ARBITRATION AWARD

Panelist/s: **Advocate Ronnie Bracks**
Case No.: **PSHS413-11/12**
Date of Award: **4 June 2012**

In the ARBITRATION between:

HOSPERSA obo LP Greyling
(Employee)

and

Department of Health- Gauteng Province
(1st Respondent)

Employee Representative:	***HOSPERSA obo LP Greyling***
Employee's address:	***P.O. Box 8789***
	Centurion
	8789
Telephone:	***012 664 1285***
Telefax:	***012 664 1749***
E-mail:	
Company/Employer representative:	***Department of Health- Gauteng Province***
Company's address:	***Private Bag X 2010***
	Krugersdorp
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DETAILS OF HEARING AND REPRESENTATION

A. The Arbitration was scheduled for hearing at the Respondent's office at Bank of Lisbon Building 14th Floor, cnr Sauer and Market Streets, Johannesburg on the 21st May 2012. The Employee was represented by Mr. Lucky Ndokoane a union official. Mr. Podile Podile, the Labour Relations Officer of the Employer represented it. The parties agreed to submit closing arguments in writing by no later than 28th May 2012. *The proceedings were recorded both manually and electronically*.

ISSUE TO BE DECIDED

B. Whether or not the Respondent committed an unfair labour practice by demoting the Applicant.

BACKGROUND TO THE ISSUE

C. The Applicant was employed by the Respondent on the 1st August 2008 as a laundry assistant. He was injured in 2008 and 2009. After an investigation into his injuries it was recommended that he should be engaged in light duties.

D The Applicant was then referred to HR as a registry clerk for assessment but he had not recovered from his injury. It was then decided to do a submission for the Applicant to be appointed into the position. This was accordingly done and submitted for approval to the chief executive officer who approved the appointment but later withdrew it.

E All attempts to resolve the matter failed and the matter was eventually referred for adjudication.

SURVEY OF EVIDENCE AND ARGUMENT

EVIDENCE

Documentary

F Bundles of documents were submitted by the parties which were marked.

** ***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.***

Employees' Evidence:

The Applicant called three witnesses who testified after being duly sworn in:

Kathryn Anne Wundram, Occupational Therapist, testified as follows:

G. She is in private practice. She explained the process, her involvement in the process and the various operations the Applicant had undergone. As this is a matter of record the award will not be burdened with this detail save to state that the witness did a two day assessment of the Applicant; she explained what this entailed.

~~G.~~H. In the process she also interacted with the Human Resource division. The results of her assessment showed that the Applicant was permanently disabled; she detailed the reason for this conclusion. It

meant that the Applicant could not do the tasks he was accustomed to doing and as a result she recommended that he should be deployed to do administrative duties.

~~H.~~I. Under cross-examination it emerged further that when there has been an injury the employee's work environment is assessed to determine what he needs to do in future. She also confirmed that the Applicant could be placed in any position other than being demoted as long the position was appropriate.

~~I.~~J. The witness stated that in the case of the Applicant it was preferred that he be placed in a position and environment other than the laundry where he had been. The witness also stated that she had not suggested it had to specifically be in HR but at the time she was told that is where he would be placed.

Amelia Da Silva, Human Resource Manager, testified as follows:

~~J.~~K. She was based at Sterkfontein. The Applicant was laundry assistant and sustained his injury in 2009 and in 2010 a letter was received asking to accommodate him in the human resource department. This was done and he did the filing. She confirmed that a report was received from the doctor confirming the permanency of the injury and that the previous witness was appointed to do a report and recommendations. The assessment was done in March 2011.

~~K.~~L. Subsequent to that the witness did a letter to the CEO stating he should be absorbed in HR. The recommendation was supported by Mr. Nkosi who was the Applicant's supervisor at the time. The CEO approved the recommendation. A week later the CEO withdrew his recommendation. They had to reverse the translation and rank. The Applicant was still allowed to work but not at the salary the witness had recommended. She explained in detail the concerns and issues which were raised. The award will not be burdened with the detail which is a matter of record save to state that the witness told them their action amounted to an unfair labour practice. She also referred them to the circulars which directed her in making the proposal.

~~L.~~M. Under cross examination it became apparent that disciplinary action was pending against the witness for the recommendations she had made in respect of the Applicant; also that the witness had acted on the advice and assistance of the district office. Nothing else significant emerged from the evidence under cross examination.

Petronella Wilhelmina Murray, Human Resource Deputy Director, testified as follows:

~~M.~~N. She is stationed at the Central office. Da Silva contacted her to discuss the matter. She detailed the discussion which is not repeated as it's a matter of record save to state that she told Da Silva that the entry level for clerks was now at level 4 and that if the Applicant was absorbed as administrative clerk that was the only level at which it could take place. In addition that it would require a change in his salary and title.

