



# ARBITRATION AWARD

Panellist/s: Paul Kirstein  
Case No.: PSHS412-11/12  
Date of Award: 16-May-2012

In the ARBITRATION between:

**IN THE PUBLIC HEALTH AND SOCIAL DEVELOPMENT SECTORIAL  
BARGAINING COUNCIL (HELD AT GEORGE)**

CASE NO: PSHS<sub>4</sub>12-11/12

In the matter between

**NEHAWU obo HUFKE, C**

**Applicant**

And

DEPARTMENT OF HEALTH: WESTERN  
CAPE

First Respondent

P V V ARRIES

Second Respondent

A ABRAHAMS

Third Respondent

E HARKER

Fourth Respondent

## ARBITRATION AWARD

1.

The arbitration was set down on 10 May 2012 in George, Western Cape. The applicant was represented by C Claassen, an official of NEHAWU. The respondent was represented by J S Faas, an official in the employment of the respondent. The second respondent appeared in person. The third and fourth respondents were not present at the arbitration. The applicant submitted bundles of documents marked bundle A, A1 and A2. The respondent submitted a bundle of documents marked bundle R. The arbitration was mechanically recorded.

### ISSUE IN DISPUTE

2.

The applicant contends that the failure of the respondent to promote him to the position of Case Manager: Administrative Line Function and Support Personnel constitutes an unfair labour practice.

## **SUMMARY OF EVIDENCE**

3.

The applicant indicated that he was employed at the respondent for approximately 25 years. The applicant applied for the post of Case Manager: Administrative Line Function and Support Personnel. The applicant referred to the functions in the mentioned post. The applicant contends that he has the necessary training and experience to conduct the functions. The applicant has acted in the post for 2 years. The applicant indicated that he did not receive any remuneration for acting in the post. The requirements for the post that he applied for was a senior certificate. The closing date for the application was 1 April 2011. The applicant referred to a second advertisement of a Case Manager Post: Health Associate Science and Support Personnel and indicated that it is the exact same post that he applied for. The requirement for the post has been amended to a health professional in possession of a health related qualification registered with the Health Profession Council of South Africa or South African Nursing Council. The applicant referred to minutes of meetings where concern was expressed with the issue of a clinical qualification for case management posts. The applicant applied

for a case management post at Knysna, Oudtshoorn and Mosselbay. The applicant indicated that he as a person who was conducting the duties of the case management post was evaluated with a mark of 50%, whilst a person who was not doing the function was not doing the functions received an evaluation mark of 82%. The applicant indicated that if he was promoted it would have promote the numerical goals of employment equity. The second respondent was the successful candidate at Oudtshoorn. The second respondent always asked the applicant how to conduct the duties in the case manager post. The second respondent had to attend a course after her appointment to conduct the functions of the case manager post. The applicant indicated that the first respondent acted male fide in advertising the post with a higher qualification requirement whilst the first respondent was aware that there was a pending dispute about the failure to promote the applicant. The applicant seeks appointment on Level 8.

## 5.

During cross examination it was put to the applicant that all candidates for the post who was shortlisted and interviewed was asked the same questions during the interview process. The applicant's evaluation mark was too low to appoint him in the position although his appointment would have promoted employment equity. The second respondent indicated to the applicant that he did not assist her in her duties and she did not attend a course to conduct the duties of a case manager.

6.

The first witness on behalf of the respondent was S Pienaar, an Assistant Director: HR Division Eden and Sentraal Karoo. Pienaar was part of the interviewing panel. Pienaar confirmed the evaluation documents of the interviewing panel. Pienaar insisted that a practical evaluation be conducted on all the candidates. The applicant indicated that he was aware that he did not do well in the interview process but indicated that he had done the work previously. Pienaar indicated that because of the low evaluation mark of the applicant, efficiency in the post was considered above the promotion of employment equity. Pienaar indicated that a candidate must be able to function independently and must obtain at least 60% evaluation mark.

