ARBITRATION AWARD

PHSDSBC
PUBLIC HEALTH AND SOCIAL DEVELOPMENT SECTORAL BARGAINING COUNCIL

Panelist/s: **Advocate Ronnie Bracks**
Case No.: **PSHS379-11/12**
Date of Award: **25 June 2012**

In the ARBITRATION between:

Makapan Attorneys obo Malahlela
(Employee)

and

Department of Health- Gauteng Province
(1st Respondent)

Employee Representative:	***Makapan Attorneys obo Malahlela***
Employee's address:	***P.O. Box 43***
	Lotus Garden
	0025
Telephone:	***082 819 6678***
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Company/Employer representative:	***Department of Health- Gauteng Province***
Company's address:	***Private Bag X169***
	Pretoria
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DETAILS OF HEARING AND REPRESENTATION

A. The Arbitration was scheduled for hearing on 21 June 2012 at the offices of the Respondent in Pretoria at SG Lourens Nursing College, Soutpansberg Street.

B. The Applicant was represented by Ms Phaladi, from *Makapan Attorneys*. Modisane Lelaka represented the Respondent. ***The proceedings were recorded both manually and electronically. The process was conducted in English.***

ISSUE TO BE DECIDED

C. Whether or not the Respondent committed an unfair labour practice by not paying the Applicant the amount offered in the initial offer.

BACKGROUND TO THE ISSUE

D. The Applicant was employed by the Respondent in 2008 at the Mamelodi Hospital earning R117 225, 00 per annum. He had submitted what was referred to as a "walk-in" application which had placed him on a common data-base. He was interviewed and given a job offer on 2 September 2009 indicating that he was appointed at salary notch R177 318 per annum. The Respondent alleges that this was an error on their part and that they then amended the offer on the 2nd November appointing him at notch R117 225 per annum.

E. The Applicant lodged a grievance which was not resolved to the Applicant's satisfaction and the matter was referred to the Council to be conciliated when it remained unresolved. It was then referred to arbitration.

SURVEY OF EVIDENCE AND ARGUMENT

EVIDENCE

Documentary

F Bundles of documents numbered A, and R were submitted by the parties.

** ***As noted previously the proceedings were digitally recorded therefore what appears hereunder constitutes a summary of the evidence deduced by the parties in so far as is relevant for the purpose of this arbitration; it is by no means a minute of what transpired in the course of the proceedings.***

Employer's Evidence:

Employees' Evidence:

Elexander Mongamola Malahlela after being sworn in testified as follows:

G. He confirmed that he started in the Respondent's employ in January 2008 at Mamelodi hospital earning R117 225 per annum. He applied for a position and was called for an interview. He was successful and presented with a job offer of R177 318, 00 which he accepted. He was informed that he would work at high care at Steve Biko Hospital. He detailed his duties in high care.

H. When he discovered that he was not being paid the salary he was offered he lodged a grievance. The grievance was not attended to and he consulted with his attorneys; still the matter could not be resolved and then he referred the matter. The relief he is seeking is to be paid the difference between the salary offered and what he was being paid.

I. Under cross examination the Applicant testified that he only had experience of just over a year. He conceded that the salary notch that he was offered applied to applicants who had at least 4 years experience. The Applicant stated that the Respondent had blatantly failed to deal with his grievance and also neither he nor his attorney had ever received the amended offer.

J. He further conceded that it was not possible for him to be appointed in the notch which he was initially offered. Despite the Applicant initially stating that he was not aware that the package offered was incorrect he conceded later that he had been in discussion with his supervisor who had told him that the package was incorrect. This conversation was followed by a formal meeting with the area manager who had informed him that there was an error in the offer. The witness went on to state that he did not sign the condition of service because he felt that it was not in terms of the initial offer.

K. It was further pointed out to the Applicant that in terms of the Public Service Act the Respondent could amend salaries where an erroneous indication was given to employees. The Applicant was also referred to the OSD requirements for the position into which he was appointed and he conceded that in terms of the OSD he did not qualify for that notch.