~~N.~~O. The witness underwent intense cross-examination all of which is a matter of record and will not be detailed except to state that she was referred to clause 7.4.2 of the Policy on Incapacity Leave and Ill Health retirement which stipulates that deployment should be horizontal with retention of benefits. She commented that the CEO was the person who would have agreed or refused that the Applicant should be appointed in the position he was appointed to.

The Respondent called two witnesses who testified after being duly sworn in:

Manyangane Raymond Billa, Chief Executive Officer, testified as follows:

~~O.~~P. He joined the hospital on 1st April 2010 as its CEO when he was confronted with the issue of the Applicant. He gave a detail account of the various options which were considered for dealing with the incapacity of the Applicant appropriately and where the best position would be to redeploy him to. He further detailed the reports which were done in respect thereof and the recommendation flowing from it.

~~P.~~Q. He informed Da Silva and Nkosi to discuss the matter and present him with a recommendation as to what the most appropriate action would be. They did so and made the recommendation to him which he eventually approved.

~~Q.~~R. After approving the recommendations he was advised that there was a problem with the recommendations and it could result in labour unrest as a person was taken from level 1 and promoted to level 4 without having followed the internal process. The only reason was that he had to be accommodated due to his injury. He admitted that he had not applied his mind and relied on the advice from Da Silva and Nkosi but he realized that he was mislead by them resulting in him approving the recommendations.

~~R.~~S. As soon as he became aware of the status quo he communicated with them asking them if they were aware that the submissions were flawed and that he intended withdrawing it. Nkosi admitted that he had not engaged the issues properly. However Da Silva was adamant that the submissions were not flawed and that the withdrawal constituted an unfair labour practice. He communicated with them that despite the circular the Applicant did not qualify to be at level 4.

~~S.~~T. According to the witness the Applicant was never appointed; he was still a clerk and therefore the mandate could never be changed and the purpose of the submission in the first place was meant to move him to level 1. The witness detailed the policy relating to injury and promotion all of which are a matter of record and the award will not be burdened with it. The Applicant was in the same place and his work was adapted and he is well accommodated.

~~T.~~U. According to the witness Da Silva was disciplined for her conduct and a number of other issues. He said that the circular was aimed at those who had been administrative clerks and not the Applicant.

~~U.~~V. The witness was subjected to extensive cross-examination during which he confirmed that his approval of the submission was based on mistaken advice given to him. He did not deny that he had signed the approval and then withdrew it with hindsight. He denied that he had had access to the circular. He also acknowledged that he had oversight of the operations of the hospital and conceded he had not applied his mind to the process at hand.

Thomas Mashimbi, Acting Human Resource Manager, testified as follows:

~~V.~~W. He explained his functions; also that once a person had been found to be incapacitated under those circumstances he had to be given an alternative position. The witness confirmed the evidence of the preceding witnesses regarding the Applicant's injury. As this is already common cause this evidence will not be repeated.

~~W.~~X. He also confirmed the evidence regarding the Applicant's removal and his absorption into human resources. He then explained that the translation in rank involved the movement of a person from one rank to another. The Applicant was not supposed to have benefitted from this movement as he was a laundry worker and the translation involved clerks.

~~X.~~Y. The witness explained that he was part of the grievance meeting at which the above issues were raised and discussed. He explained what had transpired in the meeting and that the Applicant was advised he would be placed back into laundry and that his position would be adapted accordingly.

Z. The witness was cross-examinined on the policy. Nothing of significance emerged from the cross-examination.

CLOSING ARGUMENT

Due to the length of the closing arguments of the parties it will not be repeated as the full version can be found in the file.

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, and also 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. No employer can be excused for not following these procedures. A unilateral demotion would amount to a breach of the employee's employment contract. In other words, the employer would be seen as having repudiated the contract, which is not permissible in common law. The employee should,

therefore, agree to the demotion. It cannot simply be enforced. If it's enforced, it constitutes a breach of contract by the employer.

5. In the present case the undisputed evidence was that the Applicant was found to be incapacitated and that after a report had been submitted it was ***recommended*** that the Applicant be placed into an administrative position. It was decided to place the Applicant in HR. The necessary recommendations were done and approved. However certain problems arose and the Applicant's translation was retracted. The question therefore arises whether or not the Respondent's actions constitute a demotion.

