



Commissioner : ANAND DORASAMY
Case No. : PSCB 531-15-16
Issued : 19 JUNE 2017

In the ARBITRATION between:

PSA OBO S S MAKHATHINI P & 10 OTHERS

APPLICANT

and

DEPARTMENT OF HEALTH-KZN

RESPONDENT

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DETAILS OF HEARING AND REPRESENTATION

1. The arbitration proceedings commenced at 09h00 on the 25 May 2017 at the Department of Health Boardroom in Pietermaritzburg. Mr Z Nhlangulela of the PSA represented the applicant and Mr B Gwamanda represented the respondent. The dispute concerns the interpretation or application of a collective agreement viz Resolution 3 of 1999, 1 of 2007 and 4 of 2015 dealing with danger allowance.

BACKGROUND

2. The applicants are employed at Umgeni and Estcourt hospitals. Both are public hospitals. All the applicants were not paid danger allowance from July 2007. After the matter could not be resolved the parties thereafter drafted a statement of case in respect of the issues in dispute. The submission dates were as follows:

APPLICANT'S FOUNDING SUBMISSION DUE 01:06:2017

RESPONDENT'S ANSWERING SUBMISSION DUE 08:06:2017

APPLICANT'S REPLYING SUBMISSION DUE 15:06:2017

The party's submissions were taken into account in arriving at my decision.

ISSUE TO BE DECIDED

3. I am to decide: whether:
The respondent failed to apply Resolutions 3 of 1999 and 4 of 2015 correctly in respect of the applicants' claim to be paid danger allowance from July 2007

SUMMARY OF THE EVIDENCE

4. APPLICANT'S SUBMISSION

A) STATEMENT OF MATERIAL FACTS

1. The applicants are employed by KZN Health as Social Workers and Occupational Therapists deployed in Umgeni and Estcourt Hospital respectively.
2. All applicants were not paid Danger Allowance as from July 2007 despite the fact that they are eligible categories in terms of PSCBC Resolution 1 of 2007, read with 3 of 1999 and 4 of 2015.

B) STATEMENT OF AGREED FACTS

1. As above
2. There is engagement at National Council (PHSDSBC) in respect of reviewing the list of employees who qualify for Danger Allowance.

C) STATEMENT OF LEGAL ISSUES

1. The respondent misinterpreted the provisions of PSCBC Resolution 1 of 2007 read with 3 of 1999 and 4 of 2015 and excluded the applicants from the employees eligible for the payment of Danger

Allowances despite the fact that it is provided in clause 1 of Annexure A (REPLACEMENT OF PARAGRAPH IX OF PSCBC RESOLUTION 3 OF 1999 REGARDING DANGER ALLOWANCE)

2. It explicitly reads as follows: 1. The employer shall pay the Standard Danger Allowance to an employee who in the course of her or his employment experience a genuine risk to her or his life and who is employed in one of the following categories and identified areas at work(where indicated):

- (a) Traffic/Regulatory Inspectors

- (b) Correctional Officers guarding prisoners

- (c) **Social Workers**, Youth Workers, Probation Workers, Nursing Personnel, **Occupational Therapists**, Psychologists, and Vocational Counsellors and Health Related Workers, working with prisoners, people held in places of safety.

3. The list is endless

4. The applicants who are Occupational Therapists are working closely with psychiatric patients who are unpredictably violent at times and pose a genuine risk to the applicants whilst in the course of rehabilitating them.

5. The Social Workers are also in contact with the psychiatric patients in trying to establish their origins assisting with applying for social grants.

6. The Social Workers are also expected to conduct outreach duties in communities where there are allegations of abuse of minor children by their parents or foster parents who becomes violent against the applicants on learning that they are being investigating.

7. They are expected to forcibly remove minors from the care of abusive guardians and even stop social grants if found to be misused.

8. The performance of these duties as stated above exposes them to genuine risk hence they are also eligible for the payment of Standard Danger Allowance.

D) THE ISSUES THAT THE PANELIST IS REQUIRED TO DECIDE

1. The panelist must apply his mind and correctly interpret the provisions of PSCBC Resolution 1 of 2007 (page 15, clause 1 (c), whether the applicants who are Social Workers and Occupational Therapists are eligible for the payment of Standard Danger Allowance or not.

E) THE PRECISE RELIEF CLAIMED

1. It is prayed on behalf of the applicants that the arbitrator rules that the applicants are eligible for the payment of Standard Danger Allowance, finds the respondent to have acted unfairly by excluding the applicants and directs the respondent to retrospectively pay the Standard Danger Allowance as at 01 July 2007 or as at date of employment if it was after July 2007.

F) PSCBC RESOLUTION TO BE INTERPRETED

1. PSCBC 3 OF 1999

2. PSCBC 1 OF 2007
3. PSCBC 4 OF 2015

5. APPLICANT'S REPLY

6. RESPONDENT'S SUBMISSION

ISSUE (24) (2), (24 (5) – Collective agreement – Interpretation or application

Issues to be decided: The Commissioner needs to decide where the cited PSCBC Resolution *Res 4 of 2015, 1 of 2007, 3 of 1999* makes provision for the payment of danger allowance to the following occupational categories of staff employed at Psychiatric Hospital.

