



ARBITRATION AWARD

Panellist: **Silas Ramushwana**
Case No.: **PSHS 22-11/12**
Date of Award: **7 July 2011**

In the ARBITRATION between:

C M RAMAHUMA AND ONE OTHER

(Union / Applicant)

And

DEPARTMENT OF HEALTH-LIMPOPO

(Respondent)

Union/Applicant's representative: Ms. A Germishuys-Attorney.

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Respondent's representative: Mr. R J Mailula-Labour Relations
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DETAILS OF HEARING AND REPRESENTATION:

1. The matter was scheduled for arbitration on 21 June 2011 at the offices of Department of Health-Limpopo, 18 College Street, Polokwane. Ms. Ramahuma and Ms Rapholo (hereinafter referred to as the Applicants) appeared in person and was represented by Ms. A Germishuys, attorney and Mr. Mailula R represented Department of Health as its representative (hereinafter referred to as the Respondent).

ISSUE IN DISPUTE:

2. The issue to be decided is whether or not the Respondent has acted fairly by reversing the appointment of employees who did not meet certain requirements of the post.

BACKGROUND OF THE DISPUTE:

3. It was common cause that applicants applied for Grade 3 Pharmacists posts in 2010 at Bela Bela Hospital, were invited for interviews, were successful and accepted the offers. They were given letters of appointments and resigned in Polokwane Hospital to start their new positions in Bela-Bela on 1 February 2011. They were informed in February 2011, which their appointments were being overturned as they did not have enough experience.
4. The Applicants filed a grievance procedure and the matter was not resolved and they approached the Council in terms of Section 186(2)(a) of the Labour Relations Act. The relief sought is to be reinstated as Grade 3 Pharmacist with effect from 1 February 2011.
5. The respondent, sought as a remedy that the matter be dismissed.

SURVEY OF ARGUMENTS:

6. Parties agreed during a pre-arb meeting not to give oral evidence but to submit closing arguments in writing.

APPLICANT'S CLOSING ARGUMENTS

7. It was submitted on behalf of the applicants that it is common knowledge that advertisement for posts ordinarily set out the top requirements in order to attract the most ideal candidates for the positions and that the advertisement did not indicate that those who do not qualify should not apply. There was no prohibition in that the applicants should not apply. It is submitted that the applicants qualified in all aspect expect that they did not have 13 years experience they required. It is argued in terms of Section 20(5) of the EEA, which provides that an employer may not discriminate against a person solely on the grounds that the person lacks relevant experience.

8. It is the applicant's case that they suitable qualified and were appointed in terms of the OSD measures contained in Resolution 3 of 2009. It is argued that the panel that interviewed and appointed the applicants did not err as they were senior and competent persons. The applicant denies that the appointment was irregular as there is no provision in the Public Service regulation which provides for the reversal of irregular appointments. Therefore, the respondent had no authority to overturn the appointments of the Applicants to the position of Grade 3 Pharmacists.

9. It is submitted that the respondent's act of summarily overturning their appointments amounts to unfair conduct according to Section 186(2) of the LRA in that they were not contacted prior to the termination and that they suffer loss of benefits and a diminution in status. The applicant submits that the LRA takes prevalence over a collective agreements or pieces of legislation except the Constitution.

10. The applicant concluded its argument by praying that they be reinstated to the position of Grade 3 Pharmacists with effect from 1 February 2011 without loss of benefits

RESPONDENT'S CLOSING ARGUMENTS

11. The respondent argued that the recruitment, selection and promotion measures for employees covered by the Occupational Specific Dispensation which was a product of a Collective agreement which was signed by parties at the Bargaining Council.

12. The objectives of the OSD is to introduce an occupational specific remuneration and career progression dispensation, to provide career path opportunities based on competencies, experience and performance and recognition of appropriate experience for the purpose of grade progression. The main aim of the OSD is to ensure uniformity in the recruitment, selection and promotion of the health professionals throughout the country. The employees are duly registered with South African Pharmacist Council members of the Trade Unions which were part of the signing of the Collective Agreement (Resolution 3 of 2009) at the Council level.

