



ARBITRATION AWARD

Panellist/s: Ronnie Bracks
Case No.: PSHS363-10/11
Date of Award: 15-Apr-2011

In the ARBITRATION between:

HOSPERSA obo M D Morake

(Employee)

and

Department of Health and Social Development- Limpopo Province

(1st Respondent)

Employee Representative: HOSPERSA obo M D Morake
Employee's address: P.O. Box 4783
Polokwane
0700

Telephone: 015 295 3272
Telefax: 015 295 4514
E-mail: _____

Company/Employer representative: Department of Health and Social - Limpopo Province
Company's address: Private Bag 4783
Polokwane
0700

Telephone: (015) 293-6409
Telefax: (015) 2936272
E-mail: _____

DETAILS OF HEARING AND REPRESENTATION

- A. The Arbitration was scheduled for hearing on the 14th March 2011 at the offices of the Respondent in Polokwane at Old Capricorn Building, 18 College Street.
- B. The Applicant was represented by Mr Chabalala, a HOSPERSA official. Ngoasheng M.V represented the Respondent. The proceedings were recorded both manually and electronically.

ISSUE TO BE DECIDED

- C. Whether or not the Respondent committed an unfair labour practice by failing to promote the Applicant despite him having acted in the position.

BACKGROUND TO THE ISSUE

- D The Applicant is an employee of the Department of Health stationed at Waterberg District. He occupied a position of Emergency Care Practitioner prior to his transfer to the transport section on the 8th of November 2007. On the day in question he was appointed to act in the position of transport officer. The Applicant was remunerated for acting in the said position in line with Resolution 1 of 2002, Collective Agreement.
- E The post of transport officer was advertised internally and externally on the 26th of March 2010 and the closing date for applications was the 16th of April 2010. It is common cause that the Applicant applied for the post. The requirements of the post in question were a minimum of Grade 12 certificate plus a certificate in Transport Management offered by Tankard as well as relevant competencies in Transport Management. It was further common cause that the Applicant does not have a Matric Certificate, which was a requirement for short listing. He only passed Setswana SG. Hence Applicant was not shortlisted.
- F Because many of the facts were common cause the parties agreed to present their arguments in writing and that a decision would be made accordingly.

SURVEY OF EVIDENCE AND ARGUMENT

EVIDENCE

Documentary

- G Bundles of documents were submitted by the parties in support of their submissions.

Employee's Evidence:

The Applicant's representative submitted as follows:

- H Applicant was appointed in November 2007 as Transport Officer at Waterberg. There was no mention in the Applicant's appointment of an acting allowance.
- I In March 2010 the Respondent advertised the above post. The representative conceded that the Applicant did not have the qualification but that he should have been given an opportunity to contest the position.
- J The reason for the above contention was that he was acting in the position without the minimum requirements. In addition a legitimate expectation was created by appointing him to act. The position was not only senior but required qualifications higher than what the incumbent had.
- K The Applicant met at least two of the requirements namely he has a valid driver's licence and the ability and willingness to work abnormal hours. He has also acquired the knowledge and skills for the position during the 2 years he worked in the position.
- L The Applicant's representative prayed that the Applicant be paid the acting allowance for the 2 years he acted.

Employer's Evidence

The Respondent's representative submitted as follows:

- M The Applicant contended that he was not shortlisted for the post in question, and he is of the view that the Respondent acted unfairly in not short listing him; respectfully that the Applicant's contention that he should have been shortlisted because he acted in the post is misplaced.
- N The acting appointment in the Public Service is regulated by Resolution 1 of 2002 which is a collective agreement. In terms of the latter the appointee will be compensated for the period he acted in the said position for a fixed period of time.
- O The Resolution further provides that the appointment to act does not create a legitimate expectation for appointment. The Department has a policy on Recruitment and Selection which provides *inter alia* that all posts within the Department must be advertised and all employees must be given an opportunity to apply; this implies that posts will be advertised both internally and externally to afford interested employees or candidates an opportunity to apply for and or contest the posts.
- P He submitted further that Clause 5.4.2 provides that "A candidate shall at least meet the minimum appointment requirement for the advertised post, in respect of qualifications and competencies in order to be shortlisted." Clause 5.4.2 provides further that "in order to identify a management number of Applicants who can be short- listed for the final selection purposes, a higher level of qualification and competencies than that required as a minimum in the advertisement, may be viewed as a more favorable consideration if it is justified by the post job contents."
- Q In the premise, the Respondent has complied with the policy or clauses mentioned *supra*, and I am of the view that we did not deviate from the policy. It should be borne in mind that the fact that the Respondent acted

in a position does not in itself create an automatic entitlement to be appointed and/or shortlisted see ***Joint Affirmative Action Management Forum v Pick and Pay Supermarket F1997*** 18ILJ1149 [CCMA].

