



ARBITRATION AWARD

Case Number: PSHS212-11/12

Commissioner: Abraham Nthako

Date of Award: 13-October -2010

In the matter between

Thabo Japie Raleting

(Union/Applicant)

and

Department of health – Free State

(Respondent)

Union/Applicant's representative: In person

Union/Applicant's address: C/o DNDM Solutions

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Respondent's representative: Mr. J. B. Mncube

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DETAILS OF REPRESENTATION

1. This is an award in the arbitration between Mr. Thabo Japie Raleting, the Employee and Department of Health – Free State, the Employer.
2. The arbitration was held under the auspice of PHSDSBC in terms of the Collective Agreement.
3. The conciliation process was dealt with and the matter could not be resolved.
4. The Employee requested that the matter be resolved through arbitration process.
5. The matter was set down for arbitration on the 03rd of October 2011 and it was finalized.
6. The Employee appeared in person and the Employer, Department of Health was represented by Mr. J. B. Mncube.
7. The matter was mechanically recorded and the parties submitted a bundles of documents which were marked A and B.
8. The parties agreed that they will make submissions in writing and their arguments will be submitted by the 10th of October 2011.
9. The Employee submitted his documents on the 07th of October 2011 and the Employer requested extension for submission to the 12th of October 2011.

ISSUE TO BE DECIDED

10. The issue to be decided on is whether the Employer acted unfairly towards the Employee, if so what appropriate remedy to apply.
11. The Employee alleged that the Employer demoted him and the Employer on the other hand alleged that the Employee was not unfairly treated as his contract came to an end.

BACKGROUND TO THE ISSUE

12. Employee alleged that he is presently employed by the Employer as Manager, Radiography in the Department of Health.
13. He referred the matter to the Council and as it could not be resolved a certificate of non resolution was issued.
14. The matter was set down for arbitration at Bophelo House, Department of Health in Bloemfontein on the 03rd of October 2011 and it was finalized.
15. The matter relates to unfair labour practice as per certificate of non resolution. Since that is the case, it is the duty of the Employee to prove that the Employer acted unfairly towards him.

SURVEY OF EVIDENCE

EMPLOYEE'S SUBMISSIONS

16. The Employee made submissions without calling any witnesses.

EMPLOYEE

17. Mr. Thabo Japie Raleting submitted as follows:
18. He was promoted to a position of Manager: Radiography on the 01st of September 2008 and was subsequently requested to coordinate Free State Health services for CAF and FIFA World Cup. He submitted that in terms of the letter of promotion it was indicated that the promotion was contractual. He took the matter up with the HOD, Prof. Ramela as he believed that there is nothing like contract promotion in public service. He referred to page 17 of bundle A and indicated that he made endeavors to get Prof. Ramela but in vain as he no longer in the system.
19. The documents on pages 19 to 20 of bundle B also prove the existence of the discussion with the HOD. Though he saw the document for the first time, the document does not correctly represent the discussion that he had with the HOD. The Employee in the said discussion agreed that; he will be promoted to the position of the Manager: Radiography, he accepts a task of co-ordinating Free State Health services for CAF and FIFA World Cup projects for three years, he will only perform Radiographic Services as a Manager; Radiography on completion of the said project which project was meant to run for three years.
20. The Employee submitted that since his promotion on the 01st of September 2008 he has been addressed as a Manager and he referred to official documents from the Employer on pages 18;21;24 and 26 of bundle A. He submitted that a legitimate expectation has been created by the Employer that the Employee is a Manager; Radiography who was assigned or requested to co-ordinate Free State Health services for CAF and FIFA World Cup project for three years. He submitted that according to their understanding with the HOD is that the three year contract was meant for the duration of the project which on its expiry the Employee would only perform Radiographic Services as he indeed a Manager: Radiography.
21. If the Employee was seconded to a position of Manager: Events Management that would have been irregular and reference was made to page 15 of bundle B. A definition of secondment in terms of Public Services Act and Public Service Regulations was given. According to the document secondment does not involve promotion. He submitted that his case was not handled properly by the Employer and he was not fairly treated, the implications of which are very enormous in a number of ways. He did not resign. That was the Employee's submission in brief.

