



ARBITRATION AWARD

Panellist/s: Colin Rani
Case No.: PSHS452-10/11
Date of Award: 7-Jun-2011

In the ARBITRATION between:

Mr. Zolisa Menze

(Union / Applicant)

and

Department of Health: Western Cape

(Respondent)

Union/Applicant's representative:

Mr. Z Menze.

Union/Applicant's address:

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Highbury Park

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Respondent's representative:

Dept of Health Western Cape.

Respondent's address:

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8000

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Details of hearing and representation:

1. The arbitration hearing was held in the offices of the Department of Health (Western Cape) on 10 May, 2011.
2. Mr. Zolisa Menze, the applicant, was represented by Mr. S Dolweni (Legal Representative). Adv. J Van Der Schyff (Bar) represented the respondent party, the Department of Health in the Western Cape.

Issues to be decided:

3. Whether the respondent demoted the applicant unfairly.

Background to the issue:

4. The applicant applied for a position of an Assistant Director in Finance and Supply Chain Management. On 26 March, 2010 he was duly promoted to this position. On 26 May, the applicant received a letter from the Chief Director in Metro District Health Services informing him that the appointment was reserved because the processing of filling the post was substantively flawed. The Chief Direct informed the applicant that the selection process will be redone. The applicant submits that this is an unfair demotion. He wants to be reinstated to the position of the Assistant Director offered to him on 26 March, 2010 retrospectively or to be compensated.

Summary of evidence and arguments:

5. Although I have considered all the evidence and arguments, because section 138(7) of the Labour Relations Act requires that the reasons for my decision be stated briefly, I will refer only to the evidence and arguments that I regard as necessary to substantiate my finding and the determination of the dispute.
6. The parties agreed to the admission into evidence of a bundle of documents, including the job advertisement and the interview's questionnaire used in the interviews. Neither party disputed the validity of these documents.

Applicant's case:

7. The applicant testified that he applied for a position of an Assistant Director on 26 March, 2011 after a due process of short listing and interviews. He submits that he accepted the job/position. He said that he was informed that he would be released to his new position on 1 June, 2010. Mr. Menze said he was surprised when he received a letter informing him that his appointment has been declared null and void.

8. The applicant submits that he filed a grievance against the reversal of his appointment on 1 June, 2011. He pointed out that he sees the reversal of his appointment as a demotion. He demands to be put in the position of an Assistant Director: Finance and Supply Chain Management with immediate effect. He said that he received a response from the department on 1 July, 2010. In this reply, the department requested an extension of four weeks to consider the grievance. He said he granted the extension to 31 July, 2010.
9. The applicant submits that he received an e-mail on 23 July from Glynn Barry from the department inviting him to attend interviews for the same post (Assistant Director: Finance and Supply Chain Management) to be held on 29 July. He said on the same day (23 July) he replied through an email informing the department that he has lodged a grievance regarding the position. He said he requested them to stop the process because his grievance was still not finalised.
10. During the cross-examination, the applicant confirmed that the job advertisement was for an Assistant Director: Finance and Supply Chain Management. He agreed that during the interviews, there were no direct questions asked regarding his expertise on Supply Chain Management. The applicant confirmed that in the second interview questionnaire the Supply Chain Management subject was extensively covered. He admitted that he has no work experience on Supply Chain Management, and his CV confirmed this. Nonetheless, the applicant contends that his overall experience involves Supply Chain Management expertise. He said that it is not his fault that he was not tested or asked questions on Supply Chain Management.
11. Ad J Van Der Schyff put to the applicant that the Public Service Act 1994 provides that the appointment and the filling of posts shall be based on the evaluation of the person based on training, skills and competence e.tc. The applicant did not refute this.

Respondent's case:

12. Mr. Isaac Smith, who is the respondent Director of Supply Chain Management, testified that the HR Department requested him to conduct a screening of the job description and set of questions prepared for the interviews for the post of an Assistant Director: Finance and Supply Chain Management. He found that the post required a 30/70 split between Supply Chain Management and Finance. When he perused the CV's of the candidates, he found that the applicant had not expertise of Supply Chain Management.

13. He submits that the questionnaire provided and used in the interviews were not in line with the job requirements. He said that there was no objective tool used to establish the ideal candidate for the post of an Assistant Director: Finance and Supply Chain Management. He confirmed that the promotion of the applicant was substantively flawed.
14. Mr. Van Der Schyff submitted that the instruction to declare the promotion and transfer of the applicant null and void came from Head of the Department. He argued that in terms of the section 7(3) (b) of the Public Service Act 1994 (Proc 103/1994) the Head of the Department is the person responsible for ensuring that the Department is efficiently managed and carries the responsibility to correct any action or omission in terms of the Act.

