



ARBITRATION AWARD

Case Number: PSHS1059-16/17

Commissioner: T ERASMUS

Date of Award: 20 June 2017

In the matter between:

PSA obo SINGATWA KAAS

(Union/Applicant)

and

DEPARTMENT OF SOCIAL DEVELOPMENT- WESTERN CAPE

(Respondent)

and

Ms SHIRLEY DAVIS

(interested party)

DETAILS OF HEARING AND REPRESENTATION

1. This matter was set down for Arbitration at the Public Health and Social Development Sectoral Bargaining Council in terms of section 186(2)(a) of the Labour Relations Act 66 of 1995 ("the LRA") and was heard at the offices of the 8th Floor Boardroom, 4 Dorp Street, Cape Town on 30 May 2017. Applicant was represented by Mr A Fisher from PSA, whilst the Respondent was represented by Ms L Mohamed, Labour Relations Officer at Respondent.

ISSUE TO BE DECIDED

2. I must decide whether Applicant was subjected to an unfair labour practice.

BACKGROUND TO THE DISPUTE

APPLICANT'S OPENING STATEMENT

3. Applicant is employed as a social worker and specialized in early childhood development and partial care at the DSD Head Office at the Directorate. Applicant applied for the position as advertised on page 110 of the bundle. Applicant's application was unsuccessful. Applicant lodged a grievance on 14 September 2016, which grievance remained unresolved and a promotion dispute was referred to the Council on 10 November 2016. Applicant's dispute stems from her dissatisfaction in that the successful applicant, Ms Shirley Davis, did not specialize in early childhood development and partial care, therefore the appointment should not have been made and Applicant should have been the successful candidate, based on her practical experience.
4. Applicant seeks a promotion and a finding that the successful candidate should be placed in an alternative position. The Applicant narrowed the dispute down to the point that the contents of questions during the interview are not a true reflection of the job requirement, which in turn resulted in the scoring that Applicant is complaining about. Applicant did not place procedural fairness in dispute.

RESPONDENT'S OPENING STATEMENT

5. Respondent stated that Applicant has been in the Respondent's employment since November 2004, whilst she has been employed in her current position since January 2011. Applicant is employed on a salary level 9 and she applied for the position Manager Social Work Policy in the directorate early childhood development, which is a level 11 post. Applicant was interviewed for the post and she met the minimum requirements as prescribed in the advertisement. There was a cut off of 70% for the self-evaluation score, with which Applicant complied. There was a further 70% cut off for the shortlisting panel to assess her CV, which she made in order to be interviewed for the position. The interview process entailed a practical test as well as an oral interview. The score in the interview was a 60% cut off and Applicant only scored 59% opposed to Davis who scored 69%, as a result of which

Davis was appointed after a competency test was also performed on all the applicants who were interviewed. Davis was appointed on 1 October 2016. Davis has 34 years' experience in the social work arena and early childhood development and partial care, although it is not in the Western Cape Province. The Respondent's witnesses will testify that the questionnaire was fair, as it evaluates all aspects of the job. It was a managerial position and all questions were in line with the post. The chairperson of the panel, Charles Jordan, will testify on behalf of Respondent. He was both a member of the panel and director in the unit to which the post reports. Jolinda Kruger to which the post reports will also testify on behalf of Respondent.

APPLICANT'S CASE

6. **SINGATWA KAAS testified in support of her own case (hereinafter referred to as "Applicant")**
7. Applicant testified that she was appointed as a social work policy developer on 1 January 2011 and she worked at an NGO, Sobampisana Community Development, previously and she specialized in ECD (early childhood development). Her performance was good as a result of which she was awarded a bonus in 2015. Applicant was approached by the director to act in the position for which she applied for a period of three months for the post. Applicant agrees with the contents of the advertised position as seen on page 110 and that the contents of the job details is a true reflection of the job. Applicant lodged a grievance as evidenced on page 52 of the bundle:

"I applied for a post of a Manager Policy Developer at ECD & Partial Care Directorate, where I've been working for five years. Before the post was advertised, I was requested to act on the said post for 3 months. My director was very satisfied with my performance during my acting and she is satisfied with my performance as a Social Worker Policy Developer. In 2015, my performance rating for the assessment was confirmed as commendable and in recognition of that the cash payment was made to me. To date, there are still management functions that I am asked to perform though I am no longer acting. I went to interviews and one of the applicants was from the Directorate: Business Planning, she had never been working at ECD & Partial Care Directorate and I was informed on the 08/09/2016 that she has been appointed on the post as Manager Policy Developer and will start in October 2016. I undoubtable did very well in my interview, and then I want to know as to why I did not become successful. I want to be familiarised with the criteria that was used for her to become successful to get the Manager post."

8. Reference was made to page 61, being the response to Applicant's grievance:

"Apart from the above, it was found that your allegation concerning the adjustment of questions to candidates carries no merit. To this extent, the same questions featured through the entire process and were asked to all the candidates for the managerial post. Equally, similar questions featured in interviews for other Directorates."

9. Applicant believes that her response was misunderstood. All the same questions were asked to all of the candidates, but the questions were not aligned to the position as advertised as it did not speak to the contents of the position advertised. There was ECD legislation which was not tested. Reference was made to the questions on page 39. The only question that were general management questions which Applicant does not place in dispute are questions 5 and 6. Question 1: One can replace ECD with substance abuse and the person will be able to answer the question, it is not specifically related to ECD. One can copy and paste. The same applies for question 2. Question 3 is not in line with the legislation. Question 4 appeals directly to Davis as she has a monitoring background and it has nothing to do with preparing for ECD.
10. Applicant testified that she made it clear to the panel that she was unhappy with the questions, as the questions did not ascertain her specific experience. She did not have another opportunity to elaborate on her experience. The questions put to her do not prove that she is the relevant candidate for the post. Under "General" - Applicant stated that she did not have any questions, only remarks. She remarked that she did not view the questions as fair as the department could not prove that the person interviewed will be relevant for the post of ECD as advertised. She is not aware of Davis's experience in partial care. She is only aware that Davis was in the monitoring and evaluation directorate and she moved to children and families after the restructuring, but she was never employed in early childhood development. Davis then moved to business planning.
11. Reference was made to pages 47 and 48 of the bundle, being the outcome of the interviews. She noted that her notes of the interview were not available. Reference was made to paragraph 5.2 on page 47, where Applicant's name appears and the percentage of 59% appears next to her name. Applicant stated that she was not informed by the panel what her percentage was. She fails to understand why management would not appoint her as the successful candidate, as she worked in ECD prior to the advertisement.

THE FOLLOWING ENSUED FROM CROSS-EXAMINATION:

12. Applicant has been employed in ECD since January 2011. She applied for a management post. She met certain minimum requirements. Applicant agreed that if she did not meet the minimum requirements that she would not be successful in obtaining the post. She was unaware that Davis was applying for the position. Applicant agrees that all candidates have to comply with the minimum requirements and competencies in the department. Applicant confirmed that the position reports to Jolinda Kruger who in turn reports to Charles Jordan and that both of them were part of the panel. Applicant agrees that she underwent a practical assessment.
13. Reference was made to page 32 where a budget of R100 000 000.00 was given to each candidate, her breakdown of the budget is evidenced on page 26 of the bundle. It was put to Applicant that Jordan will testify that all the questions are both content and managerial based. Applicant agreed that the same questions were posed to all the candidates and it was put to her that the score that was given to her was based on the same questions put to all the candidates, to which Applicant conceded. It was put to Applicant that Jordan will testify that each candidate's score was done independently and it was not discussed amongst the panel. Applicant responded that she could not argue with that. It was furthermore put to Applicant that Jordan will testify that he as chairperson (level 14) drafted the questions and that Applicant was not involved in drafting the questions, to which Applicant conceded. It was put to Applicant that Jolinda Kruger to whom the position reports knows what is required from the position. This was denied by Applicant.
14. Reference was made to pages 39 to 43, being the interview questions and it was put to Applicant that Jordan will testify that questions 1 to 4 were a combination of content and managerial questions. This was denied by Applicant. It was put to Applicant that Jordan will testify that questions 5 and 6 were purely are management questions, to which she agreed. Jordan also testified on the general issue that Applicant raised, that she expected the questions to be more content based.
15. It was put to Applicant that she indicated earlier that her competency assessment was not attached to the document. Reference was however made to pages 47 and 48. Applicant agreed that she went for a competency assessment at the Golden Acre after which she was interviewed. It was put to her that only people nominated normally undergo competency tests, but in this case all five candidates went for competency testing.

