acting appointment. The Applicant is entitled to payment for the remainder of the acting appointment.
52. The Applicant was paid for three months of the entire acting period. The Applicant is therefore entitled to payment of an acting allowance for the months she has acted up until present and the remaining period. The total period for which the Applicant is owed an acting allowance is 21 months. The amount due to the Applicant must therefore be calculated as follows:  $R10\ 000.00 \times 21 = R210\ 000.00$

## **AWARD**

- 53. The actions of the Respondent in not paying the Applicant an acting allowance constitute an unfair labour practice.
- 54. The Respondent is ordered to pay the Applicant R210 000. 00.
- 55. The amount in paragraph 48 must be paid to the Applicant on 15 December 2025.

*C. Oakes*

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**Charles Oakes**