The Union argues that the above cited PSCBC Resolutions makes provision for the payment of the following classes:

OCCUPAT THER TECH

OCCUPATIONAL THERAPIST

OCCUP THER ASST

SOCIAL WORKERS

The above mentioned employees are employed at Umgeni Hospital Psychiatric Institution, Umgeni Hospital is a specialized psychiatric hospital situated in Howick, which provides care for intellectually challenged persons with physical and multiple disabilities.

The degree of mental condition ranges from severe to profound mental retardation.

I wish to bring to Commissioners attention that Umgeni Hospital does not admit prisoners neither have people on parole.

The PSCBC Resolution no 03 of 1999:

Pages 40 to 41 outline the following beneficiaries of danger allowance:

1X Danger Allowance numbers 1 – 10

I have browsed and perused pages 31, 32 as well as 33 of the PSCBC Resolution 03 of 1999, I could not find any paragraph stipulating that the employees listed below must benefit in terms of the Collective Agreement the PSCBC Resolution 03 of 1999 must be paid danger allowance:

OCCUPAT THER TECH



OCCUPATIONAL THERAPIST
OCCUP THER ASST
SOCIAL WORKERS

WORKING WITH PSYCHIATRIC PATIENTS

The PSCBC Resolution 3 of 1999 is now 18 years old, one wonders what prompted the applicant to realize so late that their members listed above and other categories not listed under Annexure A, qualify to be remunerated danger allowance.

ISSUE IN DISPUTE: INTERPRETATION / APPLICATION OF A COLLECTIVE AGREEMENT.

PSCBC Resolution 01 of 2007

ANNEXURE A, replacement of paragraph 1X of PSCBC Resolution 03 of 1999 regarding danger allowance reads thus:

The employer shall pay the standard Danger Allowance to an employee who during the course of his or her employment experiences a genuine risk to her or his life and who is employed in one of the following occupational categories and identified areas of work (where indicated).

[a] Traffic/Regulatory inspectors:

[b] Correctional Officers guarding prisoners.

[c] Social workers, Youth workers, Probation Workers, Nursing Personnel, Occupational Therapists, Psychologists and Vocational Counsellors and *Health Related Workers, working with prisoners.* people held in places of safety and People on parole.

(d) Nurses working with psychiatric patients,

(e) Educationists working with prisoners,

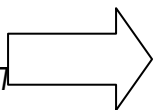
I reiterate that I perused through PSCBC Resolution 01 of 2007, but could not establish explicitly any directive contained in the collective agreement asserting that the following occupational categories must be paid danger allowance:

OCCUPAT THER TECH

OCCUPATIONAL THERAPIST

OCCUP THER ASST

SOCIAL WORKERS



WORKING WITH PSYCHIATRIC PATIENTS

In terms of the PSCBC Resolution 01 of 2007, the above mentioned employees do not qualify to be remunerated danger allowance.

Employees, who benefit in terms of the PSCBC Resolution 01 of 2007, are outlined on Annexure A: Replacement of paragraph 1X of PSCBC Resolution 3 of 1999 regarding danger allowance.

The applicant cannot therefore read Annexure A (c) in isolation; section 1 (c) deals with Health Related Workers working with prisoners. Inference can categorically be drawn that Occupational Therapy Technicians, Occupational Therapists, Occupational Therapy Assist and Social Workers working with psychiatric patients have not been incorporated as beneficiaries of danger allowance.

The PSCBC Resolution 01 of 2007 makes no specific reference to other occupational categories working with psychiatric patients, the beneficiaries of danger allowance is still limited to nursing personnel, as outlined under *1.4 Nurses working with psychiatric patients*.

PSCBC Resolution 01 of 2007 is now 10 years, one also wonders when the applicant (PSA) woke up and realized that the department ought to remunerate the Social Workers working with psychiatric patient's danger allowance.

ISSUE IN DISPUTE: INTERPRETATION / APPLICATION OF A COLLECTIVE AGREEMENT.

PSCBC Resolution 04 of 2015

Annexure A

Provisions of Danger Allowance

- 1.3 Social workers, Social Auxiliary Workers, Youth Workers, Probation Workers, Nursing Personnel, Occupational Therapists, Psychologists and Vocational Counsellors and Health Related Workers, working with prisoners, people held in Child and Youth Care Centres (CYCC) in terms of section 196 of the Children's Act 38 of 2005 and people on parole,
- 1.4 *Nurses working with psychiatric patients*,
- 1.5 Educationists working with prisoners,

It is my submission therefore Mr Arbitrator that the employees cited by the Applicant who in this case is the PSA do not qualify for Danger Allowance. Umgeni Hospital is neither a Child nor Youth Care Centre (CYCC) in terms of section 196 of the Children's Act 38 of 2005 and people on parole. Patients are admitted in terms of Mental Health Care Act 17 of 2002.