- R In *casu*, the Applicant did not meet the minimum requirement of Grade 12 as stipulated in the advert. In the matter in ***GURARNAH V South Africa Weather Service (2004) 4 BALR 454(CCMA)*** the arbitrator found that the Applicant lacked the necessary experience and that her efforts to obtain additional qualification did not in themselves give her a legitimate expectation of promotion. Also it is worth noting that even if he was recommended by his principal, the recommendation made by his supervisor does not afford him the right to claim to be shortlisted.
- S As such the letter on page 24 of the employee's bundle has no basis and the short listing panel was not obliged to abide by it. The advert set out the requirements for short listing and even our policies are clear on the issues relating to short listing. Furthermore I would like to put it on record that all employees shortlisted and /or appointed met the requirement for the post as per advert and they performed well in the interviews, hence appointed to the post..
- T The Representative prayed for the matter to be dismissed

ANALYSIS OF EVIDENCE AND ARGUMENT

1. It has become accepted labour jurisprudence that there are **three basic requirements** for a fair appointment or promotion: the **procedure** must have been fair; there must have been **no discrimination**; and the **decision** must not have been grossly unreasonable. It has long been accepted that making an appointment or promotion is part of management's prerogative but this should not be at the expense of procedural fairness.
2. From the evidence presented by all it is clear that the Applicant does not qualify for the position but believes that he should have been appointed because he had acted in the position; further the Respondent in allowing this created a legitimate expectation. It was further argued that he had met at least two of the requirements.
3. I have considered this and am not convinced by this argument. I find support for my disagreement in our labour jurisprudence that employers are expected to appoint the best, strongest candidate. (see for example the cases of *PSA v Minister of Safety & Security & another (2004) 25 ILJ 2373 (LC)*).
4. In addition, unless an Applicant proves that he was the best of all the candidates who applied for the position, no substantive unfairness has been proven. In this regard I wish to refer to *National Commissioner of the SAPS v SSSBC (2005) 26 ILJ 903 (LC)*; *Woolworths (Pty) Ltd v Whitehead (2000) 21 ILJ 571 (LAC)*; *UCT v Auf der Heyde (2001) 22 ILJ 2647 (LAC)*; *Minister of Safety and Security v Jansen NO (2004) 25 ILJ 708 (LC)*; *KwaDukuza Municipality v SALGBC [2008] 11 BLLR 1057 (LC)*.
5. By the Applicant's own admission he only met two of the requirements of the advertised position. In that case I cannot understand why he was of the view that he should be appointed to the position.

- 6 Turning to the question of legitimate expectation we see that the question whether an employee has a legitimate expectation to be promoted was the central issue in *Mogorosi v South African Reserve Bank* (Commissioner van Kerken-GAPT6982-06). In this case the employee had requested promotion by the employer for a number of years, without success. Finally tired of this, he filed a grievance and thereafter referred the dispute to the CCMA, claiming that the employer was guilty of an unfair labour practice, because he had a reasonable expectation of promotion, which had unreasonably been frustrated by the employer. The commissioner found that before an employee can claim to have a legitimate expectation to be promoted, he must prove that he was given a categorical assurance by the employer that he would be promoted.
- 7 In the circumstances the Applicant had not shown that he was given the categorical assurance. If an employee wants to prove that he has a legitimate expectation to be promoted he must convince a decision maker that the employer among other things assured him that he would be promoted. In this context legitimate expectation means that an employee is only entitled to a hearing and does not guarantee that he will be the promoted.
- 8 For the reasons stated above it is my view that the Applicant failed to discharge the onus of showing that the Respondent had acted unfairly in any way.

AWARD

The case against the Respondent is dismissed.

PSHSBC Panelist


Adv. **RONNIE BRACKS**