Employer's Evidence

The Respondent called one witness who testified after being duly sworn in:

Piet Makhabeni Motsweni, Clinical Manager, testified as follows:

L. He is the Deputy Director HR and explained his duties and responsibilities. He confirmed that the Applicant was interviewed as a professional nurse. He explained how applications are received and said in the case of the Applicant it was a walk-in application. The Applicant was presented with a job offer. He explained this in detail (R15). In respect of R16 &17 he testified R16 was the appointment letter and R17 was the amended job offer. The amended job offer came after close scrutiny of the Applicant's registration with the nursing council and credentials and it was discovered he did not qualify for the position at the notch it was offered as he lacked the appropriate experience for it. There was an acknowledgement of the letter sent to the Applicant.

M. As a result the Applicant could not be appointed at Salary scale PNB-1 Gr 1. This was clearly erroneous. The correct position which the Applicant should have been appointed in was Salary scale PNA-2 Gr. 1 as he had no experience. PNB-1 required 4 years experience.

N. He was referred to R23 which was an extract from section 38 of the Public Service Act which he read and pointed out that where there had been an error in the salary of the person appointed the Respondent was entitled to correct that error. There is a similar provision in the letter of appointment of employees. He then referred to R27 and said that it was a response from the Respondent's legal department.

O. He was then referred to A3 which he said was the conditions of appointment which the Applicant had refused to accept making reference to the initial offer. This by implication meant that he was aware of a second offer and he could only have been aware of this because he had received it.

P. In respect of the grievance the witness stated that he was not aware of a grievance being lodged since there is a specific form for this and the labour relations officer would have acknowledged receipt of it.

Q. Under cross-examination the witness was presented with a grievance form from labour relations signed by one of the officers. He conceded that the matter was delivered but stated it was never given to them to deal with and he could not explain the reason for the omission.

R. The witness confirmed that the placement of professional nurses was dependant on their experience and how they are graded in terms of the OSD. The notch the Applicant wants to be placed at requires 4 year's experience.

S. The witness reiterated that the Applicant was presented with the amendment letter as well as his attorney and that they were refusing to accept that it was an error.

CLOSING ARGUMENT

ARGUMENT BY Applicant:

T. The Applicant's representative submitted detailed closing arguments. As this is a matter of record the detail will not be repeated.

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ARGUMENT BY Respondent:

U. The Respondent's representative submitted detailed closing arguments and for the reasons stated under the Applicant's closing arguments it is not repeated.

ANALYSIS OF EVIDENCE AND ARGUMENT

1 The Labour Relations Act (LRA) prohibits unfair labour practices. An unfair labour practice is defined in the Act as any unfair act or omission at the workplace, involving:

- unfair conduct of an employer relating to the promotion or demotion or probation of an employee
- unfair conduct relating to the provision of training of an employee
- unfair conduct relating to the provision of benefits (for example, pension, medical aid, etc) to an employee
- unfair disciplinary action against an employee (short of a dismissal). For example, a final written warning or unfair suspension
- the refusal to reinstate or re-employ a former employee in terms of any agreement. For example, a retrenchment.

2. The Labour Relations Act (LRA) makes provision in Section 186 (2) for employees to take action against any employer for unfair labour practices one of which is demoting an employee. The employer should not lose sight of the fact that it has entered into a contract of employment with the employee, and the contract usually stipulates the position that the employee is employed in, as well as the salary. These conditions cannot be altered unilaterally. No employee can be demoted unless the employer first follows a fair procedure, and if the demotion is the only option available to rectify the problem.

3. In the case of poorly performing employees, the procedure for addressing issues of poor work performance must be followed first. These procedures are briefly detailed in Schedule 8 of the LRA Code of Good Practice — Dismissal.

4. It was stressed in **National Union of Metal Workers of SA v Vetsak Co-operative Ltd and Others [1996] ZASCA 69; 1996 (4) SA 577** (A) that the underlying concept of the definition of an unfair labour practice is fairness (*per* Smalberger JA at 588D). The following was said at 593 G-H by Nienaber JA:

> *"The fairness required in the determination of an unfair labour practice must be fairness towards both employer and employee. Fairness to both means the absence of bias in favour of either. In the eyes of the LRA of 1956, contrary to what counsel for the appellant suggested, there are no underdogs."*

In determining whether an unfair labour practice has been committed, a moral or value judgment is required (See **Media Workers Association of South Africa and Others v Press Corporation of South Africa Ltd (`Perskor')** [1992] ZASCA 149; 1992 (4) SA 791 (A) at 798I and 802A).

