



ARBITRATION AWARD

Panelist/s: Bella Goldman
Case No.: PSHS279-11/12
Date of Award: 12-Dec-2011

In the ARBITRATION between:

PSA obo Yvonne Persens (Union / Applicant)

And

Department of Health - Western Cape (Respondent)

Union/Applicant's representative: Angelo Fisher, Union Official
Union/Applicant's address:

Telephone:
Telefax: 021 409 7399

Respondent's representative: Russell Collop; Assistant Director: Human Relations
Respondent's address:

Telephone: 021 483 3696
Telefax: 021 483 3952

DETAILS OF HEARING AND REPRESENTATION

1. The matter was scheduled for an arbitration hearing at the CCMA offices at the Western Cape Nursing College in Athlone on 21 November 2011. Mr Angelo Fisher, Union Official represented the applicant. Mr Russell Collop, Assistant Director: Human Relations represented the respondent. The proceedings were digitally recorded. It was agreed that closing argument would be submitted in writing by 28 November 2011.

ISSUE TO BE DECIDED

2. I have to decide whether or not the employee by not being promoted to the post of Senior Administration Clerk at Citrusdal Clinic was subjected to an unfair labour practice in terms of the Labour Relations Act 1995 as amended (LRA).

BACKGROUND TO THE ISSUE

3. The respondent employed the applicant as Senior Administrative Clerk at the Citrusdal Clinic on a number of fixed term contracts from 1 August 2008 until 30 June 2011. On 28 January 2011 the permanent post of Senior Administrative Clerk was advertised. The applicant applied for it and was one of ten short listed applicants.
4. It was not disputed that the highest scoring applicant was a coloured female (Ms Ockhuis 77%), the second highest scoring applicant was a black male (Mr Sifolo 57%) and that the applicant, a coloured female was the third highest scoring (55%). It was also not disputed that Mr Sifolo was appointed based on the Affirmative Action Plan. The applicant claimed that she should have been appointed to the post on the basis that she had been employed in that post, albeit on a temporary basis for the last three years and that she met the minimum advertised criteria.
5. The applicant unsuccessfully submitted a grievance with regard to her non appointment to the post. The applicant then referred an unfair labour practice dispute to the Council.
6. The applicant made application to the Council that the successful applicant Mr Sifolo be joined as 2nd respondent on the basis that she claimed the post in terms of relief for the alleged unfair labour practice. At the arbitration hearing the applicant abandoned the application for joinder and changed her claim for relief to being placed in a similar post or compensation.

SURVEY OF THE EVIDENCE AND ARGUMENT

7. I have considered all the evidence and argument, but because the LRA (section 138(7)) requires an award to be issued with brief reasons for the findings, I have only referred to the evidence and argument that I regard as necessary to substantiate my findings and the determination of the dispute.

Documentary Evidence

8. The respondent submitted a bundle of documents in evidence which were agreed as being what they purported to be.

Employee's Evidence

The applicant Yvonne Persens gave evidence under oath. The following is a summary of her testimony:

Yvonne Persens

9. The applicant stated that she had been employed in the post on a fixed term contract for nearly three years and had given it her best and deserved to be appointed to the permanent position.
10. The applicant stated that she was short listed for the position and was interviewed and underwent a computer test which she later found out she failed. The applicant admitted that she did not have the Microsoft word and excel computer skills that were advertised as a required competency and hence was not surprised that she failed the computer test. She stated that she had been informed that she required a driver's licence for the post which she obtained but it turned out not to be an advertised requirement and that she was not told that computer skills were a requirement. She stated had she known that computer skills were a requirement she would have focussed on ensuring that she had those.
11. The applicant stated that before the post was advertised she was informed that the administrative systems were to be computerised but that she would be given the required training. The only computer training the applicant has is that she attended a one day training course in 2011.

12. The applicant did not initially dispute that she obtained the third highest score in the interview process, but later in her evidence stated that one of the interview panel members Vusi Maseko told her after the interview that she scored 71% which was the highest score. It was put to her in cross examination that she was not informed that she has scored the highest score, that 71% was not the highest score and that this was the first time she stated this in that she did not refer to this in her grievance. The applicant's response was that when she submitted her grievance she referred to all she could recall.