16. It was put to Applicant that on page 47 only Davis and Mzolisi Zatu's competency tests were included because they were the only candidates who scored above 60% and only Davis was recommended for the post.
17. Applicant conceded that only Davis and Zatu's assessments were included. It was put to Applicant that the other candidates' assessments, who were interviewed, were not included. It was put to Applicant that Jordan will testify that it is only required for candidates who score above the required minimum to be sent for competency tests, although all five were sent. It was put to Applicant that Jolinda Kruger discussed the outcome of the competency test with her, which she denied. Applicant confirmed that she acted in the position for a period of three months.
18. Reference was made to page 56, dealing with Applicant's part time appointment in the advertised position. Applicant confirmed that she was only employed in an acting position and that she was paid for her services. It was put to Applicant that in terms of paragraph 4 of the letter, the following was placed on record:

"You are reminded that the appointment to this acting position does not assign you the legitimate right to either the full term of the acting assignment or that of the permanent post, which eliminates any legal disputes against the department."

19. Applicant conceded that the fact that she acted in the position does not entitle her to being appointed in the position. Reference was made to page 129 of the bundle, forming part of the Policy Framework: Recruitment and Selection of Public Service Staff, dated 15 March 2006, more specifically paragraph 14.1 where the following is stated:

"14. Responsibilities of the Selection Panel

14.1 Where pre-screening (the short-listing process) takes place based on the applicant's CV and empirical information (preferably contained in the job description, but where necessary, also in other documentation), the interview situation is utilised to arrive at a qualitative assessment of the candidates. The objective of the exercise is to evaluate the expertise and competencies of the candidates by means of, inter alia, a questionnaire. It is essential that the process be unimpeachable, objective and accountable."

20. It was put to Applicant that Jordan will testify that he was disappointed in the way Applicant did her practical presentation, as he expected more from Applicant, as Applicant had been working in the directorate before. Applicant replied that the questions are copy and paste questions.
21. Reference was made to paragraph 13 on page 128 of the bundle, where the following is stated:

“13. Hearsay evidence

During both the short-listing process and the selection interview no hearsay evidence may be presented. Should a member of the Selection Panel be party to information or have knowledge supplementary to or in contradiction of that contained in a candidate’s application documents, such information must be verified and declared preferably beforehand.”

22. Therefore it was put to Applicant that if a panel member knows of something that is not in her CV, they have a duty to disclose it. Both Jordan and Kruger were disappointed with her answers, as her answers were too brief. Reference was made to column 8 on page 11 where Davis’s appeared in column 8 and Applicant’s in column 32. Davis scored 97% whilst Applicant scored 73%. Up to this point the scoring was based on self-evaluation. Only if she scored above 70% at that point could the panel consider her CV. Applicant stated that she was not aware of that.
23. Reference was made to page 13 of the bundle, dealing with the allocation of the percentages for the short-listing criteria, which was utilized in the score on page 11. Applicant conceded that her score after her CV was evaluated was 74%. She conceded that Davis scored higher than her as per page 47 of the bundle. It was put to Applicant that Jordan will testify that the score he gave is evident on page 113 (for each candidate), although the panel did not discuss their scores, they put in into a spread sheet and that is how they arrived at the highest score for Davis. Applicant responded that Jordan can come and testify to this effect. She cannot answer to that. Reference was made to paragraph 17 on page 130:

“17 General matters

17.1 A Department reserved the right not to fill a vacancy or not to appoint, promote or transfer any of the candidates participating in the interviews.”

