



CONCILIATION, MEDIATION & ARBITRATION COMMISSION (CMAC)

HELD AT MBABANE

SWMB 177/12

In the matter between:-

**SNACS: HOSPITAL ORDERLIES
AND AUXILLARY STAFF**

APPLICANT

And

**CIVIL SERVICE COMMISSION
MINISTRY OF PUBLIC SERVICE
AND INFORMATION
MINISTRY OF HEALTH AND
SOCIAL WELFARE**

1ST RESPONDENT

2ND RESPONDENT

3RD RESPONDENT

CORAM:

Arbitrator

: Ms. K. Msibi

For Applicant

: Mr. Q. Dlamini

For Respondents

: Mr. E. Nsibandze

Mr. P. Sihlongonyane

Ms. P. Mkhwanazi

Ms. F. Simelane

ARBITRATION AWARD

1. PARTIES AND REPRESENTATION

The pre-arbitration in this matter was held on the 20th April, 2013 and it was agreed by consent of all parties that the hearing be scheduled for the 17th and 18th April 2013, respectively.

The Applicants were represented by Mr. Quinton Dlamini from SNACS. The Respondents were represented by Mr. E. Nsibandze respectively.

2. ISSUES IN DISPUTE

The Applicants claim the following:-

2.1 payment of Hospital Orderlies on Grade A4;

2.2 Promotions for Senior non-academic positions to be made internally before external considerations.

3. BACKGROUND

The Applicants are employed by the first Respondent under the Ministry of Health and Social Welfare. The Applicants are aggrieved that the first Respondent remunerates them at grade A2, whereas their counterparts at the psychiatric hospitals are remunerated at grade A4.

The Applicants are of the view that the duties they conduct are similar to those of the orderlies at the psychiatric hospital and hence view the action of the Respondents as being discriminatory.

The Applicants are further aggrieved that the Respondents always fill vacant positions by recruiting externally, whereas they are of the view that all recruitments should be done internally, and only if the event that there is no suitable candidate that Respondents will recruit externally.

4. SUMMARY OF EVIDENCE AND ARGUMENTS

4.1. THE APPLICANTS' CASE

It was the Applicants case that duties of orderlies at the Psychiatric hospital were similar to those of Hospital Orderlies in the general hospital and clinics

It was also their case that promotions in the civil service for non-academic positions are made internally prior to recruiting outside.

There were four witnesses who gave evidence on behalf of the Applicants. They presented evidence under oath. The Applicants also presented documentary evidence in support of their case.

4 THE TESTIMONY OF ZODWA SIMELANE

- 4.1.1 The witness testified that she was employed by the 1st Respondent in June 1999 as a hospital orderly. She was initially paid under Grade 2, but was aggrieved by the payment under this grade due to the fact that she was rotated through many different departments within the hospital. She stated that these departments were not under her cadre. The witness subsequently lodged a dispute against her employer with CMAC, and was as a result promoted to grade A4 as a Mental Health Orderly.
- 4.1.2 She testified that the duties of a Mental Hospital Orderly were for all intents and purposes similar to those of a Hospital Orderly. She stated that the job description she was given when she resumed work as a mental health orderly was the same as the one she had been given when she assumed the position of Hospital orderly at Mbabane Government Hospital.
- 4.1.3 She stated that the work at the Psychiatric Hospital was similar to the work she did as an orderly at Mbabane Government Hospital. The only difference was that the patients were more violent. She stated that the main duties of an orderly at the general hospitals and clinics was to clean, bath and feed patients and at the

psychiatric hospital it was to clean, bath and feed and also sedate violent patients.

4.1.4 She stated that the different categories of orderlies faced different risks because orderlies at hospitals and clinics were exposed to HIV and TB, in that they were not provided with masks, whereas at the mental hospital the risk was more physical.

4.1.5 She stated that at the Mental Hospital there are orderlies who are paid on Grade A2, and as such they did not understand the rationale for this. As a result they had requested an official from the Ministry of Public Service and Information to explain to them the differences between the grades.

4.2 THE TESTIMONY OF SIMON MPHIKWA MKHONTA

4.2.1 The witness testified that he was employed by the 1st Respondent as a Hospital Orderly in 2002. He is based at Piggs Peak Government Hospital. He stated that he was currently paid on Grade A2.

