



ARBITRATION AWARD

Panellist/s: Leslie Martin
Case No.: PSHS46-11/12
Date of Award: 6-Oct-2011

In the arbitration between:

NEHAWU on behalf of J. Hendricks

(Union / Applicant)

and

Department of Health- Western Cape

(Respondent)

:

DETAILS OF HEARING AND REPRESENTATION

- 1.The arbitration took place at the offices of the Department of Environmental Affairs, Dorp Street Cape Town on Wednesday 14 September 2011. The applicant, Mr John Hendricks (Hendricks), was represented by Mr. A. Meniers, an official with NEHAWU. The respondent, the Department of Health, Western Cape (the respondent), was represented by Mr. X. Ngenase, its labour relations officer.
- 2.At the conclusion of the arbitration proceedings the parties undertook to submit closing arguments in writing by no later than 21 September 2011.

ISSUE TO BE DECIDED

- 3.Does the conduct of the respondent constitute a demotion of Hendricks and therefore unfair conduct as contemplated in section 186 (2)(b) of the Labour Relations Act 66 of 1995 as amended (the Act)?

BACKGROUND TO THE ISSUE

- 4.Hendricks has been working for the respondent in the permanent position of orthopedic shoemaker since 2008. He currently earns an income of R9400.00 per month.

SURVEY OF EVIDENCE AND ARGUMENT

- 5.Each party handed a bundle of documents into evidence to which no objections were recorded by either party.
- 6.At the outset of proceedings corrections were brought to the pre-arbitration minute between the parties viz. the applicant does not agree that Hendricks joined the Health Professional Council in 2009.
- 7.The applicant also withdraws from the pre-arbitration minute that Hendricks had been compensated for his previous years of experience.
- 8.Hendricks testified under oath on his own behalf.
- 9.Franklin Malan (Malan),a principal personnel officer in the respondent's human resources division testified under oath for the respondent.

THE EVIDENCE FOR THE APPLICANT:

10. Hendricks had applied for the post of orthopedic shoemaker as advertised at page 59 of the bundle of documents and was successful. The advertisement recommended supervisory skills.
11. Accordingly Hendricks had moved from level 5 to level 6. Before he had acceded to the level 6 position of orthopedic shoemaker his salary was R8,600.00 per month. Thereafter it was R9,400.00 per month.
12. The other orthopedic shoemakers were also earning less than the advertised salary so they too applied for the position. Hendricks did not know what the outcomes of their applications were. They had however all been moved to level 6.
13. When all other orthopedic shoemakers were moved to level 6 Hendricks alleges that this constitutes a demotion of himself.

14. Hendricks was not aware that the post of orthopedic shoemaker had been upgraded.
15. Hendricks had extensive experience as an orthopedic shoemaker. He had started to work in this field since 1979.
16. He later plied his trade in the military where he also did a course in orthopedic shoemaking, qualifying in 2004.
17. Since 1994 Hendricks has been registered with the Medical and Dental Council which became the Health Professional Council of South Africa.
18. During his interview for the post Hendricks had not negotiated with the respondent regarding a higher salary.
19. The post that Hendricks occupied on fixed term contract was that of chief orthopedic shoemaker while that which he had applied for and which was advertised was for an orthopedic shoemaker.
20. Hendricks' appointment into a permanent position had been since 1 July 2009 and his registration with the Health Professions Council(HPC) was since April 2009.

THE EVIDENCE FOR THE RESPONDENT:

21. Hendricks had never been appointed into a supervisory position. This was so both when he was made permanent and when he was successful in his application for the level 6 position.
22. He had also not been appointed into a position that had become vacant.
23. Hendricks' experience after he had registered with the HPC had been taken into consideration. Such experience was only for 3 months as he had registered with the HPC only in April 2009.
24. Hendricks had accepted the letter of permanent appointment at page 49 of the respondent's bundle of document.
25. Malan could not confirm that the Medical and Dental Council were the same as the HPC.
26. The recommendation of supervisory skills was not an inherent requirement to the position
27. Hendricks' post on a fixed term contract was about to expire so he was appointed against a vacant funded post. The other orthopedic shoemakers moved to a level 6 as a consequence of the position having been benchmarked at level 6. This benchmarking had been done in March 2009.
28. If Hendricks had not been appointed the others would have been upgraded to level 6 notwithstanding.

ANALYSIS OF EVIDENCE AND ARGUMENT

29. It is clear from the evidence presented at this arbitration that Hendricks had applied for the position when his fixed term contract of employment was about to terminate and that he had accordingly gone up to level 6 as a consequence of his application having been successful.
30. It is Hendricks' argument that he had therefore been promoted into the permanent position.
31. In justification thereof Hendricks contends that his position was therefore one that was higher than that of the other orthopedic shoemakers, theirs being at level 5.
32. This argument is plausible as the evidence shows that these other orthopedic shoemakers had also applied for the position. It is most unlikely that they would have applied for the position had it not been one higher than theirs.
33. The testimony of Hendricks shows however that he was not aware of the position having been upgraded and that the other orthopedic shoemakers had therefore moved to the level 6 position as a consequence of such upgrading.
34. Logic dictates further that the other orthopedic shoemakers could only have remained in the same position at level 6 if in fact the post had been upgraded.
35. In this regard the evidence is that the position which Hendricks had applied for is the one as per the advertisement at page 59/60 of the respondent's bundle of documents.
36. The said position is clearly one of orthopedic shoemaker and is not a supervisory position.
37. Hendricks' successful application had consequently placed him in a position with a higher salary than that he had whilst he was on a fixed term contract.
38. The evidence shows further that Hendricks had been registered with the HPC only for 3 months prior to his appointment. His argument that the Medical and Dental Council with which he had been registered since 1994 had become the HPC is unfounded. There is no evidence before me from which to conclude that the Medical and Dental Council and the HPC are one and the same for the purposes of Hendricks' claim to continued registration with the HPC for 16 years.
39. Hendricks had therefore had only 3 months experience after registration with the HPC when he was appointed into the permanent position.
40. The advertisement for the position also does not make any mention of the candidates overall experience in the field of orthopedic shoemaking.
41. In his testimony Hendricks had also confirmed that he had not negotiated for a higher salary at the interview for the position.
42. Hendricks therefore has no foundation for a legitimate claim to a higher salary.

43. In conclusion the evidence shows that Hendricks had applied for a position with an advertised salary and that he had been successful and is being paid the advertised salary.
44. There is furthermore no evidence challenging the testimony of Malan that the other orthopedic shoemakers had been placed at the higher level which was the same as that of Hendricks as a consequence of the position having been benchmarked at that higher level.
45. This seems to be a logical conclusion arising from the fact that the position, which the parties agree was the same as that of all orthopedic shoemakers, had been advertised at level 6.
46. It would consequently have been unfair on the other orthopedic shoemakers had they not been upgraded to level 6.
47. In acting fairly towards the other shoemakers the respondent cannot be said to have acted unfairly towards Hendricks.
48. Accordingly it cannot be said that Hendricks had been demoted when the other orthopedic shoemakers had been upgraded to a level 6 position.
49. Having thus considered all the evidence presented at this arbitration I find that the conduct of the respondent in upgrading the other orthopedic shoemakers does not constitute unfair conduct as contemplated in section 186(2)(B) of the Labour Relations Act 66 of 1995 as amended.

Award:

50. This application for relief in terms of the provisions of the Labour Relations Act 66 of 1995 as amended is dismissed.

Panellist/s: **Leslie Martin**
Sector: **Public Health & Social Development**