7.

The next witness on behalf of the respondent was S Rhodes, a Deputy Director: Finances. Rhodes acted as the chairperson of the evaluation panel. Rhodes indicated that all candidates who were interviewed were asked the same questions. The evaluation mark of the applicant was too low to appoint the applicant in any of the four available posts. Rhodes confirmed that efficiency determined that other candidates be appointed in the post despite the indication that the applicant's appointment would have promoted employment equity. Rhodes confirmed that at

least 60% must be obtained during an evaluation process to be appointed. During cross examination Rhodes indicated that she knows that the second respondent was capable of doing the duties because she worked prior the appointment with the second respondent.

## **ANALYSIS**

8.

It is common cause that the applicant applied for promotion in the post of Case Manager: Administrative Line Function and Support Personnel. If the applicant was appointed in the position it would have constituted a promotion. The applicant contests the promotion of the successful candidates in the Case Management post of Knysna, Mosselbay and Oudtshoorn. The second, third and fourth respondents were the successful candidates. The applicant contends that the failure of the respondent to appoint him in one of the mentioned posts constitutes an unfair labour practice.

9.

The applicant contends that he was conducting the duties in an acting position for 2 years. The applicant indicated that he has the necessary qualifications and requirements to occupy the post of Case Manager. It is common cause that 6 candidates were shortlisted and evaluated for the available posts. The applicant

scored the lowest evaluation mark of 50%. Although the appointment of the applicant as a coloured male would have promoted employment equity principles the respondent decided that efficiency and not employment equity principles should be the dominant factor in appointing the successful candidate. The successful candidates scored substantially higher than the applicant. Both the witnesses of the respondent indicated that a candidate should at least score 60% to be considered for promotion. It is undisputed that all candidates were asked the same questions during the interviewing process. There is no indication that any irregularity occurred during the evaluation process. The evaluation of the candidates by the evaluation panel must therefore be accepted. The respondent gave a satisfactory explanation why the applicant could not be promoted although the applicant claimed that he had conducted the duties of a case manager for two years.

10.

An issue of concern is that Rhodes who was the chairperson of the evaluating panel testified that she has worked with the second respondent and that she was aware that the second respondent was capable of conducting the duties of a case manager. In such circumstances. However, having analysed the score sheet of the other 4 panel members, the marks allocated to the various candidates were

materially similar and that the evaluation of Rhodes did not indicate that she unfairly advantaged the second respondent.

11.

It is generally held that to succeed in an unfair labour practice claim relating to promotion, an employer must be shown to have exercised its discretion capriciously, for unsubstantiated reasons or that the decision was taken on a wrong principle or in a biased manner. To succeed in obtaining an order for promotion to the disputed post, the unsuccessful candidate must show that he or she would have been appointed but for the employer's unfair conduct. The Labour Appeal Court<sup>1</sup> has made it clear that an adjudicator should not interfere with an employer's decision to promote or appoint a particular candidate if the employer considers another to be superior, unless when so doing the employer was influenced by considerations that are expressly prohibited. The applicant has failed to show on a balance of probabilities that an interference is required in the promotion of the successful candidates in the Case Management posts. The concern of the applicant that the respondent was male fide in advertising the post whilst the respondent was aware that there was a dispute pending, is not a valid concern. The posts need to be filled and the functions need to be executed. The amendment of the required qualification for the Case Manager post is rational and operational justifiable in that there is in the minutes referred to by the applicant a concern raised about the high

volume of invoices not paid. The applicant has failed to show on a balance of probabilities that an unfair labour practice has been committed.

## **AWARD**

1. The application is dismissed.
2. No order as to costs.

SIGNED AT PRETORIA ON THIS THE 15th DAY OF MAY 2012.



**PH KIRSTEIN**

**ARBITRATOR**

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<sup>1</sup> *Woolworths (Pty) Ltd v Whitehead 2000 (21) ILJ 571 (LAC)*