24. Applicant conceded that it is the department's right. It was put to Applicant that Jordan will testify that one of the candidates declined and the reason why Applicant was not appointed, was because she did not fare well in the interview process and scored poorly.

THE FOLLOWING ENSUED FROM RE-EXAMINATION:

25. It was put to Applicant that Jordan will testify that he was disappointed and expected more from her and that her answers were too brief and that Applicant stated in the interview that the questions did not deal with the contents of the post advertised, to which Applicant conceded.

RESPONDENT'S CASE

26. **CHARLES EDGAR JORDAN testified on behalf of Respondent (hereinafter referred to as "Jordan")**
27. Jordan testified that he is currently the Chief Director Social Welfare Services and he has been in this position for the past five years. He has been in the Provincial Government for the past 25 years. He has a post graduate degree in Human Resources, Psychology and Public Administration as well as Business Administration. Jordan only worked with Applicant *via* her manager for the past five years.
28. There are at least ten management posts. The position entails the management of a huge budget. He is involved with policy development and analysis, as well as staff management of about 15 people. Reference was made to page 110, being the advertised position of Manager Social Work Policy – ECD and Partial Care. The person must have a 3 year degree. The basic requirements of the post are listed on page 110 of the bundle.
29. Jordan testified that he had to ask questions to test a candidate according to the criteria listed in the advertised position. It was his responsibility to get to a short list. The Respondent invited people who scored 70% and above to an interview and they were tested according to experience. It was practical plus formal questions. It was vital to ensure that the process is fair and that everybody got an equal opportunity to present themselves. He confirmed that he read every single CV that was lodged. It was put to Jordan that Applicant alleges that Davis does not have the relevant experience, yet she has 34 years' experience, mainly in the Eastern Cape in Social Development and also in the capacity

as supervisor. She also worked in Bisho. She was employed in a Policy Development environment, pertaining to the Children's Act. ECD is part of the Children's Act. She worked in the policy and strategy unit of the department in the past year before she was appointed. Applicant also has quite a few years of experience, but he is unsure how much less experience than Davis. The second and third candidates have less experience.

30. The candidates were first subjected to a practical test as evidenced on page 112, whereafter they were interviewed. Jordan testified that a R100 000 000.00 budget which is conservative, was given in the question, as the current budget is R150 000 000.00. The candidates were asked to allocate the budget. Each candidate had 45 minutes, whereafter they had to time and present it to the panel. Jordan testified that he always asks a practical question to all the candidates. For consistency purposes, a specific question is allocated to a specific panel member. Page 39 contains typical questions. Jordan confirmed that the reference to "family" in bullet two was irrelevant and he asked the panel to disregard that point as it was not directed to this specific post. Question 2 is the first formal question after the practical question which precedes the interview questions immediately. As a manager one has to solve all these problems on a daily basis. Question 3 is an operational question. Question 4 deals with the fact that the candidate must understand what is outcome based monitoring and how one would manage the whole process. There are strict deadlines to do monitoring. Each staff member involved in monitoring must indicate on which date they are going to perform certain tasks which forms part of monitoring, which Jordan requires in order to monitor them in turn. He also looked for a tracking system. He posed the same questions to all the candidates.
31. Jordan testified that he had 25 years' service in the Provincial Government, 22 years of which in the capacity as a manager. He ensured that all these questions were asked to make sure everybody has a fair opportunity to present themselves. Applicant was asked: "Are you satisfied?" She first said she was, whereafter she said she expected more content questions for which Jordan thanked her and made a note of it. Reference was made to page 16 of the bundle, dealing with the ECD and Partial Care budget of R100 million. Jordan developed the questions solely to ensure that the questions did not leak out, he did not send it to all the panellists until the evening prior to the interviews. He sent it to Ms Kruger the evening prior to the interviews, she only saw the email the next morning. He went through the questions with all panel members the morning before they started the interviews and explained the mistake he had made with reference to "family" and management posts, by copy and pasting. He told them to ignore the reference to "family". All five candidates had the same potential initially, but as one goes along with the interview process you pick up little things.

