



PHSDSBC

PUBLIC HEALTH AND SOCIAL DEVELOPMENT
SECTORAL BARGAINING COUNCIL

ARBITRATION AWARD

Commissioner: **THUTHUZELA NDZOMBANE**

Case No: **PSHS1361-16/17**

Date of award: **25 July 2017**

In the matter between:

NEHAWU OBO SS MANGA

(Applicant)

and

DEPARTMENT OF HEALTH –WESTERN CAPE

(Respondent)

DETAILS OF HEARING AND REPRESENTATION

1. An arbitration hearing was scheduled for and heard on 5 July 2017, under the auspices of the Public Health and Social Development Sectoral Bargaining Council at Western Cape College of Nursing in Athlone. The applicant, Mr Manga, was represented by a Shopsteward, Mr Sigoge from NEHAWU. The respondent, the Department of Health, was presented by a Labour Relations officer, Mr Mniki. The parties submitted a combined bundle which was accepted and admitted as it purports to be. The respondent submitted oral arguments whilst the applicant preferred to submit written arguments by no later than 14 July 2017.

BACKGROUND

2. The applicant stated that he is employed by the respondent as from 2001. He was appointed as Clinical Programme Co-ordinator as from 2011 at Salary Level 10. In September 2016, the respondent advertised a post of Assistant Manager. He submitted his application as he believes that he qualified and met all the

requirements. To his surprise he was not shortlisted. Subsequent to that he lodged a grievance because he was aggrieved as he was not shortlisted. The first response of the respondent was that it acknowledged the error for failure to shortlist him. In future, he should continue to apply for the post. The disciplinary steps will be taken against the personnel involved in the shortlisting.

3. On 17 March 2017, he received a final outcome which stated that he should ignore the contents of the first letter. The final outcome indicated that he did not meet the requirements of the post in that he does not have three years managerial experience.
4. He was registered with the Nursing Council in 2009 as a General Nurse. According to his job description agreement between him and his supervisor is that the next level for him to apply for is the Assistant Manager's post. He believes that he has more than three year's managerial experience.
5. If, he succeeds with his dispute he requested to be compensated and be upgraded to the salary level of the assistant manager's post. Furthermore a formal disciplinary action against the personnel involved in shortlisting in this post should to be taken.
6. The respondent stated it advertised the post of Assistant Manager in 2016. The advertisement is as follows:

Post no. 19: Assistant Manager Nursing (Area: Day Duty)

Core Title: Nursing and Support Personnel

Institution: Khayelitsha District Hospital

[Chief Directorate: Metro District Health Services]

Remuneration: R465 939 (PN-A7) per annum

Service benefits:

13th cheque, employer's contribution to the pension fund, housing and medical aid allowance.

Requirements:

Minimum educational qualification:

Basic R425 qualification (i.e. diploma/degree in nursing) or equivalent qualification that allows registration with the South African Nursing Council (SANC) as Professional Nurse.

Registration with a professional council:

Registration with the SANC as a Professional Nurse.

Relief night duty manager when necessary.

Experience:

A minimum of 8 years appropriate/recognisable experience in nursing after registration as a Professional Nurse with the SANC in General Nursing. At least 3 years of the period referred above must be appropriate /recognisable experience at management level.

Inherent requirements of the job:

Willingness to work overtime should the need arise, day or night.

Relief night duty Manager when necessary.

Competencies (knowledge/skills):

Excellent disciplinary and conflict management skills.

Good managerial, supervisory and decision-making skills with excellent writing and **Verbal communication skills:**

Ability to work effectively and amicably, at management level with people of diverse background and beliefs.

Basic Computer literacy:

Knowledge of legislation relative to the Health Care Service and policies of the Department of Health.

Ability to manage own work, and that of the units which report to the post, and to ensure appropriate interventions to enhance the nursing service at the institution.

Skilled nurse clinician able to lead the nursing service within the scope of practice and accepted nursing standards.

Proficiency (verbal and written) in at least two of the three official languages of the Western Cape.

Duties (key result areas/outputs):

Co-ordinate, supervise and delegate the provision of effective and efficient patient care through quality nursing care within set standards and legal framework.

Participate in analysis, formulation and implementation of nursing guidelines, practices, standards and procedures.

Manage and monitor the cost-effective utilization of human, financial and physical resources.

Co-ordinate the provision of effective training and research.

Provide effective support to Nursing Services and maintain professional self-development.

Co-ordinate and monitor critical hospital support function afterhours in collaboration with clinical and facilities management.

7. The three years managerial experience is prescribed in the Occupational Specific Dispensation and Resolution 3 of 2007.
8. The applicant does not have managerial experience in nursing as required by the advertisement. This application should be dismissed as the respondent is not involved in an act of unfair labour practice.

ISSUE TO BE DECIDED

9. I am required to determine whether or not the respondent has committed an act of unfair labour practice by failure to shortlist the applicant for the post of an Assistant Manager as advertised in 2016.

APPLICANT'S CASE

10. **Mr Sam Manga** stated that he is the applicant in the matter and he presented the following evidence under oath. As a clinical programme co-ordinator he is responsible for the whole infection control and safety in the hospital. He works close with the wards managers. Managers report to him with regard to infection progress and problems. Part of his duties he convenes monthly meetings and discusses any challenges in respect of infection control in the hospital.
11. He gives training to the staff regarding the control of infections and he also identify training needs for the staff and patients. Moreover, he advises nurses and doctors in terms of anti-biotic stewardship on daily basis and they report to him about any progress in this regard. All the unit managers' report to him. He does not do performance assessments to the managers.
12. For him to progress he needs to apply for an assistant manager's post otherwise he has no career path in the general stream of nursing. He identifies training needs for the staff and managers and he has to manage the whole process whereby he has to liaise with service providers. He does deal with the standard of any ward if, it is poor, he will recommend as to what should be done. He also advises the CEO of the hospital when it comes to infection control. His experience speaks for itself.

