



ARBITRATION AWARD

Panellist: **N.Bantwini**

Case No: **PSHS1129-16/17**

Date of Award: **23 August 2017**

In the matter between:

NEHAWU obo Mandisa Stuurman

(Union/ Applicant)

and

Department of Health- Eastern Cape

(1st Respondent)

and

Mr Victor Tobo

(2nd Respondent)

DETAILS OF HEARING AND REPRESENTATION

1. This case was part heard on 04 July 2017 and was finalized on 07 August 2017 at the 1st respondent's offices in Bhisho. It came before the PHSDSBC in terms of Section 191 (5) (a) read with section 186 (2) (a) of the Labour Relations Act, 66 of 1995, as amended (LRA) for an alleged unfair labour practice dispute based on promotion.
2. Ms. Nomthandazo Thwalingca of NEHAWU appeared for the applicant, Mrs. Mandisa Stuurman while Mr. Bongani Lose appeared for the 1st respondent, the Department of

Health- Eastern Cape. The 2nd respondent, Mr Victor Tobo was also in attendance and was also represented by Mr Lose.

- Parties submitted written closing arguments on 14 August 2017. I have considered all the evidence and arguments, but because section 138 (7) of the Labour Relations Act, 66 of 1995, as amended requires brief reasons. I have only referred to the evidence and arguments that I regard as necessary to substantiate my findings and determination of the dispute. The proceedings were electronically recorded.

ISSUE TO BE DECIDED

- The issue to be decided is whether the first respondent's conduct of not appointing the applicant to the position of a Director: IHRM, Gen Admin IT IS salary level 13 constitutes unfair labour practice in terms of section 186(2)(a) of the Labour Relations Act 66 of 1995 as amended or not.

BACKGROUND TO THE DISPUTE

- The applicant referred a dispute to the PHSDSBC through her union, NEHAWU regarding an alleged refusal by the respondent to appoint her to a position of Director: IHRM. Gen Admin & IT IS salary Level 13. When the dispute could not be resolved at conciliation level, the applicant filed a request for arbitration.

SURVEY OF EVIDENCE AND ARGUMENT

Applicant's version

- According to Ms Thwalingca's opening statement, the dispute relates to unfair labour practice based on promotion. The applicant applied for an advertised position in Livingstone Hospital in Port Elizabeth. She was treated unfairly by the respondent because she was not afforded an opportunity to go through a competency test. The respondent did not follow Human Resources processes as the position was not approved by the MEC, the second respondent was not supposed to be involved in the initiation of the position since he had an interest in the position.
- The applicant seeks a protected promotion to the same rank (salary level 13) as a remedy.

8. The applicant, **Mrs Mandisa Stuurman** testified under oath as follows:
9. She works for the respondent as a Deputy Director: Human Resources and she is aware of the first respondent's recruitment processes/policy. The second respondent created the position whereas it is supposed to be the Line Manager, Mr Madonsela Corporate Services Manager to create the position. The chairperson of the interview was scoring candidates using an envelope.
10. The applicant further stated that the interview panel was not structured in terms of the SMS Handbook as she was not subjected to competency test whereas she was scored number 4. The panellists took a decision before he was subjected to a competency test.
11. Under cross-examination, the applicant testified as follows;
12. She was scored as the 4th candidate in terms of performance (page 14) and according to the SMS Handbook, a maximum of 4 candidates must be taken for a competency test before a final decision is taken (page 79 clause 3.2 of the bundle). The competency test could have boosted her performance. She agreed that the 2 candidates who were subjected to a competency test were not advantaged by the test. The applicant could not confirm if the score grid was populated before the interview or not.
13. The score grids were created on 13 March 2016 while the interview was conducted on 18 March 2016. The applicant confirmed that the position must have been approved by the MEC as the appointment of the second respondent was also approved by the MEC.
14. Under re-examination, the applicant stated that the score sheet of the chairperson was not accompanied by a brown envelope although she used it. The second respondent's score sheet is not linked to a competency assessment test.
15. **Ms Khunjulwa Livi** the witness for the applicant testified as follows:
16. She works for the respondent as the Deputy Director: Recruitment. She did not attend the interview process which was held in Port Elizabeth and that she attended the one which was held in Bhisho. The applicant was interviewed in Bhisho and she (the witness)

was instructed to attend as the Human resources person to give support. She did not have a decision-making function. The position in question was not new as it was vacated by Mr Maswana.