These are typical managerial questions. Jordan had to link it to the job description that was advertised. Applicant said that she expected the questions to be more content based, but according to Jordan the candidates were already tested on the content in the earlier screening and outcome based content questions were asked. If one does not have experience in content, one will not make the short list. The practical question was a combination of content and management. Question 2 was content and a little bit of a management question, whilst questions 3 and 4 were management and 5 and 6 were exclusively managerial questions. He did not discuss the point allocation with the panel members, each one has to allocate their own points. Jordan will not allow the panellists to influence each other about a candidate. Jordan is not aware how much the other panel members scored Applicant. They obtained a total from each panel member and it is then given to the secretariat to refer to the Department of the Premier who oversees the process and they calculate the scoring on the spreadsheet. Applicant came third. He asked the other two panel members if they were happy with the outcome and they confirmed that they were. As the other panel members were satisfied with the ranking, he assumed that they were in agreement with the outcome.

32. Reference was made to page 113, being the outcome of the scoring. The second last column is used to calculate an average score of all the panel members. 60% is seen as the cut-off after the formal interviews. If a candidate is appointed that scores below 50% the Head of the Department will throw it out. The Head of the Department and the Minister make the final decision, whilst Jordan only makes a recommendation.

33. Reference was made to page 45 of the bundle, being the competency test. Personality and mathematical skills were linked to a job description. They will also look at leadership abilities. The competency test is not used as part of the scoring. Reference was made to page 129 where the objectives are set out. The job description requires specific skills and Jordan's function is to ensure that those skills are tested. He has to test management skills. Applicant said that the questions are general and that there are no specific questions. Jordan denies that Davis did only monitoring. There was a short comparison between the interviews. Both spoke about content. Davis had a better understanding about financial management. Davis had more experience in the policy environment. Davis was very to the point on managerial questions, on HR questions and as how one would manage your unit. She was quite direct, whilst Applicant was not very strong on these questions. Jordan was asked why he preferred Davis over Applicant. He stated that it is not a question of preferring, the other two candidates answered better and more precise than Applicant, as is seen in the

psychometric testing. It was a fair process and nobody had been favoured in the process. The process was honest and fair, each candidate had a fair chance to prove themselves.

THE FOLLOWING ENSUED FROM CROSS-EXAMINATION:

34. It was put to Jordan that the questions evidenced on pages 39 to 43 were questions that were cut and paste. Jordan conceded that he did cut and paste certain questions that formed part of the family management post, yet he informed the panellists to ignore the reference to family. These questions are his set of questions that he normally asks and it is not focussed specifically on the post in question, if it does focus on a management position. Question 2 challenges facing the ECD programme. Applicant's response was that it was a very general question and it was not specifically ECD related. Jordan replied that the second part of question 1 was part of managerial and content and challenges the ECD program. 10% is allocated, therefore it would be right to say one cannot divide the percentage. Looking at the length of the interview, it would take too long to interview each candidate. It was put to Jordan in Question 1, the same principle applies, one cannot allocate a certain percentage to each candidate. Question 3 – is not aligned to the post as it is generalized and not calling out what legislation is required. Question 4 relates to monitoring and evaluation and has nothing to do with the contents of the post. Jordan disagreed with this as 650 contracts have to be monitored. That is how Respondent determines money and fraud.
35. It was put to Jordan that based on Applicant's experience it would be unfair to say that she would be unable to say what the functions of ECD are. Jordan responded that he thinks that she understands it well, but unfortunately everybody needs to be tested on managerial ability. Through the kind of questions they asked, Applicant came third out of all the candidates. It was put to Jordan that he noted that he took cognisance of Applicant's comment that under general the questions did not deal with content. He was challenged on why she was not given an opportunity to explain herself. Jordan said that he understood what she meant, as he understood Applicant and the other panel members did not necessarily understand that. There was a pause and she chose not to expand on that, then she laughed and said it is in order and as a matter of fact, all the panel members laughed together at this point. Applicant clearly seemed satisfied with the outcome. Applicant acted in the position for three months, yet it was too short to test her ability to fill the position on a permanent basis. The interview questions tested what it was supposed to test.

APPLICANT'S CLOSING ARGUMENTS

36. Applicant only placed the interviewing questions 1 to 4 in dispute as the content and context of the questions are not a true reflection of the post advertised.
37. Jordan testified that he could not measure Applicant's suitability for the post during her three months of acting in the position. This is belittling towards Applicant as Jordan is well aware of Applicant's years of experience and what she had accomplished in the Early Childhood Development and Partial Care directorate.
38. Applicant stated that in terms of Jordan's testimony it is clear that emphasis was placed on Finance Management as part of the scoring in Question 1, as this is not Applicant's strength. She would not stand a chance to be a successful candidate.
39. Applicant stated that Jordan based his testimony directly on administrative knowledge of Applicant's abilities. According to Applicant, the Respondent chooses to follow policies to work in its favour.
40. Applicant believes that she is the most suitable candidate and that her hard work was not taken into consideration by Respondent. The Management who recommended and appointed Davis failed to enhance Applicant's skills by preventing her from the opportunity to further her career development. It would seem that she is only there to serve the need when her expertise is required for deadlines. Her own supervisor did not even come to testify in support of her case, but when Davis needs help, Applicant is good enough to assist. According to Applicant, once the short-list was drafted the Respondent already made a decision to appoint Davis. The percentage breakdown of questions assured this.
41. Applicant seeks an order in terms of which she is placed in the position as advertised, alternatively that she be compensated for the huge financial loss suffered by her for the Respondent's failure to appoint Applicant.

RESPONDENT'S CLOSING ARGUMENTS

42. Respondent stated that according to Applicant, the advertised position was in line with the job details. Applicant received a negative outcome to her grievance. Applicant confirmed that the same

questions were asked to all the candidates during the interview. She however stated that the questions asked were too general.

43. According to Applicant, question 1 could be substituted with a different programme. With regards to question 4, Applicant stated that Ms Davis's background is that of Monitoring and Evaluation and this question is more suited to Davis's background. Applicant did not have an issue with questions 5 and 6. According to Applicant she was not afforded an opportunity to elaborate on her experience, except for the remark that she made that she did not think the questions were fair and thought the questions would be more content-based.
44. Applicant conceded during cross-examination that the advertised post required certain minimum requirements and it was a requirement that the candidate possesses certain competencies, which include Financial Management, Human Resource Management, Project Management as well as Monitoring and Evaluation. Applicant conceded that she had never seen Davis's CV and only knows of her experience since working at the Department of Social Development in the Western Cape.
45. Applicant failed to allocate a R100 000 000.00 budget as required in the practical question. Applicant was given an opportunity to undergo a competency test, although Respondent was not required to subject Applicant to a competency test, due to the fact that Applicant did not score above 60%. The fact that Applicant previously worked in an acting capacity for a period of three months is irrelevant with regards to the position advertised, as she had no expectation to be permanently appointed which was conceded to by Applicant. It was put to Applicant that Davis performed far better than Applicant in all the aspects of the recruitment process. Applicant was not appointed as a result of her poor performance in the interview, as well as the fact that she failed to meet the cut-off score of 60%, as she only scored 59%.
46. Jordan confirmed that as the position is a managerial post, the questions contained both a managerial as well as a content aspect and the panel was required to test the candidates on their abilities in terms of the above criteria. The questionnaire was not content based for the programme ECD. Questions 1 to 4 were a combination of both content and managerial aspects. Questions 5 to 6 were purely managerial based. Jordan confirms that the short-listing criteria tested for what was contained on page 13 in paragraph 3.2 and a weight was attached to each criteria. Jordan confirmed that the cut-off score of 70% at the self-evaluation phase, as well as a 70% in order to be short-listed, applied