6. I have considered this and wish to refer to what our courts have stated regarding the definition of demotion. In Van Wyk v Albany Bakeries Limited (JR1658/01) [2003] ZALC 107 (26 September 2003) it states "[15] It was argued, on behalf of the Employer, that the Applicant's redeployment to the branch manager's position did not amount to a demotion because, among others, his salary was not reduced. The Commissioner agreed with the Employer. He made himself clear: "*Of significance is that the Applicant's salary was never tampered with, it remained the same. I do not agree with the Applicant when he says that he viewed this action* (the redeployment) *as a demotion"* (at page 27 of the Bundle). [16] The dictionary meaning of the word "demote" is: *"Reduce to a lower rank or class"*. ***(The New Shorter Oxford English Dictionary, 1993 edition, at page 631).*** [17] A demotion has therefore less to do with the demoted employee's salary. It would seem the reduction of salary is only a secondary factor, the primary and decisive factor being the reduction in rank, position or status of the employee concerned. However, it further appears to me, the reduction of salary but without change in the name of rank or position has the effect of reducing the employee's status in the workplace, if it is done without his/her consent. Therefore, such an instance could still in my view, constitute a demotion. In any event, that scenario is not part of the enquiry before the Court. [18] In ***Taylor v Edgars Retail Trading [1992] 13 ILJ 1239 (IC) at 1242J-1243A*** the Industrial Court referred to the concept of demotion, as formulated by Scoble in *The Law of Master and Servant* at page 176, as follows:

> "Where a servant is employed to perform a particular class of work and contracts to perform work of a particular character, is thereafter instructed to perform work of a more menial nature, he may be said to have been degraded in his status, and .... such act by his employer may in certain circumstances be regarded as tantamount to a dismissal".
>
> (Cited with approval in ***Matheyse v Acting Provincial Commissioner, Correctional Services & Others [2001] 22 ILJ 1653 (LC) at 1658J-1659A).***

[19] In ***Matheyse's*** supra the Court further elaborated on the issue of demotion and stated:

> "In a series of decisions (which predated the LRA) the civil courts have gone further and applied a wider definition to the concept of demotion in the labour relations context, holding that it applies even where employees retain their salaries, attendant benefits, and rank, but have suffered a reduction or

demotion in their 'dignity', 'importance' and 'responsibility' or in their 'power' or 'status'."

7. In the case of the Applicant two scenarios existed: the first was his redeployment for incapacity reasons and the second was the submission which was approved by the CEO**.** These I will now consider individually.

8. In respect of the first scenario the Applicant was redeployed in terms of section 7.4 entitled "Permanent Incapacity Leave" under the "Policy and Procedures on Incapacity Leave and Ill-Health Retirement". Section 7.4.2 stipulates that if an employee is injured permanently but can still work, he should be redeployed horizontally with retention of benefits. In the case of the Applicant it meant that he should have been placed in another position equivalent to the level at which he was.

9. From the evidence presented before me it was clear that this in fact did not happen. It was clear from Da Silva's recommendations that because the Applicant was placed there with the intention of finding him a suitable place she felt it convenient to leave him there. Both Da Silva and Murray should have known that the Applicant had to be deployed in the level he was on at the time of his incapacity in accordance with the Respondent's policy and that it was inappropriate to move him to a level that would constitute bumping him up several levels without following the promotion policy of the Respondent.

10. I cannot agree with Billa that he was misled as he was clearly negligent in that he did not apply his mind. However, his actions can be justified because he relied on Da Silva to supply him with the correct information but she submitted documents which later turned out to be contrary to the Respondent's policy. In terms of the policy the Applicant should have been horizontally redeployed but instead she suggested his translation to a higher level to which he was not entitled.

11. The second scenario which needs consideration is whether it can be said that the Respondent is bound by the CEO's approval of the submissions to appoint the Applicant at a higher level. Two issues are important in this regard. The first is that the approval by the CEO of the submission was based on an erroneous premise that the Applicant had indeed qualified for the position. I say erroneous since in terms of the policy the Applicant was supposed to have been placed at level1 and not level 4. The question therefore is whether it would be fair to hold the Respondent to the error of the CEO when the policy is very clear that the Applicant must "*be redeployed horizontally with retention of his benefits "* ***There was never ever the intention to promote him to level 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).

12. The second issue is that in terms of the undisputed evidence the Respondent has a policy relating to promotions which should be followed. If the Applicant is promoted to a higher level through incapacity this would be unfair towards other employees and could lead to inconsistency.

13. It is therefore my view that the Applicant had failed to discharge the onus that he was demoted as the initial intention was never to promote him but to deploy him horizontally in level 1 to accommodate his incapacity. No promotion should have taken place. 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.

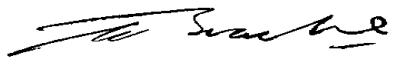
14. Applying the law to the facts it is clear that the Respondent's action was based on the bona fide belief that the submissions were in line with the Respondent's policies and when it was discovered it was not it was left with no other choice than to retract the approval.

15. For the reasons stated above and the fact that the intention was never to promote the Applicant to a higher level but to redeploy him horizontally it is my view that the Applicant had not discharged the onus of proving that he was unfairly demoted.

AWARD

The case against the Respondent is accordingly dismissed.

PSHSBC Senior Panelist



Adv. RONNIE BRACKS