



ARBITRATION AWARD

Panelist/s: Bhekinhlanhla Stanley Mthethwa
Case No.: PSHS549-11/12
Date of Award: 18-Sep-2012

In the ARBITRATION between:

NUPSAW obo Zulu, VT

(Union / Applicant)

and

Department of Health: KZN

(First Respondent)

NUPSAW obo Mtshali, S

(Second Respondent)

Union/Applicant's representative: L. Mthethwa.
Union/Applicant's address: P.O. Box 1431
Durban
4000
Telephone: (031) 304-1405
Telefax: (031) 304-3847

Respondent's representative: M. Khumalo
First Respondent's address: Private Bag X 9051
Pietermaritzburg
3200
Telephone: (033) 395-3212
Telefax: (033) 395-3220

Second Respondent's representative: RT. Molefe.

Second respondent's address: P.O. Box 1431
Durban
4000
Telephone: (031) 304-1405
Telefax: (031) 304-3847

Details of hearing and representation:

1. The matter was scheduled for arbitration on 26 April 2012 at the offices of the Department of Health at Natalia Building, in Pietermaritzburg and remained part heard and it was heard again on 19 June 2012, 24 & 25 July 2012. Mr. L. Mthethwa, a trade union official of NUPSAW represented Mrs. VT. Zulu (hereinafter referred to as the Applicant), Mr. M. Khumalo represented the Department of Health (hereinafter referred to as the First Respondent) and Mr. RT. Molefe, a trade union official of NUPSAW represented Mr. S. Mtshali (hereinafter referred to as the Second Respondent). The proceedings were digitally recorded.
2. Having presented their respective cases, parties agreed to submit written arguments by 10 August 2012 and only did so on 31 August 2012.

Issues to be decided:

3. I have to decide whether or not the respondent committed “unfair act or omission... involving unfair conduct...relating to the promotion “of the applicant, as contemplated by section 186(2) (a) of the Labour Relations Act (“the Act”), as amended. In the event that it does, I have to determine the appropriate relief.

Background to the issue:

4. The applicant applied for the Human Resource Manager’s post and was short-listed and invited to attend interviews on 15 June 2011 and 9 September 2011.
5. The applicant contended that the interviews were cancelled on 15 June 2011 due to the failure by the first respondent to verify experience of the candidates. That was not justifiable reason to cancel interviews. The main reason for this cancellation was that the second respondent was not amongst the candidates who had applied; and the first respondent cancelled interviews so that the second respondent could apply. As a result of the cancellation of the interviews the first respondent re-advertised the post. Indeed; the second respondent applied when the post was advertised for the second time, he was short listed, invited to the second interviews; and eventually appointed as Human Resource Manager.
6. After receiving the outcome that she had been unsuccessful, she felt aggrieved because if the first interviews had proceeded she would have landed the job since she was the most suitably candidate in

the absence of the second respondent. The first respondent should have not advertised the post in the absence of the Employment Equity Plan.

7. According to the applicant this amounted to unfair labour practice and referred the dispute to the Council in terms of section 186(2) (a) of the Act. The applicant sought compensation in terms of section 193 of the Act as a remedy.
8. The first respondent, on the other hand, contended that there was nothing unbecoming in cancelling the interviews on 15 June 2011 and to start the process afresh. Furthermore, it was entitled to appoint a suitably qualified candidate to the position. The applicant did not have required qualifications. The respondent, sought, as a remedy, that the matter be dismissed.
9. The second respondent argued that it was suitably qualified to be appointed in the Human Resource Manager's post. The second respondent also sought, as a remedy, that the application be dismissed.

Survey of evidence and arguments:

10. All witnesses gave evidence under oath. This is a summary and it reflects all the relevant evidence and arguments heard and considered in deciding this matter. The applicant testified, the first respondent led evidence of Mr. Zakhele Robert Mhlanga and the second respondent also testified. Their evidence may be summarized as follows;

Applicant's case:

The applicant testified on her own and she did not call any witness.

11. She testified as follows:
12. She was employed as Chief Human Resource Officer at Niemeyer Memorial Hospital. She had applied for the Human Resource Manager's position when it was advertised. The respondent followed an incorrect procedure in processing advertisement of this post. The position had been advertised sometime in May 2011. She was invited to interviews on 15 June 2011. On the said date there were 5 candidates invited to the interviews and the second respondent was not invited. At about 12h30 on 15 June 2011 they were called by the Interviewing Panel and advised that interviews have been withdrawn due to a technical error.

