



ARBITRATION AWARD

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Panellist : F.N.Bantwini

Case Number: PSHS 131-10/11

Date of Award: 08 August 2011

IN THE ARBITRATION BETWEEN

DENOSA obo Bally T.D. and other : APPLICANT/EMPLOYEE

AND

Dept of Health- EC : RESPONDENT/EMPLOYER

Union/Applicant's Representative : Ms. C.V.Vacu
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Respondent's Representative : Mr. P.Oosthuisen

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DETAILS OF HEARING AND REPRESENTATIONS

1. This arbitration was heard on 15 July 2011 at PE Hospital Complex in Port Elizabeth. It came before the PHSDSBC in terms of Section 191 (1) 5(a) read with section 186 (2) (a) of the Labour Relations Act 66 of 1995 (the LRA). The applicants, Misses. T.D.Bally and Z.P. Ngamlana were present and were represented by Ms. C.K.Vacu, an official from Democratic Nursing Organization of South Africa (DENOSA). The respondent, the Department of Health was represented by Mr. P. Oosthuisen. The second respondent, Mrs. Nadiema Van der Bergh was also in attendance. Parties agreed to submit written closing arguments on 21 July 2011.

ISSUE TO BE DECIDED

2. The issue to be decided is whether the applicants's positions can be upgraded to salary level 11 or get protected promotion or not.

BACKGROUND TO THE DISPUTE

3. The applicants, Misses. Bally and Ngamlana referred a dispute to the PHSDSBC through their union, DENOSA regarding failure of the respondent to appoint them to a position of a Deputy Director: Communicable Diseases (HIV & AIDS/TB) which was advertised by the respondent. When the dispute could not be resolved at conciliation level, the union filed a request for arbitration.

SURVEY OF EVIDENCE AND ARGUMENT

Applicant's case

4. According to Ms. Vacu's opening statement the dispute arose when the respondent appointed the second respondent, Mrs. Nadiema Van der Bergh to a position of a Deputy Director: Communicable Diseases

(HIV & AIDS, STI and TB). She does not qualify for the position and the applicants seek protected promotion/upgrading of their salary levels from 9 to 11

5. The first applicant, **Mrs. Zodumo Princess Ngamlana** testified that Mrs. Van der Bergh does not meet the qualifications of the Deputy Director: HIV&AIDS/TB position which was advertised by the respondent. She further testified that the second respondent does not possess anything relating to TB in her CV and has only 1 year 10 months managerial experience.
6. Under cross-examination, the applicant testified that there are differences between HIV/AIDS and TB and their policies are also different. The applicant was referred to the advertisement of the position as well as the letter from the HR Manager of PROVIDENCE Healthcare Risk Managers. This letter confirms that the second respondent has 9 years managerial experience and it appears on page 29 of the bundle. The applicant further confirmed that the slash that appears in the advertisement means and or (HIV/TB).
7. The second applicant, **Mrs. Thelma Duduzile Bally** testified that Mrs. Van der Bergh does not qualify for the position and never worked in the TB management programme.
8. Under cross-examination, Mrs. Bally testified that she was one of the candidates who was interviewed for the position. Only one union attended the interview (NEHAWU) and no objections were raised by the union representative. She further testified that she was not aware that the second respondent had 9 years managerial experience.
9. In closing, Ms Vacu argued that the second respondent/Mrs. Van der Bergh was not a Manager and did not have 3-5 years experience as suggested by the respondent's representative. She further argued that the reference letter from PROVIDENCE was written on 14 April 2011 while the interviews were conducted on 07 December 2009. This means that the letter was an afterthought by management.
10. The meaning of forward slash in medical terms does not mean (and or) as referred to in the dictionary context. TB and HIV and AIDS are two different programmes with different policies and guidelines. The union representative finally argued that the appointed candidate does not meet the requirements of the position and since she is a preferred candidate by the respondent, the aggrieved employees are requesting protected promotion to the level of the appointed candidate as a remedy.

Respondent's case

11. According to Mr. Oosthuisen's opening statement, the advertisement for the position indicated that HIV & AIDS/TB. In terms of English dictionary, the slash means and or. The respondent followed the recruitment policy during the appointment of Mrs. Van der Bergh. The organized labour was invited and only one

union (NEHAWU) attended the process. Mrs. Van der Bergh was selected amongst other candidates who applied for the position.