4.2.2 He stated that this was confusing to him because his job description read that he was paid on Grade 4.

4.2.3 He stated that as an Orderly he was required by the employer to rotate under the different wings within the hospital and was currently based at the Psychiatric ward in Piggs Peak. He stated that he was paid at the lower grade despite the fact that he was required to handle violent patients.

4.3 THE TESTIMONY OF SELBY SABELO KHUMALO

4.3.1 The witness testified that he was employed by the 1st Respondent as a Nurse and was currently based at the Piggs Peak Government Hospital. He testified that he had worked at

the Psychiatric Hospital in Manzini for over twenty years , before being transferred to Mankayane Government Hospital and finally to Piggs Peak.

4.3.2 He testified that he was currently based at the psychiatric unit in Piggs Peak. He stated that from his observation the duties done by the orderlies between the two different institutions were similar in that it required somebody to clean. He stated that the entry requirements were that the person would be from around that community, physically fit and strong. He said there were no special qualifications and the work required on the job training.

4.3.3 He said risks varied between the different wards. For example the TB wards carried the risk of exposure to contagious diseases, maternity wards carried more risks, as the patients were inclined to develop mental problems and attempt to manhandle the hospital personnel, whereas with the mental patients there is a high exposure of violence on admission and thereafter they are sedated and are separated indifferent wards.

4.3.4 He stated that in Piggs Peak mental patients were admitted at the police station due to the shortage of nurses. There after they are transferred to the mental hospital in Manzini.

4.4 THE RESPONDENTS CASE

4.5 THE TESTIMONY OF HAPPY TSABEDZE

4.5.1 The witness testified that she was employed by the first Respondent as a mental hospital orderly and was based at the mental hospital in Manzini. She stated that according to her job description, she reported to the nurses.

- 4.5.2 She stated that she was paid at Grade A4, and that some of her colleagues were paid on Grade A2. She stated that these orderlies were only responsible for cleaning corridors and did not go into the wards.
- 4.5.3 She stated that as a mental health orderly she was exposed to numerous risks, resultant from having to deal with violent patients. She stated that the violence was such that it could lead to the loss of body parts due to the continuous violent nature of these patients.
- 4.5.4 She stated that her duties included inter alia the grooming of patients, holding down patients, feeding patients, separating fights. She stated that there were no lodgers at the mental hospital and patients were admitted at all hours.
- 4.5.5 She stated that mental health orderlies underwent numerous training. She stated that nurses could only enter the wards if accompanied by an orderly.

4.6. THE TESTMONY OF SIBUSISO MAKHUBU

- 4.6.1 The witness testified that he was also employed as a mental health hospital orderly at the mental hospital in Manzini and was paid on Grade A4.
- He corroborated the evidence of Happy and further went on to state that the work they carried out was similar to that of prison warden in that they apprehended patients, unshackled patients from restraints, secluded patients and separated fights.
- 4.6.2 He went on to state that a mental patient could start a fight over petty issues and as such it was important for them to provide counselling to the patients.

5. ANALYSIS OF EVIDENCE

5.1 **SIMILARITY OF DUTIES**

5.1.1 Zodwa, the first witness for the Applicant testified that the duties conducted by the hospital orderlies at the mental hospital and at other government institutions were relatively the same. The Respondent in trying to dissuade this position presented two different job descriptions for the position of Mental Hospital Orderly. The first one was titled Mental Health Orderlies job description. Both these job descriptions have no stamp affixed on them to show when they were adopted and/ or incorporated. Job descriptions for government departments in most cases always have a stamp affixed to assist in determining when these job descriptions were adopted.

5.1.2 One of these job descriptions is a very brief job description in comparison to the other one. The second job description presented by the Respondents was more detailed and was titled Mental Patient Orderly Grade A4. This job description refers only to Grade A4. This is despite the fact that the Respondent conceded that there were orderlies in the Mental Hospital who are paid on Grade A2. No evidence was given to show that those orderlies were given a different job description, this is despite that the gist of the Respondents case emanates from the job description.

5.1.3 The first witness for the Applicant testified that on her transfer to the mental hospital she was given the same job description she used at the Mbabane Government Hospital.