13. On 21 June 2011 she received a letter; explaining that interviews were withdrawn because the verification of the relevant experience was not submitted by all candidates. However, she believed that interviews were cancelled because the first respondent wanted to allow the second respondent to apply for the position.
14. She had been performing duties of Human Resource Manager's position between 10 June 2006 and 7 October 2011. She was not paid at the Human Resource Manager's position salary level. The Chief Executive Officer did not complaint about her performance while she was performing Human Resource Manager's duties. It was her responsibility to develop Employment Equity Plan. They were so many other positions that were filled without the Employment Equity Plan.
15. At the time she did not have the required qualifications but she met the relaxed criteria. She did not know the qualifications of the second respondent. She felt that she could have been appointed in the first instance; if the interviews proceeded without the second respondent. She was more qualified than other candidates that were invited to the interviews. The second respondent did not apply because he was not interested in the position. The second respondent was head-hunted by the first respondent.
16. She did not object to the composition of the Interviewing Panel.

First respondent's case:

The first respondent called one witness in support of its case.

First witness – Zakhele Robert Mhlanga

17. Mr. Mhlanga testified as follows;
18. He was the Chief Executive Officer at Niemeyer Memorial Hospital. The Human Resource Manager's position had been created in the institution. A person cannot act on the newly created post. The applicant did not act in the Human Resource Manager's position. The applicant was only asked to handle human resources issues since she was the senior person in the department.
19. The post was advertised twice because in the previous instance other candidates did not submit verifications of their experience and qualifications. It is not true that the applicant could have been appointed if the interviews were not cancelled.

20. The applicant was responsibly for drafting Employment Equity Plan in the institution. However, the applicant's key performance areas were not similar to that of the Human Resource Manager's post.
21. The applicant did not object to the re-advertisement of the post. The second respondent was appointed on merits. He was appointed because he had qualifications and he was doing the same job. He did not know the second respondent before the interviews. He did not advise the second respondent to apply for the Human Resource Manager's post.

Second respondent's case:

The second respondent testified on his own and he did not call any witness.

22. He testified as follows:
23. He was the Human Resource Manager at Niemeyer Memorial Hospital. He saw the post on the intranet and applied. He was not told by anyone to apply for the post. He did not know anyone in the hospital including the Chief Executive Officer. He has been working at Ceza Hospital as Human Resource Manager since August 2003. He was invited to the interview on 9 September 2011. He had qualifications for the post.

Analysis of evidence and arguments:

24. In this instance I am only required to determine whether or not the cancellation of interviews by the first respondent on 15 June 2011 constituted unfair conduct relating to promotion.
25. It was the applicant's case that she would have fared much better in the first interviews on 15 June 2011 because she was more qualified than other candidates. According to the applicant the cancellation of interviews on 15 June 2011 was aimed at affording the second respondent the opportunity to apply; and that was unfair to her.
26. In order for me to find against the first respondent I must find that it was capricious and arbitrary to cancel first interviews in relation to the applicant. I do not believe this was the case.
27. The first respondent's case was that the interviews were cancelled because other candidates did not submit verifications. This was the only reason why it decided to cancel interviews and start the process

afresh. Despite that I do not find any merits in the applicant's case. In my view there was no guarantee that the applicant could have been appointed if the first interviews were not cancelled. It is not only her "experience and/or formal qualifications" on which the Interviewing Panel would have based their recommendations, but also the impression she would have made orally in terms of how she understood the various attributes and skills required to perform the task expected of her.

28. If this was not so, surely the employers would have been otherwise entitled to make appointment based on candidates curriculum vitae's alone.
29. Therefore, I do not find any justifiable reason why the respondent would have been obliged to proceed with interviews on 15 June 2011 if it was not satisfied with certain criteria. Secondly, the applicant was invited in the second interviews and she was assessed and found not suitable, on her own admission she did not have the required qualifications. So whatever expectation might have been created in the applicant's mind when she was performing some of the Human Resource Manager's duties would have been met when she was short listed and invited for an interview.
30. The applicant's evidence that; if the first interviews were not cancelled she would have been appointed; to say the least; I find it illogical and nonsensical because she did not meet the requirements of the post. On the other hand Mhlanga and the second respondent testified undisputedly that the second respondent was suitably qualified for the post.
31. In terms of the evidence before me, the applicant cannot claim to have had any legitimate expectation that she would have been appointed if the interviews on 15 June 2011 were not cancelled without meeting the requirements of the post. The applicant bears the onus of proving that she had been unfairly treated when the interviews on 15 June 2011 were cancelled; and I find she has not discharged that onus.
32. In the circumstances I make the following award:

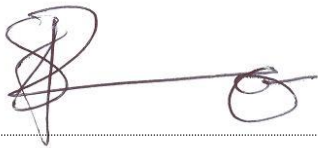
Award:

33. The first respondent's cancellation of interviews on 15 June 2011 did not constitute unfair labour practice.
34. The applicant's application is dismissed and she is not entitled to any relief.

35. No order for costs is made.

DONE AND SIGNED IN JOHANNESBURG ON THIS 17TH DAY OF SEPTEMBER 2012.

Bhekinhlanhla Stanley Mthethwa

A handwritten signature in black ink, consisting of a large, stylized initial 'B' followed by a horizontal line and a smaller, circular flourish.

Signature