Employer's Evidence

The respondent called one witness, Johanna Elizabeth Eygelaar, Primary Health Care Manager: Citrusdal Area. She gave evidence under oath. The following is a summary of her testimony:

Johanna Elizabeth Eygelaar

13. The applicant reported indirectly to the witness. After the post was advertised the applicant told the witness that Nicolette part of whose functions are Human Resources informed her that it will not be worth her while to apply for the post as it was going to be an employment equity appointment and that as the applicant was a coloured female her appointment would not promote employment equity. The witness told the applicant that she must apply for the post as no one knows what the outcome was going to be.
14. The witness stated that the applicant scored the third highest score, the highest score was obtained by a coloured female and the successful applicant was a black male who scored the 2nd highest score. The final score was a combination of the results of the interview and the results of the computer test and that the recruitment and selection process was fair and in line with the respondent's recruitment and selection policies. The witness stated that even if the appointment had not been made in accordance with the affirmative action plan the applicant would not have been appointed to the post. The applicant who scored the highest would have been appointed.
15. The witness stated that computer skills were a critical requirement for the post as the administrative systems of the clinics were in the process of being computerised and that as such the incumbent of the post requires computer skills to meet the key performance areas of the position.
16. It was put to the witness in cross examination that the respondent had a duty to accommodate the applicant in another position, the witness denied that there was such a duty and that the only way to be appointed to a position was for it to be advertised and for a person to apply for it and be fairly selected for the position in terms of a fair procedure.

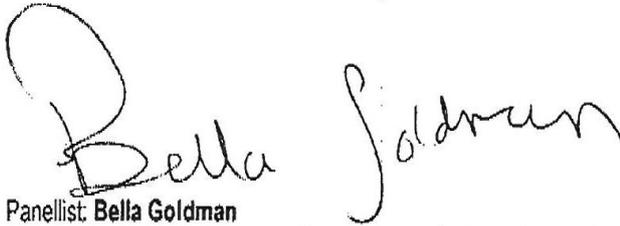
17. The witness stated that there were many opportunities available for the applicant to obtain computer skills which would equip her to apply for a position.
18. The parties submitted argument in support of their respective cases which I will refer to where necessary in my analysis.

ANALYSIS OF THE EVIDENCE AND ARGUMENT

19. In a case where an unfair labour practice is alleged the onus is on the applicant to prove it on a balance of probabilities.
20. In terms of the evidence before me the process of filling the advertised post in question was substantively and procedurally fair. The applicant did not dispute that she was the third highest scoring interviewee. The applicant's claim appears to be based only on the fact that she filled the position on a number of fixed term contracts and that gave her an alleged automatic entitlement to the post which has absolutely no basis in law.
21. The applicant appeared to be clutching at straws and was not honest. She stated that she was not aware of the fact that employment equity was a determining factor in the filling of the post. This is contrary to the evidence of Eygelaar who was a far more credible and consistent witness.
22. In terms of the evidence before me the post was filled through a competitive process. The applicant did not dispute that she lacked the critical computer skills required for the position and appears to hold the respondent accountable for this lack of skills. I find it extremely disappointing that a union official should present such an argument. Had the respondent argued for costs I would have been tempted to make such an order.
23. It is trite that the decision to appoint is the prerogative of the employer and that if the employer is an administrative body as the respondent is, then the procedure of filling of the post must be substantively and procedurally fair, which in terms of the evidence before me it was. I thus find that the applicant was not subjected to an unfair labour practice relating to promotion by not being appointed to the post in question.

AWARD

24. I find that the applicant's non appointment to the post of Senior Administrative Clerk did not amount to an unfair labour practice and the applicant's referral is dismissed.

A handwritten signature in black ink that reads "Bella Goldman". The signature is written in a cursive style with a large initial "B" and "G".

Panelist: **Bella Goldman**

Sector: **Public Health & Social Development Sectoral Bargaining Council**