



ARBITRATION AWARD

Panellist/s: Patrick Stilwell
Case No.: PSHS147-10/11
Date of Award: 27-Sep-2011

In the ARBITRATION between:

PHSDSBC

Arbitration award

Case number PSHS 147-10/11

Applicant : DENOSA obo Z.R.Gumede

Respondent : Department of Health KZ-N

Date of award : 10th September 2011.

1. Details of hearing and representation

1.1. This arbitration was heard at King Edward VIII Hospital, in Durban on 23rd of August 2011. Applicant was present and represented by a trade union official Ms S Ngcobo. Respondent was represented by Mr L. Magubane from his human resources component.

2. Issue to be decided

2.1. Whether the respondent has committed an unfair labour practice in relation to the promotion of applicant, and if so, what relief should be granted her.

3. Background

3.1. The material facts in this matter are mainly common cause.

3.2. Applicant is a professional nurse. At times the relevant to this dispute she worked at the Stella Hospital near Stanger in KZ-N. In the year 2004 she was instructed by the nursing manager, Mrs Ngcobo to take charge of the female medical annex. The medical annex was a "step down" from the main female medical ward. This catered for patients who had been discharged from the main medical facility and were awaiting reintegration in their families and community.

3.3. By reason of her status as a nursing sister in charge she was given full authority to manage the ward.

3.4. On the 9th February 2007 it was announced (in circular number 92/2007) that the Department of Health had come to an agreement with organised labour regarding the implementation of the Occupation Occupational Specific Dispensation (O.S.D.) for nurses, and that the Minister had determined the implementation date thereof to be 1st July 2007.

3.5. Another circular emanated from the office of the Head of the Department of Health KwaZulu-Natal on the 18th of February 2008 (circular number 13/2008). The circular added further detail to circular 92/2007. Paragraph 4 thereof stated the following " Chief Professional Nurses who were appointed and or were assigned to perform the duties on a full-time basis as Chief Professional Nurse in charge of a ward..... on or before the 30th of June 2007 and are still performing those duties should be translated as Operational Manager Nursing grade 1, 2 or 3..... provided that.... she was the only person in charge of a ward.....".

3.6. During 2008 the Department decided to place advertisements inviting suitably qualified persons to apply for the post of Operational Manager in respect of the ward in question. Applicant applied even though she did not meet the minimum criteria stipulated in the advertisement, in terms of her experience. She was unsuccessful.

4.Survey of evidence and argument

4.1. Three witnesses testified in this matter and a number of documents were handed in. I do not deem it necessary to summarise the evidence of these witnesses because they are all ad idem as to the historical facts leading up the referral of a dispute to the Council. It is in relation the interpretation to be placed on those facts that they differ. The documents, on the other hand speak for themselves. Neither the authenticity nor the truthfulness of the content of any document was challenged. They will therefore be accepted as what they purport to be and the contents of the various letters and memoranda will be accepted as accurately conveying the thoughts of the authors thereof.

5. The contentions of the parties

5.1. Applicant contends, quite simply, that she should have been appointed as Operational Manager of her ward by reason of the fact that she had been acting in that capacity since 2004. This demonstrated that she had the ability to do the job and her employers accepted it as such .

5.2. It was contended on the half of respondent that when applicant was assigned the duties of taking charge of the ward, such action did not amount to promotion. It was merely a case that she had been "allocated" those duties. Respondent's view was that applicant could not be translated to an Operational Manager for the simple reason that in terms of the O.S.D. circulars it was only "Chief Professional Nurses" who qualified. Applicant was not a Chief Professional Nurse at the time but was only a Senior Professional Nurse.

6. Analysis of evidence and argument

6.1. In his book "Principles of Unfair Labour Practice" (Juta - Cape Town - 1985 - p 42) the learned author Theo Poolman says the following "an unfair labour practice suggests some form of conduct which has not met the requirement of "fairness". Fairness is, therefore, an important element of obligation in labour relations. The word "fairness" is

today equated to "equitable", "equity", "unbiased", "reasonable", "impartial", "balanced", "just", "honest", "free from irregularities", "according to the rules" etc.

6.2. The onus is on the party alleging an unfair labour practice, to prove that such exists. It is therefore incumbent on the applicant to prove that the conduct of respondent has not been equitable, or unbiased, or reasonable, or impartial, or not balanced, or not just or honest, or that it was not free from irregularities. Inasmuch as the wording of the O.S.D. circular is to the effect that Chief Professional Nurses qualify for translation can be said that the employer was acting in an unreasonable, or partial, or biased, or dishonest, or unjust, or irregular manner by not appointing a person who did not meet that criteria? In my view it cannot. Nor, I would suggest, can it be said that the employer can be faulted for not appointing applicant pursuant to the advertisement, for the same reason.

6.3. Applicant appears to have assumed the belief that she had somehow "earned" the right to be appointed to the post because she had worked in it for a number of years and had faithfully and efficiently served the respondent in that capacity. One cannot but have a measure of sympathy with her if she does feel that way. But the reality is that in the Public Service no post is earned. All posts must be filled by means of a process of advertisement, short listing and interviewing. The process of filling posts in the public service is a product of a collective agreement between Government and organised labour. It is not possible to "migrate" into a post simply by virtue of the fact of having served in the post. The present dispensation of filling posts by means of open competition is one which the parties to the collective agreement believe is the best safeguard against corruption, nepotism and cronyism in the appointment process. I must take cognizance of the fact that the parties to this collective bargaining process have adopted the stance. It clearly reflects their views, or to borrow a phrase from the law of the delict, it reflects their "legal convictions" on such matters. I must therefore conclude that applicant has failed to prove that respondent committed an unfair labour practice and I accordingly determine this matter as follows.

7. Award

7.1. The application is dismissed.

Patrick Stilwell
Arbitrator