



ARBITRATION AWARD

Panellist/s: Lungile Matshaka
Case No.: PSHS439-10/11
Date of Award: 5-May-2011

In the ARBITRATION between:

In the matter between:

HOSPERSA obo Motshabi, N. W.

Applicant

And

Department of Health – North West

Respondent

ARBITRATION AWARD

DETAILS OF HEARING AND REPRESENTATION

1. The matter was set for arbitration hearing at the Potchefstroom Hospital's Boardroom in Potchefstroom on 31 March 2011. It took place under the auspices of the Public Health & Social Development Sectoral Bargaining Council. Mr W Olivier, official of HOSPERSA,

represented the Applicant, while Mr M Adoons, Assistant Manager from Labour Relations Unit of the Department, represented the Respondent. The proceedings were mechanically recorded and witnesses gave evidence under oath.

ISSUE TO BE DECIDED

2. I am required to determine whether the Respondent's conduct constituted an unfair labour practice in that the Respondent failed to appoint the Applicant into higher salary level of Secretary (level 6) as per approved by the Hospital Chief Executive Officer and further created an expectation for a promotion.

BACKGROUND TO THE ISSUE

3. The Applicant was employed on 31 July 2007 as a Senior Household Supervisor at level 3 in salary. With effect from 4 July 2008 the CEO (Chief Executive Officer) formally advised the Applicant that his probation in terms of the provisions of section 13(3) of the Public Service Act, 1994 (103 of 1994) and in accordance regulations applicable is confirmed.
4. The only issue pertains to the upgrade of the Applicant's remuneration.
5. On the other hand the Respondent denies that its conduct constituted an unfair labour practice in not promoting or upgrading the Applicant's remuneration.

SURVEY OF THE EVIDENCE AND ARGUMENTS

The Applicant's evidence

6. In his own testimony the Applicant testified as follows:
 - a. He confirmed his appointment at the Residence Department of the Hospital as a Senior Household Supervisor with effect from 31 July 2007. Not long thereafter on the 3rd September 2007, he was relocated to the Deputy Director of Nursing's Office.

- b. A performance agreement entered into between the Applicant's supervisor (N P Mcwabeni) and the Applicant was signed on 23 June 2008. The Applicant further testified that his supervisor had earlier on motivated for the salary upgrade of the same position (secretary) from level 3 to level 6. The CEO in turn approved and directed "*HR to do what was necessary*".
- c. The Applicant further testified that he had had to lodge in a grievance on the basis that the Acting CEO (Mr Mlambo) did not keep his promise of him (the Applicant) being permanently appointed to the said post.
- d. Prior to this Mr Mlambo had approached him and enquired as to whether he would be able to help out in the Deputy Nursing Director's office. He in turn asked whether this was a permanent move. His response was positive. Mr Mlambo went on to inform him that they were trying to create a new post for Mr Sekome, the incumbent of the secretary's post, elsewhere.
- e. Mr Mlambo further confirmed that the Applicant's position would further change accordingly. On showing willingness he was then taken to the said office and actually reported there on the 3rd September 2008. After 6 months he e-mailed Mr Mlambo enquiring about the change in rank, salary and post as envisaged in their previous discussions. On their physical encounter Mr Mlambo signed at the back of the relocation letter his approval. In the end on meeting an HR Officer, one Mr Kutwana, he was advised that there was no Senior Admin post.
- f. After a year while still in the Deputy Nursing Director's Office nothing had changed. In the end on 6 August 2010 he was formally advised to report back at his previous workstation with effect from 10 August 2010.

- g. In cross-examination the Applicant confirmed that he expected to remain in the Deputy Nursing Director's office as long the management was still trying to create a post for Mr Sekome. He insisted that he was never advised that he had moved with his post and that his transfer was lateral and had nothing to do with upward or downward mobility.
7. The Applicant's first witness, Mr Maleke, who occupies a Senior Admin Officer's post, confirmed that he knows the Applicant from the time of his appointment. He further confirmed that he was later requested to work in the matron's office. He was aware of the discussions of upgrading of the Applicant's rank within a period of 6 months to the level 6.
8. In cross-examination Mr Maleke conceded that he was not familiar with the HR procedures regarding upgrading of posts and promotion of a person.
9. The second Applicant, Mr Kgosi Sekome, confirmed his current position as the Senior Revenue Clerk. He knows the Applicant. He further confirmed that he started at level 3 at the Nursing Manager's Office and was then upgraded to level 6 before his transfer.

The Respondent's evidence

10. The Respondent's first witness, Patrick Kotoane, testified as follows:
- 10.1 He holds the HR Manager's position since September 2004 to-date. He testified that late in October/November 2007 management took a decision to introduce a 24 hour service at the residence. From that time onwards personnel was increased. During 2008 after the appointment of the Applicant the process was stopped.
- 10.2 Mr Sekome was then moved to the department of Information Management Systems to take over from a lady going on maternity leave. The Applicant was then identified from Household Residence section to take over from Mr Sekome and run the Deputy Nursing

Director's office. Following discussions the Applicant agreed to be moved to that office on a horizontal transfer without any change.

10.3 However, after the decentralization of the services, unlike before, most of the Assistant Nursing Directors and matrons were doing most of the administrative work.

10.4 Mr Kotoane further testified that guidelines regarding promotion of staff in terms of Resolution 3 of 2009 are clearly stipulated.