5. I am further guided by what our courts pronounced in ***George v Liberty Life Association of Africa Ltd* (1996) 17 ILJ 571 (IC); *PAWC (Department of Health & Social Services) v Bikwani & others* (2002) 23 ILJ 761 (LC) 771** that is an employer has a prerogative or wide discretion as to whom he will promote. Courts and arbitrators should be careful not to intervene too readily in disputes regarding promotion (*which I believe also applies to appointments*- **my italics**) and should regard this as an area where managerial prerogative should be respected unless bad faith or improper motive such as discrimination are present.

6. In the case of the Applicant it is clear that an error had been made in appointing the Applicant to the wrong notch. Also, the Applicant himself during cross-examination acknowledged that he did not meet either the requirement of the notch or the requirement for OSD.

7. The question then arises if the Respondent should be held liable for the erroneous appointment and whether they are not in a position to correct the mistake. It is clear that if this were the case then it would lead to unfairness towards the Respondent. From the outset it was clear that the main complaint of the Applicant was that he was not receiving the salary initially offered to him. During cross-examination he conceded that he did not meet the requirements for the notch which the Respondent had offered him initially nor did he meet the OSD criteria. If the Respondent is required to appoint him in that position it could lead to all kinds of future problems and could further lead to operational instability when it comes to appointments.

8. Moreover the Respondent also referred me to a further provision namely that in paragraph 3 of the letter of appointment (R16) the Respondent retains the right to correct the error. More importantly I was further referred to section 38 of the Public Service Act, 1994 which stipulates:

> "1) a) If an incorrect salary, salary level, salary scale or reward is awarded to an employee, the relevant executive authority shall correct it with effect from the date on which it commenced.
>
> b) Paragraph (a) shall apply notwithstanding the fact that the employee concerned was unaware that an error had been made in the case where the correction amounts to a reduction of his or her salary.
>
> 2) If an employee contemplated in subsection (1) has in respect of his or her salary, including any portion of any allowance or other remuneration or any other benefit calculated on his or her basic salary or salary scale or awarded to him or her by reason of his or her basic salary-

a) been underpaid, an amount equal to the amount of the underpayment shall be paid to him or her, and that other benefit which he or she did not receive, shall be awarded to him or her as from a current date; or

b) been overpaid or received any such other benefit not due to him or her-

i) an amount equal to the amount of the overpayment shall be recovered from him or her by way of the deduction from his or her salary of such instalments as the relevant accounting officer may determine if he or she is in the service of the State, or, if he or she is not so in service, by way of deduction from any moneys owing to him or her by the State, or by way of legal proceedings, or partly in the former manner and partly in the latter manner;

ii) that other benefit shall be discontinued or withdrawn as from a current date, but the employee concerned shall have the right to be compensated by the State for any patrimonial loss which he or she has suffered or will suffer as a result of that discontinuation or withdrawal.

3) The accounting officer of the relevant department may remit the amount of an overpayment to be recovered in terms of subsection (2) (b) in whole or in part.

9 It is clear that this provision would be applicable in the present case and that the Respondent would be entitled to correct possible errors when it come to the salary of employees. In the present case the salary was changed from R177 318 to R177 225.00 commensurate with Applicant's experience and the OSD.

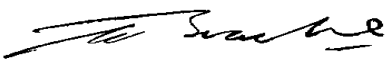
10 There is no doubt that the Respondent had not acted in manner one would expect from a prudent employer that is addressing and discussing the Applicant's grievance and explaining to him what the state of affairs was. Having said this I do not believe that it would be fair to use this as a justifiable reason to find against the Respondent and placing the Applicant in a higher position than what he qualifies for. The Respondent also drew my attention to the fact that this would be contrary to the nursing code.

11 In conclusion I wish to draw attention to what our court have stated in ***George v Liberty Life Association of Africa Ltd*** **(supra);** ***PAWC (Department of Health & Social Services) v Bikwani & others*** **(supra)** that is that an employer has a prerogative or wide discretion as to whom he will promote. Courts and arbitrators should be careful not to intervene too readily in disputes regarding promotion.

12 Similarly I believe in this case there is no reason for me to interfere as the Applicant was appointed in the correct position and notch.

AWARD

The case against the Respondent is dismissed.



Adv. RONNIE BRACKS

PSHSBC Panelist