



ARBITRATION AWARD

Case No: **PSHS1210-16/17**

Commissioner: **Suria van Wyk**

Date of award: **2 October 2017**

In the **matter** between:

NEHAWU obo MW Molahloe

(Union/ Applicant)

and

Department of Social Development – Free State

(Respondent)

DETAILS OF HEARING AND REPRESENTATION

1. The arbitration hearing convened on 31 August 2017 at the Civilia Building in Bloemfontein.
2. Mr KMG Mapane, from NEHAWU, represented the applicant and Mr H Rapapali appeared on behalf of the respondent.
3. A recording was made of the hearings.

ISSUE TO BE DECIDED

4. The issue to be decided is whether the respondent committed an unfair labour practice as envisaged in section 186(2) of the Labour Relations Act 66 of 1995

(hereinafter referred to as the LRA) by not appointing the applicant into the position he applied for and /or appointing a candidate who did not meet the requirements set in the advertisement.

5. The applicant sought protected promotion.

BACKGROUND TO THE ISSUE

6. The following facts were common cause between the parties:
 - a. The applicant applied for the position of Senior Manager: Security Management and Anti-Corruption.
 - b. The requirements for the post was an appropriate BA Degree / National Diploma or equivalent in Security Management as well as extensive relevant working experience in Security- and Anti-Corruption services.
 - c. He was shortlisted and interviewed. He scored the second highest in the interview and he was not appointed.
 - d. The successful candidate, Mr SR Mohoboko, did not meet all the requirements of the post as he only possessed a senior certificate (grade 12).
 - e. He was interview and subsequently appointed.
 - f. He received a letter dated 30 March 2015, indicating that she was appointed as a Nursing Assistant Grade 3, this was however later changed to reflect that she was appointed as a Nursing Assistant Grade 1.

7. The issues in dispute are:
 - a. Whether the applicant met the inherent requirements of the post.
 - b. Whether the respondent committed an unfair labour practice.

SURVEY OF EVIDENCE AND ARGUMENT

8. At the outset, it must be noted that not all the evidence led at the arbitration will be captured in the award. The award will only contain a brief summary of the

relevant and salient points. The summary is a compilation of evidence in chief, cross-examination and re-examination. Simply because evidence is not recorded in the summary does not mean that the evidence was not considered. For a full record of all evidence parties should refer to the digital recordings of the hearing which is available from the Bargaining Council upon request.

Applicant's case:

9. Mr MW Molahloe testified under oath to the following:
 - a. He was employed as the Deputy Director – Information Security.
 - b. In his opinion he met the requirements of the post as he had a BA degree and he had experience in Security Management and Anti-Corruption as indicated on his CV.¹ The BA degree was not in Security Management and in his opinion, it required any BA degree.
 - c. He would not have been shortlisted if the respondent did not think he qualified and because Mr SR Mohoboko did not qualify, he should not have been shortlisted.
 - d. Information Security was a combined department, which is divided into Physical and Information Security and that entailed that he had experience in both Security and Anti-Corruption as required. He conceded that his Anti-Corruption experience was not listed in his CV. He conceded that the requirement was “extensive” experience but no indication was given what was regarded as extensive. He denied that he only qualified in terms of security and not in terms of Anti-Corruption.
 - e. In his opinion he was not appointed because the interview panel was bias towards him and in his opinion Mr SR Mohoboko was appointed because of his political affiliations and this statement was based on his own assumptions.² The referral to him as “incumbent” on the recommendation forms indicate that he was already employed – this was disputed by the respondent.³

¹ Bundle A, page 52.

² Bundle A, page 42.

³ Bundle A, page 39-44.

- f. When he became aware that Mr SR Mohoboko did not meet the requirements of the post he filed a grievance. The response received indicated that he was not appointed as he did not perform satisfactorily at the interviews.⁴ The answer did not deal with the gist of the grievance, i.e. that the Mr SR Mohoboko did not meet the requirements.
- g. It was unfair for the respondent to appoint a candidate who did not meet the requirements set in the advertisement and the panel should have seen that Mr SR Mohoboko was not qualified.⁵
- h. He conceded that if someone else performed better in an interview, then that person would be appointed and he did not dispute the scores given in by the interview panel.