10.5 In cross-examination Mr Kotoane confirmed that as no resolution was passed at the time the CEO could not use his discretion. He further confirmed that at that time the intention was to build the office of Information of Management System so that it should be able function even if a staff member is on leave. He further made the point that if the work was decentralized, that meant that the volume has been minimised. The Applicant was therefore approached on the basis that his transfer was horizontal. He further confirmed that he was not present when Mr Mlambo discussed the matter with the Applicant. All that he knew was that the mandate was to look for somebody who would run the Nursing Manager's office.

11. The second witness, Mr Mlambo, confirmed his position as an Assistant Director Admin for a period of 7 years to-date. He further confirmed that he did act as CEO from 15 November 2007 to July 2008. He denied that he had promised the Applicant that his position would be upgraded. The Applicant was approached and requested because of his potential. He had only indicated to the Applicant that if he would agree to take over the post, he would be better positioned to be appointed to the said post once advertised.

a. In cross-examination Mr Mlambo confirmed that Mr Sekome moved with his post. He conceded that the upgrading of his post was done erroneously. He further conceded that the Department should recover any amount paid in error on that

basis. However, they could not institute that process because of a pending similar case in the Premier's Office.

- b. He further confirmed that it was his main task to identify the Applicant, but he could delegate. He did not remember sitting in the same session with Mr Maleke in his consultations with the Applicant.

ANALYSIS OF THE SUBMISSIONS

12. Section 186(2) (a) of the Labour Relations Act, No. 66 of 1995, as amended, defines "*unfair labour practice*' as any unfair act or omission that arises between an employer and an employee involving- unfair conduct by the employer relating to the promotion, demotion, probation or training of an employee or relating to the provision of benefits to an employee".
13. Grogan in his book, **Dismissal, Discrimination & Unfair Labour Practices, 1st Ed, 2005**, makes the point that employees complaining of this form of unfair labour practice must prove at the outset that a post existed for which they are contenders, that the post was of higher status than posts the employee occupied at the time, and that the employer refused to place the employee in the post.
14. The learned author has further expressed a view that employers have also been guilty of unfair conduct relating to promotion if they give employees a 'legitimate expectation' that they will be advanced and then, without adequate reason, frustrate that expectation (**Spoornet v Salstaff (Johannesburg)** [1998] 4 BALR 513 (IMSSA)). He goes on to state that a legitimate expectation arises when the employee acquires a reasonable impression from the employer's words or conduct that he or she will be promoted. Such an impression may arise from prior promise, which may fall short of a binding agreement, or past conduct – for example, where employees have habitually been promoted if they satisfied certain conditions.

15. Turning to the present case on the one the Applicant following discussions was relocated to the office of the Deputy Director Nursing to perform duties of the Secretary. Prior the Applicant joining the office, the said post was upgraded to the salary level 6. The Applicant avers that the Respondent through the Acting CEO at the time, Mr Mlambo, created an expectation to him of upgrading the rank and salary to said level 6 within six (6) months from the assumption of duties.
16. On the other hand the Respondent avers that it did not commit any act that might have unfairly violated any of the Applicant's rights to fair labour practices. It further argues that the Applicant agreed to be moved and was told on more than one occasion that such movement was without any financial or rank change. Thus he moved with his post to the office of Deputy Director because of the fact that the incumbent, Mr Sekome, had also moved with his post to the revenue section. The said movement was horizontal and did not give rise to better benefits as compared with the benefits the Applicant enjoyed immediately prior the move to the office of the Deputy Director.
17. Further, the Respondent submits that the name change accorded with the new office the Applicant occupied and to suggest that such name change equalled salary increment and/or higher salary level is to be reckless with the truth and disingenuous. The aim of having taken the Applicant with his consent, was to expose him and place him at a better position should a permanent secretarial post be created.
18. The Respondent further submits that the Applicant's insinuation that he was, subsequent to his having raised a grievance about the promise not being honoured, evicted from the office is reckless usage of the language only intended to solicit sympathy. The Applicant was removed from the Deputy Director's office at his own behest.
19. I have noted in no uncertain terms that as per correspondence directed to the Applicant that he was requested to come through and work in the Deputy Director's Office on a lateral transfer which basically had nothing to do with upward or downward mobility. Further, at the

time it was made absolutely very clear that Mr Sekome was still occupying the post. It was therefore not pragmatic to fill the post.

20. I am therefore convinced that on the basis that Grogan has also made it clear that a lateral transfer is not a promotion and further that a dispute must relate to a failure or refusal to promote the employee to an existing vacancy. In the present case there was no existing vacancy. On that basis, technically speaking, the alleged expectations did not even arise. The said staff movements were more internal arrangements to address pressing needs and as well as to expose the staff concerned.

21. In the light the above exposition, I can only come to the conclusion that the Applicant has not discharged the onus to prove that the Respondent's conduct constituted an unfair labour practice in not appointing the Applicant to the approved salary of the Secretary.

AWARD

22. I therefore find that the Applicant has failed to discharge the onus of proving that the Respondent's conduct constituted an unfair labour practice in terms of section 186(2) (a) of the Labour Relations Act, no. 66 of 1995, as amended. The matter is hereby dismissed.

—



Lungile Matshaka

PHSDSBC Panellist