



PHSDSBC

PUBLIC HEALTH AND SOCIAL DEVELOPMENT
SECTORAL BARGAINING COUNCIL

ARBITRATION AWARD

Case No: **PSHS253-17/18**

Case No: **Suria van Wyk**

Date of award: **10 August 2017**

In the matter between:

HOSPERSA obo Susan Jantzen

(Union/ Applicant)

and

Department of Health- Free State

(Respondent)

DETAILS OF HEARING AND REPRESENTATION

1. The arbitration hearing convened on 4 August 2017 at Katleho District Hospital Boardroom in Virginia.
2. Mr S Ramokoatsi from HOSPERSA represented the Applicant and the Respondent was neither present nor represented despite being properly notified¹ to attend via fax sent to six fax numbers of the respondent on 5 July 2017.
3. A recording was made of the hearing.

¹ CCMA Rule 4.

ISSUE TO BE DECIDED

4. The issue to be decided is whether the respondent committed an unfair labour practice by not elevating the applicant to a level 9 position.
5. The applicant sought to be retrospectively promoted into the position she qualified for.

BACKGROUND TO THE ISSUE

6. The Applicant was employed as a Senior Administration Officer at Katleho Hospital. She was employed on a level 8.
7. On 25 October 2012, a work evaluation was done at Dihlabeng Hospital but promotions were not implemented due to financial constraints of the Department. In 2016 a new letter of approval for promotion was issued but not implemented.

SURVEY OF EVIDENCE AND ARGUMENT

8. At the outset, I must indicate that only relevant evidence (pertaining to the issue in dispute) will be recorded in the award and not all the evidence presented at the proceedings.

Applicant's case:

9. Ms Susan Jantzen testified under oath to the following:
 - a. In 2012 a job evaluation was done and it was determined that she should be elevated to the position of a Supply Chain Specialist, level 9. The implementation in 2013 did not materialize due to financial constraints. The financial implication for the promotion would have been R2151.00 per annum with an annual increase of 6% thereafter.

- b. An internal memo² was issued on 8 December 2016 to the CEO: Katleho District Hospital, indicating that following a request for job evaluation/benchmark process/comparison to OSD, the posts were evaluated and the outcome then presented to the MEC: Health, for approval. The final outcome indicated that the position of Susan Jantzen to level 9 was granted by the MEC: Health on 28 August 2013. The approval for implementation of the case was granted by the CEO: Treasury on 6 December 2016. Implementation of the reviewed salary level was to be with effect from 1 April 2016.
- c. The respondent started implementing the promotions from March 2017 but failed to implement the promotion of the applicant, hence a dispute was referred to the Council on 7 June 2017.
- d. She sought to be promoted retrospectively from October 2012 and to receive back pay. It was her view that the matter related to promotion as the job evaluation was done in terms of the HR Delegations as approved by the MEC, item 21.

Respondent's Case:

10. None presented.

ANALYSIS OF EVIDENCE AND ARGUMENT

11. Section 186(2) contains the definition of an unfair labour practice: "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 to the promotion, demotion, probation (excluding disputes about dismissals for a reason relating to probation) or training of an employee or relating to the provision of benefits to an employee; (b) unfair suspension of an employee or any other unfair disciplinary action short of dismissal in respect of an employee; (c) a failure or refusal by an employer to reinstate or re-employ a former employee in terms of any agreement; and (d) an occupational detriment, other than dismissal, in contravention of the

² Bundle A, page 2.

Protected Disclosures Act, 2000 (Act No. 26 of 2000), on account of the employee having made a protected disclosure defined in that Act.

12. Under the common law, employees have no legal entitlement to be promoted to higher posts, unless they can prove a contractual right or, perhaps, a “legitimate expectation” based on some prior practice or promise.³

13. In the matter of *Mathibeli v Minister of Labour* [2015] 3 BLLR 267 (LAC) the appellant, a legal officer in the Department of Labour, occupied a post at grade 10. The department engaged in a re-grading exercise, in which a number of posts, including that of the appellant, were identified as worthy of upgrading, and the grading team recommended that this be implemented. However, the Minister failed to approve the recommendation when it was established that it conflicted with an early occupational specific dispensation collective agreement governing professional posts in the public service. The department was advised that it should implement the ISD scheme, and the departmental re-grading scheme was abandoned. The appellant referred an unfair labour practice dispute for arbitration. The arbitrating commissioner found that the department had perpetrated an unfair labour practice, and ordered the department to pay the appellant a grade 11 salary. The Labour Court set the award aside on the basis that Council lacked jurisdiction because the dispute before the arbitrator was one of interest, not about rights. The Court noted that the Commissioner had understandably expressed disgust at the department’s bungling, which in his view had aroused a legitimate expectation of promotion among affected employees. However, this view had no logical connection with the award’s outcome. On the facts, no employees’ rights had been violated because the job-evaluation scheme was never authorised. Nor could the order upgrading the appellant be sustained, because in terms of the applicable legislation the appellant had no right or legitimate expectation to be upgraded. The award had accordingly correctly been set aside. Turning to the finding by the court *a quo* that the council lacked jurisdiction because the dispute was one of interest, the Court held that the fact that the appellant had no right to be upgraded did not