to all candidates. Davis scored higher at the end of the interview process than Applicant. Each panel member scored the candidates independently and provided the scores to the HR representative, Faiza Matthews. Davis scored higher than the other candidates after all the scores were conveyed to HR.

47. Jordan confirmed that Applicant received a bonus in 2015 and she was requested to act in the advertised position for a period of three months, but the period was too short for him to determine what Applicant's leadership/management abilities are. All candidates were submitted for a competency test even though it carried no weight. It forms a guide to confirm whether a candidate possesses the necessary skills suited for the position. There was a predetermined cut-off for appointment which was 60% and Davis scored 69%. Zathu ranked second with a score of 63% and Applicant ranked third with a score of 59%. She was therefore the below the cut-off score and Davis was appointed as a result.
48. Applicant referred an Unfair Labour Practice dispute in terms of section 186(2)(a) of the Labour Relations Act, 66 of 1995. Applicant did not dispute the process followed in the recruitment and selection process. The fact that Davis scored higher than Applicant was not placed in dispute. The onus was on Applicant to prove that she was subjected to an unfair labour practice dispute. Jordan confirmed that the questions were a combination of content and managerial aspects. He did not test the contents of candidate's knowledge of the ECD programme, but Applicant clearly did not understand the questions, therefore she did not respond well. Applicant conceded that all candidates were asked the same questions and she did not have sight of Davis's CV, therefore she is not in a position to testify on Davis's experience prior to her commencing employment with the Department approximately ten years ago.
49. Applicant failed to score above the predetermined cut-off of 60% during her interview, therefore she was not suitable for appointment. The fact that Applicant had been acting in the post before, is irrelevant as stated in paragraph 3.1.8 of the GPSSBC Resolution 1 of 2002. There is no legitimate expectation created of a permanent appointment, therefore Applicant could not lay claim to the post. Since the process was not in dispute, the fact that it was in line with the Provincial Government Western Cape Transversal Human Resource Management policy, will also not be in dispute.
50. Applicant failed to discharge the onus that Respondent acted unfairly by not promoting her into the post in question. The questions posed covered all aspects of the post and all the candidates were

posed the same questions, given the same time to respond and represent their responses. Applicant did not score high enough for consideration, as the cut-off score was 60% and she only attained a score of 59%.

51. Reference was made to **SAPS v Security Sectoral Bargaining Council & Others [2010] 8 BLLR 892 (LC)**, where Basson J stated as follows:

“The decision to promote or not to promote falls with the managerial prerogative of the employer. In the absence of gross unreasonableness of bad faith or where the decision relating to promotion is seriously flawed, the court and arbitrator should not readily interfere with the exercise of the discretion...”

52. As a result of the fact that Applicant did not fare well enough, she failed to discharge the onus in terms of the dispute and the fact that the Department has a discretion to fill a post, the application should be dismissed with costs.

ANALYSIS OF THE EVIDENCE AND ARGUMENT

186. Meaning of dismissal and unfair labour practice

(2) “Unfair labour practice” means 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 a reason relating to probation) or training of an *employee* or relating to the provision of benefits to an *employee*.

