



PHSDSBC

PUBLIC HEALTH AND SOCIAL DEVELOPMENT
SECTORAL BARGAINING COUNCIL

ARBITRATION AWARD

Arbitrator: **Mr. Anand Dorasamy**

Case No: **PSHS1039-15/16**

Date of Award: **4 DECEMBER 2016**

In the matter between:

PSA OBO NHLANGULELA

(Union/ Applicant)

and

DEPARTMENT OF HEALTH- KWAZULU NATAL

(1st Respondent)

and

Ms BONGEKILE ELLEN CELE

(2nd Respondent)

DETAILS OF HEARING AND REPRESENTATION

1. The arbitration proceedings commenced at 10H00 on the 23 November 2016 at the Dunstan Farrell hospital Boardroom, in Hibberdene. Ms G Hassan of the PSA represented the applicant and Mr S A Mzele represented the first respondent (employer) and Ms C N Moabi of the PSA represented the second respondent (the appointee). This is a dispute in terms of s 186(2) (a) of the LRA dealing with promotion. After the evidence was tendered the parties submitted written closing arguments on the 30 November 2016. I have taken note of the closing arguments in arriving at my decision.

BACKGROUND

- 2 The applicant contends that the employer had unfairly not promoted him to the post of Senior Systems Management Officer, Dunstan Farrell hospital, level 8 with effect from 1 December 2015. and seeks retrospective appointment with compensation.

3. The employer contends that the Applicant is in the process of being translated to level 5 so in fact the Applicant would be on the same level as she will be backdated for the translation. Therefore the application should be dismissed.

ISSUES TO BE DECIDED

4. I am to determine whether the employer perpetrated an act of unfair labour practice against the applicant in respect of not promoted him to the post of Senior Systems Management Officer, Dunstan Farrell hospital, level 8 with effect from 1 December 2015 and seeks retrospective promotion.

APPLICANT'S OPENING STATEMENT

5. The applicant applied for the post of Senior Systems Management Officer's post a level 8 post at Dunstan Farrell hospital. Currently he employed (substantive post) at Estcourt hospital as a Principal Security Officer at level 6.
6. He was interviewed for the post and scored the highest 73% and in terms of the respondent's Employment of Equity Plan there was a need for two African males. Both in terms of his suitability, skills, knowledge and EEA considerations were found to be the most suitable candidate.
7. On the day of the interviews he filled a declaration form to declare that he had been dismissed from employment but was later re-instated. The applicant followed up the interview process and was told that he was no longer suitable for the post.
8. The applicant seeks the setting aside of the appointment of the second respondent and he be promoted to the position retrospectively from 1 December 2015.

The first respondent wants the second respondent's appointment to be confirmed whilst the second respondent wants the employer to defend her appointment to the post.

FIRST RESPONDENT'S OPENING STATEMENT (EMPLOYER)

9. The respondent submits that the institution followed the circulars (Circular 40/2015) in this matter and states that the Declaration Form must be filled and returned in 5 days. The applicant failed to follow the circulars and procedures and did not submit the presiding officer's report or arbitration award. The next best candidate was appointed and respondent prays for the appointment to be confirmed.

SECOND RESPONDENT'S OPENING STATEMENT (APPOINTEE)

10. The appointee is Ms Bongekile Ellen Cele and she believes that the employer must defend the decision to appoint her.

APPLICANT'S CASE

ZAMANI NHLANGULELA

The salient aspects of his evidence are recorded below.

11. He was appointed on the 1 April 2006. After the interviews and after two weeks he enquired if the appointment was made and was told that he would be contacted if he was successful. A week later He was told that the post was offered to a female but after he did his research he was told that a male had vacated the post. He lodged a grievance but it remained unresolved.
12. In terms of the EEA targets African males and not females were targeted. He declared a dispute at the CCMA and was supplied with documents that showed that he scored the highest and was recommended for the post. He was not told the reason he was not appointed.
13. The respondent enquired from Estcourt hospital about his case in 2011 and the arbitration award. The requested information was supplied.
14. He made the disclosure out of honesty although he was not obliged to do so. He was given the Declaration Form and not the circular.
15. The action of the respondent prejudiced him in that he was put under lot of stress and would have been two levels higher.

Under cross examination he stated as follows.

FIRST RESPONDENT

16. He sits on the EEA committee.
17. He was not dismissed in terms of the law.

SECOND RESPONDENT

18. Nil

HOWARD SIHKE KWENZAKUFANI HLONGWA

The salient aspects of his evidence are recorded below.

19. He is the HR Manager at Grey's hospital.
20. He worked at Natalia building when the policy was implemented. There is no review process in promotion policy.
21. A candidate cannot be disqualified if one has a clean record.

Under cross examination he stated as follows.

FIRST RESPONDENT

22. Scores are one of the factors in deciding who to promote. He was on the task team to formulate the policy.

SECOND RESPONDENT

Nil

FIRST RESPONDENT'S CASE

LINDA MARGARET CHIPOSI (DR)

The salient aspects of her evidence are recorded below.

23. She is the hospital's medical manager and was the chairperson of the Interview committee. The Declaration form must be completed and returned within 5 working days.
24. If the case was overturned at arbitration it was not necessary to reveal that as no misconduct. The verification is done by the Department. The applicant came for the interview and submitted his Declaration form and HR brought the misconduct to their attention.
25. The re-convening of the panel was done because the applicant did not meet the conditions of the declaration. The second highest candidate was selected.

Under cross examination she stated as follows.