EMPLOYER'S SUBMISSION

22. Employer did not call any witnesses after submissions.
23. The Employer submitted as follows:
24. That the Employee is Assistant Manager: Radiographic Services at Motheo District Health Services. The Employee was appointed on a contract basis to the post of Events Manager on the 01st of September 2008 for the duration of the FIFA World Cup for a period of three years. The Employee accepted the terms and conditions of the contract of which he has performed the functions and has further entered into the agreement with the Employer that he will resume the functions of Assistant Manager: Radiography for the remainder of the contract until the contract expires, upon which he will remain as Assistant Manager: Radiography.
25. On the 09th of November 2010 the Employee lodged a grievance that he was dissatisfied as he was unfairly treated by not retaining the conditions of his contract upon its expiry and that the Employer did not consult him on how he shall be utilized for the remainder of the contract after the core functions of the contract for which he was appointed had become redundant. On the 27th of January 2011 the Employee was informed that the allegations leveled by him that he was not consulted are not true or correct because he had a meeting with Me. Kala, the Manager and Mr. Fikozolo, the Executive

Manager before his placement at Motheo District Office on the remainder of the period of his contract. The creation of the post, Events Manager was as a result of the 2010 World Cup Soccer Tournament. The Employer had to create the post to manage Health programmes in the Free State Province as a project; hence the life span of it was three years.

26. Employer submitted that there was a contract that was for specified time and it came to an end. He submitted that the Employee was bound by the terms of the agreement at the time the dispute arose. He was a Manager: Events Management. It was not correct that the Employee was Manager: Radiography at the time he lodged the grievance. The contract had not yet expired and the Employee was bound by the contract of employment as a Manager: Events Management. Job title on page 18, 21, and 24 of bundle A is an administrative cliché.
27. The Employee was evaluated in terms of the Performance Management Policy as per page 21 of bundle A. That was the Employer's submission in brief.

ANALYSIS OF EVIDENCE AND ARGUMENT

28. **Section 185 of The Labour Relations Act 66 of 1995 provides that every employee has the right not to be unfairly dismissed and subjected to unfair labour practice.**
29. **This dispute has been referred to the Council in terms of Section 191(1) of Act 66 of 1995. In Nawa v Department of Trade & Industry [1998] 7 BLLR 701 (LC) the Labour Court stated that the LRA does not provide for general unfair labour practice definition and concluded that an employee who alleges an unfair labour practice must show that it falls within the residual unfair labour practice.**
30. 2002 amendments inserted the definition of an unfair labour practice into section 186(2) of Act 66 of 1995. The definition reads as follows: 186(2) Unfair labour practice means any unfair act or omission that arises between an employer and an employee involving- (a) unfair conduct by the employer relating the promotion, demotion, probation or training of an employee or relating to the provision of benefits to an employee; (b) the unfair suspension of the employee or any other unfair disciplinary action short of dismissal in respect of the an employee; (c) a failure or refusal by an employer to reinstate or re-employ a former employee in terms of any agreement; (d) an occupational detriment, other than dismissal, in contravention of the Protected Disclosure Act 2000 (Act No 26 of 2000), on account of the employee having made a protected disclosure defined in that Act.
31. The Employee submitted that he was promoted to a position of Manager: Radiography on the 01st of September 2008 and was subsequently requested to coordinate Free State Health services for CAF and FIFA World Cup. He submitted that in terms of the letter of promotion it was indicated that the promotion was contractual. On the other hand the Employer submitted that the Employee is Assistant Manager: Radiographic Services at Motheo District Health Services. The Employee was appointed on a contract basis to the post of Events Manager on the 01st of September 2008 for the duration of the FIFA World Cup for a period of three years.
32. The first question that has to be answered is whether the Employee was promoted to Manager: Radiography or not. It is common cause that the Employee was appointed to another post on the 01st of September 2008. The Employer argued that the Employee does not have the right to claim retention of conditions of a contract that has expired. The Employer went further to say that the Secondment to Manager Events Management for FIFA World Cup was on contractual basis and has effectively expired on the 31st of August 2011. Reference was made to page 19 to 20 of bundle B.
33. On the other hand the Employee argued that he was not seconded to the position of Manager: Events Management and even if he was seconded, that secondment would have been irregular and illegal which is therefore, null and void. On the 09th of September 2011 he was demoted to the position of Assistant Manager: Radiography as per page 25 of bundle A. On page 19 to 20 of bundle A is a document that approved secondment of the Employee, Mr. T. J. Raleting as Events Manager for 2010 Soccer World Cup.