Analysis of evidence and arguments:

15. Here it is a fact that the applicant was duly promoted and transferred as an Assistant Director: Finance and Supply Chain Management on 26 March, 2010. The applicant was required to commence with his new duties on 1 May, 2010. This did not happen because the respondent found out that the applicant's appointment was substantially flawed.
16. Dr. K Cloete, who is the respondent's Chief Director: Metro District Health Services, wrote the applicant a letter on 26 May, 2010 informing him that his promotion and transfer as an Assistant Director: Finance and Supply Chain Management was declared null and void. Even though the respondent carries a responsibility to correct the situation which it considers to be detrimental to the public interest, the interest of the employee for a fair treatment should not be compromised.
17. The respondent unilaterally changed the conditions of employment of the applicant. On 26 May, 2010 the respondent had an opportunity to meaningfully consult with the applicant regarding a mishap which was not the applicant's fault. The applicant was just told that his promotion and transfer was declared null and void and that the selection process will be re-done. This was unfair.
18. The applicant decided to lodge a grievance on 1 June, 2010. He submits that the reason for lodging this grievance was that the respondent did not give a reasonable explanation regarding his demotion. The applicant received a letter from the respondent on 17 June, 2010 informing him that the decision to re-do the selection process still stands, and his application will also be considered. There was no mention of the applicant's grievance. The respondent should have at least explained to the applicant why his

promotion/transfer was being reversed. This would have given the applicant an idea of what went wrong with his confirmed promotion and his prospects of success if he decides to re-apply for the post.

19. Mr. NL Duma, who is the respondent Director: Labour Relations acknowledged the receipt of the applicant's grievance on 1 July, 2010. He simultaneously requested a four-week extension to attend to the grievance. The applicant accepted the extension of the four weeks. The respondent was expected to respond to the grievance not later than 31 July, 2010. On 23 July the respondent invited the applicant to attend the interviews for the post he was demoted from which were scheduled for 29 July, 2011. In this invitation, there was no mention of the applicant's grievance.
20. The applicant only received a formal response regarding his grievance on 13 August, 2010. The response came from the Minister of Health: Western Cape. In essence, the response confirmed the earlier position that the selection processes were substantively flawed. It further stated that *in terms of Public Service Regulation, 2001, as amended, Part 111, Section D.1 (ii) the Executing Authority has the right to assess the human resources necessary to perform her/his department's functions, with particular reference to the competencies which those employees must possess. In order to promote good governance it was decided to re-do the selection process.*
21. Here, I do not wish to pronounce on whether the appointment of the applicant was substantively flawed or not. Moreover, the applicant did not refute that the post required a competence in supply chain management, and that he was not questioned and/or tested on supply chain management. It is trite law that an adjudicator should be careful not to intervene too readily in disputes regarding promotion and should regard this as an area where managerial prerogatives should be respected, unless a bad faith or improper motive such as discrimination is present.
22. The pertinent question to answer is whether the respondent's conduct was unfair. It is also trite law that the employee must prove that the decision not to appoint him/her was unfair. The mere unhappiness or a perception of unfairness does not establish unfair conduct. What is fair depends upon the circumstances of a particular case and essentially involves a value judgement. The fairness required in the determination of an unfair labour practice must be fairness towards both employer and employee.
23. In the matter of *Ndlovu v CCMA & others* (2000) 21 ILJ 1653 (LC); *Department of Justice v CCMA* 2001 ILJ 2439 (LC) the court has established that regarding the promotion disputes, the conduct of the employer may be substantively and/or procedurally unfair. The substantive unfairness relates to the reason for not promoting the employee, whereas procedural unfairness relates to an unfair process

applied by an employer during the selection process. Here I find that the respondent decision to re-do the selection process was not unreasonable. Nonetheless, I find that the respondent's conduct was procedurally unfair.

24. The applicant was duly appointed and transferred to a senior position. He had good reason to believe that he was a suitably qualified candidate for the position. He only became aware about the exact reasons for the reversal of his promotion in the arbitration hearing. The omission regarding the promotion of the applicant could have easily been detected at an earlier stage, had the entire directors involved in the appointment of the applicant performed their duties diligently. Alternatively, the respondent should have ensured that the applicant was given detailed reasons for his demotion and/or ensures that his grievance is addressed before inviting him to attend the second interviews. This did not happen.
25. Section 193 of the Labour Relation Act gives guidelines on how to deal with procedural unfairness. According to the LRA, the compensation awarded to an employee in respect of an unfair labour practice dispute must be just and equitable in all the circumstances, but not more than the equivalent of 12 month's remuneration. Here, I find that the applicant did not suffer financial loss, save damage to his interest and/or dignity.
26. In the matter of Johnson & Johnson (Pty) Ltd v Chemical Workers Industrial Union (1999) 20 ILJ 89 (LAC) the court decided that where the loss in an unfair labour practice dispute is of a non-patrimonial nature, compensation is in the form of a *solatium* (meaning solace money to salve injured feelings and sentimental loss) for the loss of a right.

Award:

27. The respondent must pay the applicant R12 000.00 (Twelve thousand rand) for being treated unfairly, payable on or before 15 July, 2011. This amount will earn interest as stipulated in section 143(2) of the Labour Relations Act.

28. No order for costs is made.

DONE AND SIGNED IN CAPE TOWN ON THIS 10TH DAY OF MAY 2011.

A handwritten signature in black ink, appearing to read 'Rani', with a large, stylized initial 'R' on the left.

Signature

Panellist/s: **Colin Rani**