The PSCBC Resolution 04 of 2015

Provisions on the danger allowance

Crystal clear inference is drawn to section 1.3 Social workers, Social Auxiliary Workers, Youth Workers, Probation Workers, nursing Personnel, Occupational Therapies, Psychologists and Vocational

Counsellors and Health Related Workers, working with prisoners, people held in Child and Youth Care Centres (CYCC) in terms of section 196 of the Children's Act, 38 of 2005 and people on parole.

Additionally the PSCBC Resolution 05 of 2015

Item 03 of the Resolution

3.1 Parties agree that the employer shall undertake a comprehensive review of the danger dispensation applicable to the Public Service and the modality for the payment of danger allowance and such shall be tabled at the PSCBC for negotiations.

3.2 The sectors will identify and agree on new categories that may be included under danger dispensation.

The applicant is granted an opportunity in terms of the PSCBC Resolution 05 of 2015, to negotiate the extension of payment to other categories, at this juncture no directive has been issued to extend the payment of such remuneration.

The matter of other categories is currently in discussion at the PSCBC.

The Commissioner should be mindful of the fact that, if an arbitration award is granted, the institution does not have the authority/requisite jurisdiction to effect any benefit unless directed by the Provincial department to execute such, in any case at institutional level we get directives in terms of Human Resources Management Circulars, directing Head of Institutions to implement any benefit, in the absence of such no payment can be effected.

The Applicant the PSA in this case must defer the matter to the PSCBC for negotiations, should they succeed to negotiate the inclusion of other categories as indicated in the PSCBC Resolution 05 of 2015, the DPSA will then issue a directive to Provincial Department, the Provincial Department to the institution that is the normal flow of instructions.

Furthermore the issue of Review of Danger Allowance in the Public Service is currently, being discussed at PHSDSBC meeting; please see Annexure A (Minutes of the special Council meeting, held on 11 May 2017, in Public Health and Social Development Sectoral Bargaining Council (PHSDSBC)

Agenda meeting wherein Review of danger Allowance was discussed is indexed hereto as **Annexure B**.

The issue/s that the panellist is required to decide:

- Whether applicant qualify to be paid danger allowance.

- Whether the arbitrator has the requisite jurisdiction /power to extend beneficiaries of Danger Allowance outside the ambit of agreed PSCBC Resolutions cited as PSCBC 3 of 1999, 01 of 2007, and 4 of 2015, wherein it is unambiguously stipulated who should benefit.
- Whether the institution may adopt a parallel approach wherein an item is being deliberated by the applicant through collective bargaining process, and put the cart before the horse, remunerate employees without any PSCBC Resolution signed extending danger allowance to other categories.

THE PRECISE RELIEF CLAIMED

It is prayed that the arbitrator rules that the applicant is encouraged to continue negotiating at the Council with jurisdiction, for the inclusion of Social workers, Occupationally Therapy Technicians, Occupational Therapy Assistants, Occupational Therapists working with Psychiatric Patients.

The referral is flavourous.

SURVEY OF EVIDENCE AND ARGUMENT

7. The applicant challenges the respondent's application of Resolutions 4 of 2015, 1 of 2007 and 3 of 1999 in respect of danger allowance.
12. The respondent challenges the assertion of the applicant and submits that the applicants do not qualify for the benefit alternatively the benefit in question danger allowance in the Public Service is presently being negotiated in the PHSDSBC.

ANALYSIS OF EVIDENCE AND ARGUMENT

13. In order to remain within the scope of section 138 (1) of the Labour Relations Act the relevant provision of the applicable resolutions have been read with the applicable provisions relating to the terms and conditions of employment of employee by the employer.
14. In terms of decision in Public Servants Association O B O Liebenberg v Department of Defence and others (2013) 22LC 4.2.1 the issue of the jurisdiction of councils to arbitrate disputes referred under section 24 of the LRA has been settled. The followings are important sections of the judgment:

The Court, accordingly, ruled that the council had jurisdiction to entertain the dispute under section 24 of the LRA, and remitted the matter to the council to arbitrate on the merits.
15. In the present cases the applicants challenge the employer's application of the Resolutions and contend that they should be paid the danger allowance. The necessary document/ Resolutions are too large to attach to the award but has been considered when I arrived at my decision.
16. The resolutions are clear and unambiguous in that the nursing personnel that qualify for the danger allowance must be working with prisoners, people held in places of safety and people on parole. The category of persons listed above are unlike the patients that are treated in the hospitals in which the applicants work.

17. The resolutions were designed to remunerate nurses that are faced with the dangers of working with persons that were convicted and sentenced to prison or housed in places of safety.
18. It is unreasonable for the applicants to access this benefit. The extension of this benefit to other categories of employees is presently being negotiated. As such and because they do not qualify in terms of the resolutions the applicants case is dismissed.

As a consequence of the above I make the following order:

AWARD

19. The Respondent correctly applied the provisions of the resolutions in question in relation to payment of danger allowance.
20. The applicants claim is dismissed and in the present form they do not qualify for danger allowance.

A handwritten signature in cursive script, appearing to read 'a S Dorasamy', written in dark ink.

Commissioner: ANAND DORASAMY