My observation of the witness was that she was a competent witness was a witness and maintained her composure under cross examination. As such I am inclined to be persuaded by her evidence. I am thus of the view that the Respondents could not have presented different job descriptions to some orderlies and

another one to other the orderlies at the mental hospital. This is because this purported job description contains a pay grade.

- 5.1.4 An essential element in a claim for equal pay for equal work is a factual substance, that the work performed by the comparator is “equal”. This does not mean only that the work must be identical or interchangeable;- it is sufficient that the work is similar in nature where any differences are infrequent or of trivial significance in relation to the work as a whole.
- 5.1.5 The Respondents have gone to painstaking lengths to point out that duties conducted by the orderlies in hospitals and the mental hospital are distinct. They enumerate the risk factor to be a major deciding factor. It is my view however, that risk is not a factor that would justify differential pay grades. There are other means that could be explored to mitigate job worth.
- 5.1.6 In my view these two positions are not disparate. The reporting structure for one is similar, the duties conducted, the entry skill and qualification. It is thus unfair to pay one group more simply because they are at the mental hospital. This is because as was pointed out even the orderlies in Piggs Peak for example work with mental patients and are not accordingly rewarded. This discrepancy creates percipience that others are more equal than others.
- 5.1.7 In making a ruling on this matter I will be guided by the manner in which nurses are paid. I am inclined to the fact that nurses are paid as professional staff because they possess a relevant tertiary qualification and are thus paid based on qualification and seniority. What is however of paramount importance is that if the argument raised by the Respondents of a risk factor was to be taken into account, the question would be why are nurses at the mental hospital not paid more, because they are also

subject to the physical risks. Do the Respondents only mean that the risk factor comes into play only when orderlies are concerned?

- 5.1.8 The Respondent went on to painstaking lengths to show that the duties carried on by these two categories are not the same. Accordingly the duties carried out by nurses in the mental hospitals are not similar to those carried out by nurses elsewhere.
- 5.1.9 I am thus inclined to state that orderlies are employed in the same designation and performing the same job, thereby rendering it unfair for the Respondents to make disparate payments to them.
- 5.1.10 The justification that the mental orderlies are paid more because they are trained is a misconception. The witness for the Respondents testified that they undergo a one day workshop. Such a workshop does not in my view amount to training. It appears to be more of an induction on the job and hence would not in my view justify such payment. Employers are mandated to train their employees, and it becomes unfair when one group is trained in order to justify or warrant such pay. In my view all these orderlies possess the same skill or expertise.
- 5.1.11 In ***Harksen v Lane NO & others 1998 (1) SA 300 (CC)*** at 325A. It was pointed out that ‘Employment policy or practice’ is defined by section 1 of the EEA to include remuneration, employment benefits and terms and conditions of employment. To pay an employee less for performing the same or similar work on a listed or an analogous ground clearly constitutes less favourable treatment on a prohibited ground...”

5.1.12 The **ILO Equal Remuneration Convention 1951 (No. 100)** situates the comparison to be made at the level of the value of work, and obliges ratifying member states to give effect to the principle of equal remuneration for men and women workers for work of equal value. To this extent, it is required to interpret the relevant sections in our law in compliance with the public international law obligations.

DISCRIMINATION

5.1.13 The Applicant contends that the action by the Respondents is a form of discrimination. **The Employment Act, No 5 of 1980** in section 29 provides as follows: “No employer shall in any contract of employment between himself and an employee discriminate against any person or between employees on grounds of race, colour, religion, marital status, sex, national origin, tribal or clan extraction, political or social status”. Section 20 of the **Constitution of Swaziland No 1 of 2005** also provides that no person shall be discriminated against on the ground of gender, race, colour, ethnic origin, tribe, birth, creed or religion or social or economic standing, political opinion, age or disability.

The word “discriminate” is defined as giving different treatment to different persons attributable only or mainly to their respective descriptions by gender, race, colour, ethnic origin, tribe, creed, birth or religion, or social or economic standing, political opinion, age or disability.