53. I must determine whether Applicant was subjected to an unfair labour practice due to the fact that she was not appointed to the position advertised on page 110 of the bundle, where the minimum requirements include at least 60% in the interviewing process.

54. Applicant furthermore averred that the interviewing questions were aimed to specifically favour Davis, as the interviewing questions posed to the candidates for the advertised the position suited Davis’s background and experience.

55. It is clear from the minimum requirements of the position, that once a candidate fell short of the criteria, there was no obligation on Respondent to give any further consideration to Applicant's application.
56. There is no evidence before me that Applicant was treated any different to any other candidate who applied for the position.
57. I am also satisfied that the Respondent followed the correct procedure (although procedural unfairness was not placed in dispute) and Applicant could not be short listed due to the fact that she did not adhere to the basic minimum requirements as advertised.
58. It is common cause that Applicant did not adhere to all the minimum requirements, as per advertised position.
59. Applicant applied for the position Manager Social Work Policy – ECD and Partial Care. Applicant adhered to the minimum requirements for the position which secured her a position on the short list for interviewing purposes. The minimum requirement at interview stage is 60%. Applicant only obtained 59% opposed to Davis who obtained 69% and Zatu who obtained 63%. Applicant conceded that she underwent a competency test together with all the other candidates, although Jordan's testimony that it is not required of the Respondent to send all candidates for competency tests, as only those who scored above 60% had to be sent, was not placed in dispute. Applicant confirmed that she indeed underwent competency tests. Applicant could not dispute Davis's experience in other Provinces. Applicant did not place procedural fairness in dispute. Applicant only placed the questions that were asked during the interview process in dispute in that she stated that the questions should have been more content based.
60. Jordan's testimony that it is accepted that candidates who were short listed have the necessary knowledge and experience for the position, therefore the questions were both content and managerial based, was not placed in dispute. Questions 5 and 6 were purely managerial, which questions were not placed in dispute by Applicant. Applicant only disputed questions 1 to 4. Jordan's testimony that Applicant's performance in her practical tests was not satisfactory, was not disputed by Applicant. Jordan testified that a budget of R100 000 000.00 was given to each candidate. Applicant only allocated R1 000 000.00, whilst Davis performed much better in the practical question. Her answers were down to the point and in other aspects such as Human Resources she also performed a lot

better than Applicant. Applicant could not dispute this. Applicant indicated to the panel at the end of the interview that she had no questions other than to make a remark that she believes that the questions should have been more content based. Applicant alleges that she was subjected to an unfair labour practice dispute related to promotion. Applicant stated that she was previously employed in a part time capacity in the exact same position. Applicant could however not dispute Jordan's testimony that the fact that she acted in the position, does not entitle her to be appointed in that position. This is clearly stated in her letter of appointment. Jordan's testimony that he drafted the interview questions and that it is his standard set of questions was not placed in dispute.

61. Applicant believes she was entitled to be appointed in the position due to her years of experience.
62. Applicant could not dispute that Davis fared better than her in the interviewing questions as Davis obtained 69% whilst Applicant only obtained 59%, therefore she did not meet the minimum requirements in this respect. This could not be disputed by Applicant. Furthermore, Jordan's testimony that he only makes a recommendation, whilst the final appointment lies with the Premier and the Head of the Department, was not disputed either. Jordan's testimony that the panel members allocate their scores independently, which scores are sent to Human Resources Department and put in a spread sheet, was not disputed by Applicant. Jordan's testimony that the scores are not discussed amongst panellists was not challenged by Applicant either. Applicant is not entitled to promotion. Promotion and more specifically in this specific post, would be subject to minimum requirements being met.
63. I am satisfied that Applicant did not meet the minimum requirements for the position advertised. Therefore Applicant was not subject to an unfair labour practice dispute.

AWARD

64. Applicant was not subjected to an unfair labour practice. Therefore Applicant is not entitled to any relief.



COMMISSIONER: T ERASMUS