13. It was time for him to move upwards in order to add value to the hospital. He worked at head office as quality assurance manager from 1 September 2011 and he also acted as assistant manager at some sporadic times.

RESPONDENT'S CASE

14. **Ms Henrietta Peach** stated that she is employed by the respondent and she is placed at Compensation Management within HR Component in the Head Office as Assistant Director and she presented the following evidence under oath. The requirements of the post come from the Occupational Specific Dispensation. There are four different streams within the department which are a general stream, specialty stream, lecture stream and primary health stream. This post falls under the general stream and within this stream there are two posts which are an operational manager and a clinical programme co-ordinator.

15. The operational manager's post is a managerial post within nursing whilst a clinical programme co-ordinator's post is to handle a programme but do not supervise any employee. For example, the clinical programme co-ordinator co-ordinates infection programmes. Mostly, clinical programme co-ordinators run their own programmes.

16. The requirements for the post need a person who has three years managerial experience in nursing. Although the applicant has experience in nursing he does not have three years managerial experience in nursing. A quality assurance post is non-occupational specific dispensation and any person can occupy such a post like a nurse or social. There is need for no nursing experience to qualify for quality assurance manager.

17. A clinical programme co-ordinator is occupational specific dispensation post and one needs to be registered as a nurse. The applicant has experience of nine years and seven months in nursing which qualifies him for the advertisement. But, he does not have three years managerial experience in nursing hence he was not shortlisted.

18. The applicant's curriculum vitae clearly show that he does not have three years managerial experience in nursing. This post needs a person with experience in dealing with conflicts, assessment appraisals, managing leave, taking disciplinary

actions, handling human capital, procurements, problem solving, to refer employees to ICOSA, to manage medicine and instruments, to delegate powers , to supervise subordinates, training and manage vacant posts, budget and finances. If a person was a manager in factory shop that will not be applicable because it is not in nursing.

I will refer to closing arguments and cross examination where necessary in my analysis.

ANALYSIS OF EVIDENCE AND ARGUMENT

19. In **National Education Health and Allied Workers Union v University of Cape Town & Others (2003) ILJ 95 (CC)** at page 110 *the Constitutional Court referred to the constitutional right to fair labour practices entrenched in section 23(1) of the constitution and the absence of a definition of “unfair labour practice “in the constitution and remarked as follows “The concept of labour practice is incapable of precise definition. This problem is compounded by the tension between the interest of the workers and the interests of the employees that is inherent in labour relations. Indeed, what is fair depends on the circumstances of a particular case and essentially involves a value judgment. It is therefore neither necessary nor desirable to define this concept”.*

20. Section 186 (2) (b) of the Labour Relations Act No. 66 of 1995 as amended (“LRA”), states that *“unfair labour practice means an unfair act or omission that arises between an employer and an employee involving unfair conduct by the employer relating the promotion, demotion, probation (excluding disputes about dismissals for a reason relating to probation) or training of an employee or relating to the provisions of benefits to an employer”.*

21. It is trite law that an employee has a duty to prove that an employer has embarked on unfair conduct relating to unfair labour practice. It is the prerogative and a cardinal function of an employer to appoint or to promote an employee. It stands to reason therefore that an employer is best placed to make such a decision. Labour forums should be slow to interfere with such decisions unless the discretion exercised by the employer was unfairly or grossly unreasonably done.

22. In **Aries v CCMA & Others (2006) 27 ILJ 2324(LC)** the court held that “*there are limited grounds on which an arbitrator, or a court, may interfere with a discretion which had been exercised by a party competent to exercise that discretion. The reasons for this is clearly that the ambit of the decision-making powers inherent in the exercising of a discretion by a party, including the exercise of the discretion, or managerial prerogative, of an employer, ought not to be curtailed. It ought to be interfered with only to the extent that it can be demonstrated that the discretion was not properly exercised. The court held further 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 principle or in a biased manner*”.
23. Under cross-examination the applicant conceded that he does not manage employees and therefore he does not have the three years managerial experience as a requirement in the advertisement. For this concession, it is clear to me that the applicant does not meet all the requirements of the post. Having considered the case of Aries above I find that the respondent did not exercise its discretion capriciously, or for insubstantial reasons, or based upon any wrong principle or in a biased manner”.
24. I agree with the applicant as the matter stands he is confined to his present position in terms of career path. Obviously, this situation is unfair to him but such can only be rectified if the collective agreement is amended or the post of clinical programme co-ordinator should be taken out where it is currently slotted within the agreement.
25. Or the applicant or any other employee who occupies the same post should consider the suggestion made by Ms Peach that they should apply for posts in districts, regions and head office. Having considered the evidence before me I find on balance of probabilities that the applicant has failed to discharge the onus that the respondent was involved in an act of unfair labour practice by failing to shortlist him to the position of assistant manager in 2016.

AWARD

26. I find that the applicant has failed to prove that the respondent was involved in unfair labour practice for failure to short list for the post of assistant manager. Consequently, the application is hereby dismissed.

A handwritten signature in black ink, enclosed in a faint rectangular border. The signature is stylized and appears to read 'Thuthuzela Ndzombane'.

Panelist: Thuthuzela Ndzombane

Sector: Public Health