12. Mrs. Chaimaine Jagers, the respondent's witness testified under oath as follows:

13. She is holding a position of an Assistant Director Administration and her focus is on integrated Human Resources Management. According to the advertisement the slash means and or, meaning the requirements are HIV and or TB. The job description for the position was drawn by different managers relevant to the post as it is a newly created position. The panel comprised of the supervisors, with the knowledge of the programme, the district Head and the overall head of TB/HIV programmes. The unions were invited to the process but only NEHAWU honored the invitation.
14. Before the short listing is conducted, an oath of secrecy is signed by the members of the panel. Twenty (20) applications were received and four (4) candidates were shortlisted. The process was conducted in a fair manner and no objections were received from the unions until a recommendation to appoint Mrs. Van der Bergh was approved.
15. Under cross-examination, the witness testified that Mrs. Van der Berg was recommended by a panel of the interviewers and she was not part of the panel. Based on the panel's recommendation, she believes that Mrs. Van der Bergh qualifies for the position. She was involved in the formulation of the advertisement for the position in question. The HOD or the Head of the District has powers to appoint the recommended candidate for the position.
16. In closing, Mr. Oosthuisen argued that the unions were invited to observe the recruitment process from the sifting and short listing stage up to the stage when a recommendation to appoint Mrs. Van der Bergh was made. All candidates during the interview were subjected to the same set of questions and Mrs. Van der Bergh was the highest scorer hence she was selected. The requirements of the position according to the advertisement is 3 to 5 years experience within TB/HIV field was not ambiguous as the forward slash used TB/HIV is generally interpreted in English writing as a punctuation mark which exclusively illustrates similarity of the words used in the text.
17. The respondent's witness indicated clearly that all steps in accordance with the recruitment and selection policy were followed. The 8 years managerial experience of Mrs. Van der Bergh as a Case Manager, specializing in HIV/AIDS Disease Management was a comprehensive responsibility serving both TB and HIV/AIDS. The respondent's representative further submitted that the fact that the 2 applicants call for

protected promotion is totally unjustifiable as the respondent's organizational structure only offers one position which has been filled.

18. Mr. Oosthuisen finally submitted that the trust invested in the panel of interview was indeed to ensure that the most suitable candidate is selected for the position for effective service delivery, following the recruitment and selection policy.

ANALYSIS OF EVIDENCE AND ARGUMENTS

19. It is common cause that the applicants applied for an advertised position of Deputy Director: Communicable Diseases (HIV & AIDS, STI's and TB), level 11. It is also common cause that Mrs. Van der Bergh was appointed to the position hence she was joined to the proceedings as the second respondent.
20. It is the applicants' case that the second respondent does not qualify for the above mentioned position as she does not have TB qualifications and 3 to 5 years managerial experience as indicated in the advertisement. TB and HIV & AIDS according to the applicant's contention are two different fields with different policies and guidelines.
21. According to the respondent's evidence, the advertisement sought for an incumbent with 3 to 5 years experience within TB/HIV & AIDS fields. The forward slash according to English dictionary means and or. This then means that the requirements were interpreted as TB and or HIV and AIDS programmes.
22. The respondent referred the second applicant to Mrs. Van der Bergh's letter of reference from PROVIDENCE Healthcare Risk Managers. This letter appears on page 29 of the bundle and indicates that Mrs. Van der Bergh worked for the company from 01 January 2000 to 31 January 2008 as a Case Manager specializing in HIV/AIDS Disease Management.
23. It is the union representative's contention in her closing arguments that the reference letter is dated 14 April 2011 while interviews were conducted on 07 December 2009. This letter according to her was an afterthought. This evidence was not tested during the proceedings.
24. Clause 7.7.4.4. of the respondent's recruitment and selection policy stipulates "Concerns of an observer (Union/s) regarding the selection process must be submitted to the Chairperson of the Committee to form an integral part of the minutes of the meeting for due consideration by the employee to whom the power has been delegated to approve the appointment of the candidate"

25. Both applicants did not dispute that all unions including DENOSA were invited to observe the recruitment and selection process from the short listing to the stage where a recommendation to appoint the best candidate was made. Only one union (NEHAWU) attended the process. The applicants, also did not dispute that no objections were raised during the process until a recommendation to select Mrs. Van der Bergh was made and subsequently appointed to the position.
26. It is furthermore, the respondent's representative case that the position in question is only one (1) in the organogram and as such it has been filled. He further contended that the call for protected promotion by the applicants is unjustifiable.
27. It must be noted that none of the applicants' curriculum vitas were submitted to the proceedings to prove that they indeed qualify for the position in question instead of the selected candidate.
28. It is also my view that the applicant has failed to prove the claim of unfair labour practice against the respondent.

AWARD

29. I therefore make the following award:

29.1 The respondent, **Department of Health-EC** cannot be compelled to promote **Misses Thelma Duduzile Bally and Zodumo Princess Ngamlana** to the position of a Deputy Director: Communicable Diseases HIV & AIDS, STI's and TB, level 11 or to an equivalent position/level or get protected promotion.

29.2 There is no order as to costs.

29.3 The application is dismissed.



Signature

Faith Ncumisa Bantwini