APPLICANT

26. The actual reason for not being appointed is based on not completing information within 5 days. The award nullifies the dismissal. HR should have guided them in this respect and should answer this question.
27. The institution requested information on the 13 November 2015 from Estcourt hospital. The award was provided to Duncan Farrell hospital. The interviews took place on the 9 November 2015. The decision was based on the guidance from HR and lack of documents.

SECOND RESPONDENT

28. Nil.

SPECIAL NOTE

The second respondent elected not to testify or call witnesses.

SURVEY OF EVIDENCE AND ARGUMENTS

29. The applicant believes that the employer perpetrated an act of unfair labour practice against him in not offering h the post of Senior Systems Management Officer Level 8 with effect from 1 December 2015.
30. The respondents believe that the employer did not perpetrate any act of unfair labour practice against the applicant and prays that the application be dismissed.

ANALYSIS OF EVIDENCE AND ARGUMENTS

- 31 This matter was cited as an unfair labour practice dispute in terms of Section 186 (2) (a) of the LRA. The issues to be decided is whether the respondent (employer) perpetrated an act of unfair labour practice against the applicant in not appointing him to the post of Senior Systems Management Officer Level 8 with effect from 1 December 2015.
32. I have taken cognizance of the decision in Sweeney/ Transcash [2000] 6 BALR 712 (CCMA) where the commissioner held that arbitration hearings constitutes a rehearing *de novo* on the merits. The award must accordingly be based on evidence led at the arbitration.
33. The issues in dispute in this matter are fairly straightforward. The applicant applied for the post of Senior Systems Management Officer Level 8 with effect from 1 December 2015.
34. After the interviews he challenged his non appointment and after receiving the information pursuant to the matter referred to the CCMA he declared a dispute at the Council.
35. The applicant scored the highest and satisfied the employer's EEA target. He disclosed that he was dismissed but that his dismissal was overturned at arbitration. The arbitration award had nullified the disciplinary sanction hence this cannot be held against the applicant.
36. The only question that the panel used to displace the applicant was that he did not provide documents. The documents were not necessary and in any event the documents were provided by Estcourt hospital before the decision to appoint the second respondent was made. The HR person sitting at the process ought to have advised the panel that there was no need for the documents or the verification as the dismissal was overturned. Further the HR should have advised the committee of the contents of Human Resource Management Circular NO 14 of 2015 wherein the following is relevant:
- 1.1.Only new appointment to the public service including employees from other departments/ other provinces will be subject for verification of information by State Security Agency. In service employees within the Department of Health shall not be subjected to the verification of information when they apply for advertised posts with effect from 1/03/2015 (my emphasis).***
- 37 It is clear the employer did not apply its mind from the evidence tendered the interview panel was not advised of the employer's policy for recruitment and appointment by the HR practitioner who sat in at the interviews and was supposed to guide the committee in respect of the policy.
38. The employer has a recruitment and selection policy that culminates in the successful applicant being recommended to the appointing authority. In the case of the applicant was the highest scoring candidate and was recommended for the post but the committee re-convened (not in terms of the

policy) offered the post to the second respondent who was not aware that she was not the first recommended candidate.

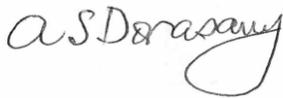
39. In *City of Cape Town v SA Municipal Workers Union on behalf of Sylvester & others* (2013) 34 ILJ 1156 (LC); [2013] 3 BLLR 267 (LC) it was held that “in deciding whether the employer acted fairly in failing or refusing to promote the employee it is relevant to consider the following:
- * whether the failure or refusal to promote was caused by unacceptable, irrelevant or invidious consideration on the part of the employer; or
 - * whether the employer’s decision was arbitrary, or capricious, or unfair; or
 - * whether the employer failed to apply its mind to the promotion of the employee; or
 - * whether the employer’s decision not to promote was motivated by bad faith;
 - * whether the employer’s decision not to promote was discriminatory;
 - * whether there were insubstantial reasons for the employer’s decision not to promote;
 - * whether the employer’s decision not to promote was based upon a wrong principle;
 - * whether the employer’s decision not to promote was taken in a biased manner.
40. Further in *Aries v CCMA & others* (2006) 27 ILJ 2324 (LC) the court held as follows:
“that an employee can only succeed in having the exercise of a discretion of an employer interfered with if it is demonstrated that the discretion was exercised capriciously, or for insubstantial reasons, or based upon any wrong principals or in a biased manner.”
41. There are no justifiable reasons advanced for the employer not appointing the applicant in the first instance save for the applicant not submitting the documents if it was necessary as recorded in his Declaration Form. In any event the documents were submitted prior to the second respondent being appointed.
42. Accordingly the applicant qualifies for appointment retrospectively which will place him in the same position that he would have been had he been appointed on the 1 December 2015.
- 43 As a consequence of the above the applicant has discharged the onus of proving that the employer perpetrated an act of unfair labour practice in respect of not appointing him Senior Systems Management Officer Level 8 with effect from 1 December 2015.

8. AWARD

I make the following award:

44. The 1st respondent perpetrated an act of unfair labour practice against the applicant in respect of not appointing him to the post of Senior Systems Management Officer Level 8 with effect from 1 December 2015.
45. The application succeeds and he is entitled to the relief claimed.
46. The 1st respondent is ordered as follows:-
 - (i) to set aside the appointment of the 2nd respondent.
 - (ii) to place the Applicant in the position of Senior Systems Management Officer Level 8 with effect from 1 December 2015.
 - (ii) to reimburse the applicant the difference in salary from his current position to the promotion of Senior Systems Management Officer Level 8 with effect from 1 December 2015.
47. The 1st respondent must comply with the order made above on or before 31 December 2016.

Signature



Arbitrator: Anand Dorasamy