17. With regards to the interview grids, the human resources prepare them in advance hence they were prepared on 13 March 2016. The panel of the interview may decide to take 2 candidates to for the competency test for as long they justify their reason for doing so. None of the 2 candidates were advantaged or disadvantaged by being taken to a competency test according to the information at her disposal. The witness also confirmed the master list containing documents submitted by the second respondent including the Z.83 application form.

18. Under cross-examination, Mrs Livi testified as follows:

19. She was present at the applicant's interview and she saw her presenting documents to the panel. Files for each candidate were brought in by the CEO and there is no way that the second respondent could have been shortlisted, interviewed and appointed without submitting Z83 form which is an application form. According to the score grid, the applicant was scored number 4 while the second respondent was scored number 1 hence he was appointed being the best candidate for the job.

20. The witness further testified that the position was initiated by the Line Manager, Mr Madonsela, the second respondent only verified and checked as to whether the position was vacant and funded or not. This was the procedure and within the 2nd respondent's job to do.

21. With regards to the competency test, minutes of the interview indicate that the panellists decided to send 2 highest scored candidates due to financial constraints (page 18 to 21). The witness confirmed a master list which was submitted by the first respondent and stated that she does not know as to why it is not signed.

22. Under re-examination, the witness stated that Mr Tobo was interviewed on 13 April 2016 according to the minutes.

23. In closing, **Ms Thwalingca** argued as follows:

24. The applicant was not given a fair chance to compete in the recruitment processes as she was not subjected to a competency test.
25. The second respondent was favored by the first respondent as he was requested to act in the position from 18 January 2016 and on 25 January 2016. The second respondent initiated the position. This was a calculated move by the chairperson of the panel in making sure that the second respondent is appointed to the position.
26. The applicant was not scored in the score grid like other candidates as the chairperson of the panel, scored the applicant in the brown envelope and could not produce the brown envelope on request.
27. The recruitment process was manipulated by the panel as the date of the interviews and shortlisting is the same. This was found to be incorrect by Mrs. Livi who is an expert in the recruitment process.
28. The recruitment policy and DPSA directive on recruitment was violated by the first respondent in order to put the applicant at a disadvantage. The second respondent did not follow the correct procedures when applying for the position as he failed to submit an application form (Z83).
29. The applicant seeks protected promotion with effect from 01 September 2016 as a remedy.

Respondent's case

30. According to Mr Lose's opening statement, the respondent disputes that the applicant was prejudiced by the appointment of the second respondent. He stated that the position must have been approved by the MEC hence he approved the appointment of the second respondent. The first respondent disputed that the second respondent created the position for himself as it was his responsibility to see to it that the position is being advertised as he was the Acting Director; IHRM Gen & Admin IT IS. The memo was approved by the DDG: HR for the position to be advertised (p12).

31. **Mr Victor Luthando Tobo**, the second respondent testified as follows:

32. It was within his scope of performance as the Acting Director: IHRM Gen & Admin IT IS to check and verify if the position was vacant and funded or not before it was advertised. The request for advertisement was done by the CEO, Mr Madonsela (page 11 to 12 of the bundle).

33. The witness testified further that he submitted Z.83 form, driving licence, ID copy and certificates as per the requirement of the advertisement. The human resource section conducts screening of the applicants in terms of annexure C. The final shortlisting is as per the minutes contained on page 20 of the bundle.