³ John Grogan: *Employment Rights* (JUTA) 2010, page 107; The existence of that concept in our law was confirmed in *Administrator of the Transvaal & others v Traubothers* (1989) 10 ILJ 823 (A).

give rise to the conclusion that the dispute was one of interest. The dispute had been referred as a dispute about an unfair labour practice concerning promotion. The appellant's case rested on two claims: (i) that he was *in fact* occupying a grade 11 post; (ii) that his post had actually been upgraded. The core of both complaints was that the appellant was being underpaid. This was a "rights issue". The commissioner accordingly had jurisdiction, even if the claim was meritless. The appropriate award should therefore have dismissed the appellant's unfair labour practice claim.

14. Case law makes it clear that the mere fact that a job evaluation was done did not give any right to an employee to be elevated to such a level. It was clear that the job evaluation done in 2013 was not approved and implemented due to financial constraints hence no right to be promoted came into existence, nor was a legitimate expectation created.

15. The Labour Appeal Court also aligned itself with the findings of Freund AJ in *National Commissioner of the SA Police Service v Potterill NO and others* (2003) 24 ILJ 1984 (LC) *that the substance of the dispute pertained to the employees' complaint that their posts had been regraded but, despite the fact that they had continued to be employed in the same posts and despite the requirements of regulation 24, their salaries had not been increased. In my view this is a complaint about alleged unfair conduct 'relating to the promotion' of the employees. In my view regulation 24 requires one to draw a distinction between a decision to regrade a post and a decision to allow the incumbent employee in the regraded post to continue to occupy that post. Where the incumbent employee is permitted to continue to occupy the regraded post and is afforded the appropriate higher salary, the employee is, in my view, 'promoted'. In my view such a situation falls within the first meaning given for the word 'promote' in The Concise Oxford Dictionary (9ed), namely: 'V.tr. 1 (often foll. by to) advance or raise (a person) to a higher office, rank, etc (was promoted to captain).'* A bulletin issued by the South African Police Service on 28 March 2002 which sought to explain the meaning and effect of regulation 24 stated: 'There is, however, no obligation on the National

Commissioner to upgrade the post and promote the incumbent. Instead, he may . . .' (Emphasis added.) In my view the author of this document was quite correct in distinguishing between the decision to 'upgrade the post' and the decision to 'promote the incumbent'. The employees' complaint that regulation 24(6) had not been applied with regard to their posts and their request that their salaries be increased to the salary level of directors must, in my view, be construed as a complaint that they were entitled to be, but had not been, promoted. By alleging that their employer was guilty of an unfair labour practice they impliedly alleged unfair conduct on its part 'relating to' its failure to promote them. Having regard to the substance of the dispute as the parties understood it I am satisfied that this was a dispute about alleged unfair conduct relating to promotion.

16. Things however changed in 2016 when the elevation of the applicant from level 8 to level 9 was formally and officially approved by the MEC: Health and the CEO: Treasury. This was communicated to her and from March 2017 other employees were placed into the higher levels resulting from the job evaluations and approval thereof. She enquired about the implementation of her upgrade and all that was received was promises that she would be upgraded, but it was never done.
17. The applicant has therefore proven that a legitimate expectation was created by the respondent that she would be elevated to the position of Supply Chain Specialist, level 9 as the conditions for such an elevation as set out in the Public Service Regulations have been met, i.e. that the MEC approves the elevation and that it is financially viable. The conduct of the respondent not to implement the upgrade/elevation of the applicant with effect from 1 April 2016 amounts to an unfair labour practice.
18. The applicant's claim for promotion backdated to 25 October 2012 is not supported by any documentation confirming that implementation was approved by the MEC: Health and the CEO: Treasury and therefore the order will only be made in accordance with the information contained on the internal memo dated 8 December 2016 which indicates that: *"Implementation of the reviewed salary level is with effect from 1 April 2016."*

AWARD

19. The respondent committed an unfair labour practice by not implementing the applicant's elevation to level 9 that was approved by the MEC: Health and the CEO: Treasury as per the internal memo dated 8 December 2016.

20. The respondent is ordered to implement the promotion of the applicant retrospectively from 1 April 2016 (as per the internal memo dated 8 December 2016) without the loss of any benefits. Implementation and payment of accrued benefits must be done by no later than 31 August 2017.

Signature:



Commissioner: **Suria van Wyk**