34. The Employee was seconded and as a result of the said secondment he was placed at a higher salary level while his job title remained as Assistant Manager. The Employer referred to page 17 to 18 of bundle B and 19 to 20 of bundle A. The document on page 17 of bundle B refers to status of the Employee's employment. Page 19 and 20 of bundle B is the same letter but it is signed. The Employee signed receipt thereof on the 15th of April 2011. In terms of paragraph 6 of the document on page 19 it is stated that **"Since the level will now differ from Mr. Raleting's current salary level he can no longer be seconded into the post. A request is thus made to promote him to level of salary 12, for the 3 year contract period. After completion of the contract period, he will be placed back in his previous post of Assistant Manager: Radiography on salary level 9"**.
35. From the letter on page 17 of bundle A it is noted as Contract Promotion. The Employee alleged that he challenged the contract and there were discussions about it with the then HOD. He submitted that he accepted a task of co-ordinating Free State Health services for the CAF and FIFA World Cup projects for three years. He argued that he was to perform Radiographic Services as a Manager: Radiography on completion of the said project which project was meant to run for three years.
36. On page 20 of bundle B the post for the Employee was with effect from the 01st of September 2008 for period of three years. It is common cause that there was a contract that the Employee entered into with the Employer for three years but the question that remains is what was it for. The Employee alleged that he has been addressed as a Manager: Radiography since he was promoted on the 01st of September 2008. Whether the Employee was promoted or seconded in terms of the Contract of Employment it is a question of interpretation of the agreement. Whether the agreement was illegal or is null and void is the jurisdiction of the Higher Courts.
37. The duty of the Council is to establish from the evidence given whether the Employee had been unfairly treated and if so, whether such treatment constitutes unfair labour practice.
38. When a dispute arises about an agreement which has been reduced to writing in a document, a party will often experience the need to bring evidence from outside the document (extrinsic evidence) to prove his version of the content and meaning of the contract. In such circumstances the parole evidence rule generally comes into play, to restrict the nature and extent of the evidence that may be brought.
39. Extrinsic evidence is not admissible but integration rule of parole evidence determines the extent to which extrinsic evidence can be admissible and interpretation rule determines when and to what extent extrinsic evidence may be brought to interpret the words used in the in the document that was intended as a final reflection of the transaction. **See: Johnston v Leal 1980 3 SA 927 (A) 942 - 943**
40. Since the Employee has accepted the task of co-ordinating Free State Health services for the CAF and FIFA World Cup projects for three years. An inference could be drawn that the Employee accepted that the contract was for three years. He alleged that he was promoted from the 01st of September 2008 but that was the date upon which the contract for the period of three years started. The letter of approval on page 19 on page 19 of bundle B clearly indicated that **"After completion of the contract period, he will be placed back in his previous post of Assistant Manager: Radiography on salary level 9"**.
41. The Council does not have the powers to adjudicate on the validity of a contract and or change the change the terms of contractual obligations. The Employee's allegations of unfair labour practice are unfounded as he knew what his obligations were and for what period was he contracted. It is my view that the Employee was not unfairly treated considering the meaning or within the confines of unfair labour practice.

FINDING

- 42. Based on the above, it is my finding that the Employee failed to discharge the onus of proving that the Employer acted unfairly and as such that constitutes unfair labour practice.
- 43. The Employee case should be dismissed.

AWARD

- 44. The Employer did not act unfairly towards the Employee, **Mr. Thabo Japie Raleting**
- 45. The Employee's case is dismissed.
- 46. I make no other as to costs.

Signature: _____
Commissioner: *Abraham Nthako*
Sector: *Health*