10. Mr C Howard testified under oath to the following:

- a. He was the former Director: Human Resources and he was currently retired.
- b. He was familiar with the selection documents contained in the bundle and he indicated when he signed the document that Mr SR Mohoboko did not meet the requirements of the post. He recalled that in that case all the other candidates did qualify as per the requirements of the post.⁶
- c. When the recommendations were checked he had all the documents were checked. The applicant did meet the requirements as he had a BA degree, he denied that the BA degree had to be in Security Management.
- d. The applicant also had experience in Anti-Corruption as proof was provided that he acted as Senior Management and he was also personally aware of same.
- e. He was not part of the interview panel. On face value there was nothing wrong with the scores. Scores were used as a tool and the highest scorer would not automatically be appointed, the panel makes the decision on who to recommend for appointment.

⁴ Bundle A, page 13.

⁵ Bundle A, page 43.

⁶ Bundle A, page 40, 44.

- f. In his opinion the use of the word “incumbent” in the documents did not mean that Mr SR Mohoboko was appointed, he was a candidate.

Respondent’s case:

11. The respondent did not call any witnesses to testify, only arguments were submitted.

ANALYSIS OF EVIDENCE AND ARGUMENT

12. Arbitration is a new hearing (*de novo*). The arbitrator determines the dispute in the light of the evidence admitted at arbitration. The standard of proof is that of a balance of probabilities. If, in this analysis, certain evidence is not referred to, this does not imply it had not been considered.
13. The applicant referred an unfair labour practice dispute in terms of section 186(2) of the Labour Relations Act, 1995. The onus of proof rests on the applicant to establish the existence of the alleged unfair labour practice.
14. The correct approach for arbitrators to adopt when faced with promotion disputes was set out in *Ndlovu v Commission for Conciliation, Mediation and Arbitration and Others* (2000) 21 ILJ 1653 (LC) where the court provided: ‘The questions which the commissioner asked in the first paragraph of that quotation were wholly justifiable questions in relation to a dispute over a matter of promotion. It can never suffice in relation to any such question for the complainant to say that he or she is qualified by experience, ability and technical qualifications such as university degrees and the like, for the post. That is merely the first hurdle. Obviously, a person who is not so qualified cannot complain if they are not appointed. The next hurdle is of equal if not greater importance. It is to show that the decision to appoint someone else to the post in preference to the complainant was unfair. That will almost invariably involve comparing the qualities of the two candidates. Provided the decision by the employer to appoint one in preference to the other is rational it seems to me that no question of unfairness can arise.’

15. In *National Commissioner of the SA Police Service v Safety and Security Sectoral Bargaining Council and Others* (2005) 26 ILJ 903 (LC) it was also held that in addition to the above it is also important for an applicant to show a causal connection between the unfairness complained of and the prejudice suffered.
16. In the matter before me the first question would be to determine whether the applicant qualified for the position. It was testified to by both the applicant that in his opinion he met the requirements of the post and that was confirmed by Mr C Howard. It was not disputed by the respondent that the applicant indeed held a BA Degree in Public Administration, it was however argued that that the BA Degree had to be in Security Management. This averment was denied by Mr C Howard when he testified and he indicated that the BA Degree of the applicant was compliant with the requirements. He was personally involved in the checking of the documents when the recommendations were done. Mr C Howard also confirmed the applicant's version that he possessed experience in both Security and Anti-Corruption services.
17. Apart from disputing and challenging the version of the applicant and Mr C Howard, the respondent failed to lead any evidence to rebut the evidence that the BA Degree held by the applicant was sufficient to qualify in terms of the requirements nor was any evidence led to indicate what was meant by "extensive" experience.
18. I therefore find that the applicant has proven on a balance of probabilities that he did meet the requirements as set out in the advertisement of the post.
19. The respondent submitted that the applicant did not meet the requirements of the post. If this was true, certainly to ensure a fair process, the same criteria should have been applied to Mr SR Mohoboko. It was common cause that he was appointed as the successful candidate and that he did not have a degree but merely held Grade 12. No evidence was led to justify why he was not held to the requirements set out in the advertisement.