13. It is argued that the reason why the appointments were reversed was solely that they did not meet the requirements as per advertisement. Both employees did not have 13 years experience as pharmacist whilst they possessed relevant qualification and registration. It would be against the required recruitment procedures to employ people who do not meet the requirements.

14. The employer stated that it has the duty to correct wrong action by its officials and that it will not be fair to compromise the quality of provision of health care by ignoring the requirement of experience in appointing people. It is therefore submitted that the employer acted fairly to remedy the wrong decision by its officials by promoting employees against the requirements set by the Collective Agreement.

ANALYSIS OF ARGUMENTS

15. The only point in this dispute will be whether the employer acted fairly in reversing the decision of appointing the employees to the positions of Grade 3 Pharmacists. It was common cause that applicants applied for Grade 3 Pharmacists posts in 2010 at Bela-Bela Hospital, were invited for interviews, were successful and accepted the offers. They were given letters of appointments and resigned in Polokwane Hospital

to start their new positions in Bela-Bela on 1 February 2011. They were informed in February 2011 that their appointments were being overturned as they did not have enough experience (13 years).

16. The employee party agrees to the fact that employees did not have 13 years as required by the advertisement and stated that it is commonly known that advertisements would always set out top requirements to attract ideal candidates. It is argued that the employer should not discriminate an employee on the basis of the person lacking experience in terms of Section 20(3)(c) of the EEA and that the employer committed unfair labour practice in terms of the LRA.
17. The employer on the other had argued that the recruitment, selection and promotion of employees are covered by the OSD and that the officials did not comply with it. The reason for the reversal is solely on the fact that the employees lacked 13 years experience although they were having qualifications and registered with the Council. The reversal was correcting the wrong actions of the officials.
18. It is clear that employees read and understood the advertisement and its requirement but they decided to explore as they aspire to grow in the careers. Had the employer rejected the before or after the interviews this dispute would not have been created. What exaggerated the unfairness was the fact that employees were given letters of appointment or offers and accepted. The fact that employees were covered by the OSD is not disputed and it is absurd that the officials could not take it into cognisance during the whole process. The mere fact that officials had decided to appoint them was with full knowledge that the positions required 13 years experience and they were also in full knowledge that employees had lesser years of experience as they might have disclosed on application or during the interviews but officials continued inviting them to report for duty on 1 February 2011. It was clear that the employees were qualified, registered with SAPC and the concern by the employer was the 13 years experience. The duty by the department as argued to correct the wrong action by its officials on reversing the appointments of the employees disadvantaged the applicants and constituted an unfair labour practice in terms of Schedule 7 Item 2(1)(b) of the Labour Relations Act.

19. Although it was not clearly set out by the employer as to which Item in Resolution 3 of 2009 was contravened by its officials in appointing the employees, it is noted that Section 210 of the LRA provides that if there is any conflict between the Act (LRA) and any legislation, the LRA will prevail. I, therefore, on the balance of probabilities believe the applicant's version than the respondent's version.

20. I am therefore persuaded that the applicant has succeeded on a balance of probabilities to prove that the decision of the employer in reversing the appointments was unfair conduct and it is just and equitable to render the following award.

AWARD:

21. The reversal of the applicants, **Ramahuma C M and Rapholo M M** (Applicants) by **Department of Health-Limpopo** (Respondent) to the positions of Grade 3 Pharmacist, constituted an unfair labour practice,

22. The respondent, **Department of Health-Limpopo**, is ordered to reinstate the applicants to the same terms and conditions of the applicant's employment as it existed on 1 February 2011 by allowing them to report on duty on the **5th of September 2011** at **Bela Bela Hospital**.

23. The respondent is further ordered to back pay the applicants all the benefits which were supposed to be received with effect from 1 February 2011 to the 21 June 2011 as per their letters of appointments. The above-mentioned payment should be made within 30 days on receipt of this award.

24. There is no order as to costs.

Signed and dated at Pretoria on 7 July 2011.



Panellist: Silas Ramushwana