5.1.14 The Applicants contend that this is an act of discrimination by the Respondents. It is however imperative to state that same does not fall within the ambits of discrimination that appear in both the Employment Act and the Constitution. For an employee to successfully claim that he has been discriminated against the

alleged act of discrimination must fall within one or more of the categories mentioned in the Constitution and the Act. If it falls outside these ambits than it cannot be properly regarded as discrimination. In **Louw v Golden Arrow Bus Services (Pty) Ltd (2000) 21 ILJ 188 (LC)**, **Landman J** said the following:

“In other words, it is not an unfair labour practice to pay different wages for equal work or for work of equal value. It is however an unfair labour practice to pay different wages for equal work or work of equal value if the reason or motive, being the cause for so doing, is direct or indirect discrimination on arbitrary grounds or the listed grounds, eg race or ethnic origin.” at 196.

5.1.15 In **“Essential Employment Discrimination law”**, Landman suggests that to succeed in an equal pay claim, the claimant must establish that “the unequal pay is caused by the employer discriminating on impermissible grounds”. This suggests that a claimant in an equal pay claim must identify a comparator, and establish that the work done by the chosen comparator is the same or similar work (this calls for a comparison that is not over-fastidious in the sense that differences that are infrequent or unimportant are ignored) or where the claim is for one of equal pay for work for equal value, the claimant must establish that the jobs of the comparator and claimant, while different, are of equal value having regard to the required degree of skill, physical and mental effort, responsibility and other relevant factors. Assuming that this is done, the claimant is required to establish a link between the differentiation (being the difference in remuneration for the same work or work of equal value) and a listed or analogous ground. If the causal link is established, section 11 of the EEA requires the employer to show that the discrimination is not unfair, i.e. it is for the employer to justify the discrimination that exists.

- 5.1.16 In ***Ntai & others v South African Breweries Ltd (2001) 22 ILJ 214 (LC)***, the Court acknowledged the difficulties facing a claimant in these circumstances and expressed the view that a claimant was required only to establish a *prima facie* case of discrimination, calling on the alleged perpetrator then to justify its actions. But the Court reaffirmed that a mere allegation of discrimination will not suffice to establish a *prima facie* case (at 218F, referring to ***Transport and General Workers Union & another v Bayete Security Holdings (1999) 20 ILJ 1117 (LC)***). **Grogan A.J.** stated the following at page 1119, in respect of discrimination: “However, the mere fact that an employer pays one employee more than another does not in itself amount to discrimination: see **Du Toit et al/ The Labour Relations Act of 1995 (2ed) at 436**. Discrimination takes place when two similarly circumstanced individuals are treated differently. Pay differentials are justified by the fact that employees have different levels of responsibility, expertise, skills, and the like.”
- 5.1.17 I agree fully with this opinion. An employer may pay different wages to the same type of employees who do the same type of work, provided there are certain justifiable factors that inform the disparity, such as expertise, skill, and experience.
- 5.1.18 In the present case however all these orderlies possess the same skills and experience? The notion of risks can only if justified; be rectified by the payment of a risk allowance. Even then same would have to be particularly quantified with the employer engaging all the relevant stakeholders. It would be unfair for the employer to particularly decide on its own contention to award the one group a higher grade, without first having consulted extensively.

5.1.19 In its opening remarks the second Respondent submitted budgetary constraints, in the upgrading of the affected orderlies. However, no evidence was led to show that the Respondents could not afford to implement this. A lot of emphasis was particularly made on the failure by the Respondents to pay the one group of orderlies more because they face no risks.

PROMOTIONS TO BE MADE INTERNALLY PRIOR TO EXTERNAL RECRUITMENT

5.1.20. The basis of fair labour practice requires recruitment to be made internally prior to external recruitment. This is a basis that promotes good industrial relations in any work situation. I am thus inclined to concede on this notion with the Applicant. The Respondent is as such required to make promotions internally, before external recruitment.

5.1.21. The Respondent is required to advertise internally, failing which it can recruit externally.

6. AWARD

6.1 The Respondents are directed to upgrade the positions of all orderlies in the country to Grade A4. This upgrade is to be implemented as from the 1st April, 2014, to enable the Respondents to sufficiently include the same in its budget.

6.2 The Respondents are directed to firstly consider internal advertising all auxiliary positions. This is to be implemented with immediate effect. The Respondents can only recruit externally if no suitable position is identified within the cadre.

**THUS DONE AND DATED AT MBABANE ON THISDAY OF
SEPTEMBER, 2013.**

**KHANYISILE MSIBI
CMAC ARBITRATOR**