20. It was common cause that in the interview, Mr SR Mohoboko scored the highest and the applicant scored the second highest and ultimately Mr SR Mohoboko was recommended for the position.
21. To succeed in proving the alleged unfair labour practice, the applicant needs to prove that the decision to appoint someone else into the post in preference to the complainant was unfair. In the absence of any grounds for justification, I cannot find that the conduct of the respondent to appoint a person (who without a doubt did not meet the requirements set out in the advertisement) was fair.⁷ The conduct of the respondent is therefore found to amount to an unfair labour practice.
22. The applicant claimed a protected promotion as relief. In order to award the protected promotion, evidence must be led to the effect that had it not been for the unfair conduct of the respondent, he would have been promoted i.e. the successful candidate.
23. It was common cause that the applicant scored the second highest in the interview. The undisputed evidence of Mr C Howard however confirmed that the scoring in the interview was only used as a tool and that it was not a guarantee that the highest scorer would be the recommended candidate. He also testified that from all the shortlisted candidates it was only Mr SR Mohoboko who did not meet the requirements, all the other candidates qualified. Therefore, I have no evidence before me to prove that in the event that Mr SR Mohoboko was not recommended, that the applicant would have been the recommended candidate out of the remaining candidates.
24. The allegations of the applicant that the panel was bias, was by virtue of his own evidence only based on his own opinion and assumption and no evidence to

⁷ Noonan v Safety and Security Sectoral Bargaining Council and Others [2012] 9 BLLR 876 (LAC); City of Cape Town v SAMWU obo Sylvester and Others [2013] 3 BLLR 267 (LC).

substantiate that claim was led. The claim that the use of the word “incumbent” proves this is also only based on opinion and carries little evidentiary weight.

25. In the matter of *Sun International Management Pty Ltd v CCMA and Others* (LC) (unreported case no JR 939/14, 18-11-2016), Lagrange J noted that in promotion disputes it is not enough to merely show that there was a breach of protocol or procedures in the recruitment process. It is also necessary for a complainant to show that the breach of the procedure had unfairly prejudiced him. As such, the main question was, but for the alleged failure to consider internal candidates first, would the third respondent have been appointed? Lagrange J noted further that the third respondent had conceded that his curriculum vitae did not disclose any managerial experience as required by the advertisement, though he advanced that his supervisory experience was the same. As a result of this, it was absurd to suggest that the applicant did not contest that the third respondent would have been chosen had he been interviewed. The main point was that the applicant argued that the third respondent would not have been chosen because he would not have been interviewed at all because he did not meet the minimum requirements. Lagrange J noted further that there was also no evidence before the arbitrator as to why the interview process would necessarily have resulted in third respondent’s successful appointment. The arbitrator, having inferred, that the third respondent did have the minimum qualifications, then concluded that he, therefore, was the best candidate, which is illogical. The arbitrator also overlooked that the third respondent needed to show not only that he was a suitable candidate for consideration, but that he was the best candidate, even if he was only compared with the other internal candidates, who incidentally were also found to be insufficiently qualified. The arbitrator reached the conclusion that the third respondent was the best candidate for the position without sufficient evidence to support such a finding on the probabilities and that accordingly his finding was unreasonable. Although the arbitrator was aware of the test he was required to apply, he did not follow the principles he ought to have in terms of the judgment in the *Ndlovu* case, which caused him to misconstrue how he ought to evaluate the evidence before him.⁸

⁸ <http://www.derebus.org.za/unfair-labour-practice-relating-promotion>.

26. In the light of the above, although I found that the conduct of the respondent amounts to an unfair labour practice, I cannot award protected promotion. The applicant will instead be compensated for the unfair labour practice. Considering that as much as there was no proof that he would be recommended, there was also no evidence that he would not have been recommended. From the evidence led it was clear that the interview panel was made aware of the fact that Mr SR Mohoboko did not meet the requirements and still they continued to appoint him it was therefore not just and oversight but a conscious decision. In considering the facts before me I find compensation of six months to be just and equitable.
27. The applicant was earning a basic salary of R42 339.38.⁹
28. The credibility of witnesses was found to be satisfactory and no evidence will be disregarded.

⁹ Bundle A, page 50.

AWARD

29. The conduct of the respondent amounts to an unfair labour practice in terms of section 186(2) of the Labour Relations Act, 1995.
30. The respondent, Department of Social Development- Free State, is ordered to compensate¹⁰ the applicant, MW Molahloe, for the unfair labour practice in the amount of R254 036.28 (Two hundred and fifty-four thousand and thirty-six rand and twenty-eight cent).
31. Calculation: $R42\,339.38 \times 6 = R254\,036.28$
32. The abovementioned compensation must be paid to the applicant by no later than 31 October 2017 and will accrue interest in terms of the LRA in the case of default.
33. There is no order as to costs.

Signature: _____

Commissioner: ***Suria van Wyk***

Sector: ***Social Development***

¹⁰ Section 193 of the LRA.