34. Under cross-examination, the witness testified as follows:

35. His involvement in the position ended when he checked as to whether the position was vacant and funded in terms of the recruitment guidelines. This was part of his work as he was the Acting Director; IHRM (page 11 to 12 of the bundle). There was a need to advertise the position. Annexure C was submitted in order to prove that he submitted Z.83 with other documents as required by the advertisement.

36. In closing, **Mr Lose** argued as follows:

37. It is the applicant's case is that the process followed to fill the position in question was unfair; in that she was not sent for the competency based assessment, and that the decision to appoint the second respondent was pre-determined.

38. The applicant's witness, Ms Livi, confirmed that the DPSA directive on pages 78 -79 of bundle A, paragraph 3.2 states that "*a maximum of 4 suitable candidates must be invited for the competency assessment*". However, in this case only 2 top candidates were sent for this assessment. During cross examination Ms Livi was referred to minutes of the shortlisting panel on page 21 of the same bundle wherein it is recorded that only top 2 candidates would be sent for competency assessment in order to minimize costs.

39. Ms Livi, also did not dispute that the average candidate scores on page 14 of the bundle do not include the outcome of the competency based assessment.

40. The fact that the applicant was not sent for the competency assessment test did not in any way prejudice her. This is so because the results of the assessment were not added on the average scores of the candidates who were sent for the assessment test. Secondly, Bundle B/ Annexure C clearly shows that the successful applicant, Mr Tobo, submitted all the required application forms.

41. As such, there is no evidence led to prove that the respondent acted unfairly in exercising their prerogative to appoint the successful candidate.

42. Mr Lose finally prayed that the case is ruled in favour of the 1st respondent and that the applicant's case is dismissed.

ANALYSIS OF EVIDENCE AND ARGUMENTS

43. It is common cause that the applicant was shortlisted and interviewed for the post. Further, that the interview panel recommended the 2nd respondent, Mr Tobo, as the most suitable candidate and his appointment was approved by the Member of the Executive Council (MEC).

44. The applicant's allegation to the fact that the 1st respondent created the position in question as she allegedly initiated it is not true. It is common cause that the 1st respondent acted in the position before it was advertised and documentary evidence reflects that the Line Manager, Mr Madonsela initiated the process. Based on the responsibilities of the 2nd respondent while he was acting in the position in question, he verified as to whether the position was vacant and funded or not which a requirement is before any position is advertised in the public service. This evidence was not disputed by the applicant.

45. It is also the undisputed evidence of Mrs Livi that the position was not new as it was vacated by one Mr. Maswana.

46. The fact that the applicant was not subjected to a competency based assessment test did not prejudice her as no marks were added to the average scores of the 2 candidates who were tested. I disagree with the applicant's contention to the fact the competency based assessment test could have boosted her scores/marks.

47. The interview minutes revealed that the panel decided to take 2 instead of 4 candidates to a competency based assessment test due to financial constraints (page 21 of the bundle).
48. The applicant could not prove that the score sheets were populated before the interview was conducted and she could not dispute Ms Livi's evidence to the fact that the interview grids are normally prepared before the date of the interview hence they reflect 13 March 2016.
49. The applicant, also could not prove that the chairperson of the interview was scoring candidates using a brown envelope as all score sheets including Ms Campbell's score sheet were submitted and form part of the bundle.
50. Although the applicant claims that the 2nd respondent did not submit an application form (Z83), the master list (annexure C) which was submitted by the 1st respondent reflects all the documents which were submitted by the shortlisted candidates in terms of the advertisement including Z83 by 2nd respondent.
51. It is evident from both parties' evidence that the 1st respondent did not exercise its prerogative in appointing the 2nd respondent in a biased, unfair, capricious and unjust manner.
52. The applicant has failed to discharge the onus to prove the claim of unfair labour practice based on promotion by the 1st respondent.

AWARD

53. I therefore make the following award:

54. The applicant failed to prove that the 1st respondent's conduct constituted an unfair labour practice involving promotion.

55. The application of the applicant is dismissed.

56. I make no order as to costs.



Signature

Ncumisa Bantwini
PHSDSBC Arbitrator